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Mutava v Tribunal Appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya (Petition 15 "B" of 2016) [2019] KESC 49 (KLR) (Civ) (12 March 2019) (Judgment)

Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR

Neutral citation: [2019] KESC 49 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

PETITION 15 "B" OF 2016

PM MWILU, DCJ & VP, MK IBRAHIM, JB OJWANG, N NDUNGU & I LENAOLA, SCJJ

MARCH 12, 2019

BETWEEN

HON MR JUSTICE JOSEPH MBALU MUTAVA .... PETITIONER

AND

THE TRIBUNAL APPOINTED TO INVESTIGATE THE CONDUCT OF JUSTICE JOSEPH MBALU MUTAVA, JUDGE OF THE HIGH COURT OF KENYA .... RESPONDENT

(Being an Appeal against the decision and recommendation of the Tribunal appointed under Article 168(5)(b) of the Constitution, to investigate the conduct of the Hon. Justice Joseph Mbalu Mutava, delivered at Nairobi on 2nd September, 2016)

Circumstances in which a judge would be removed from office.

An appeal was filed at the Supreme Court raising questions about the removal of a judge from office. The court considered gross misconduct or misbehavior as a ground for removal of a judge from office. The complaints against the judge included causing a file to be irregularly allocated to him, rendering a decision (ruling) in a matter concerning which there were pending investigations against the judge and influencing the making of a decision by a different judicial officer in favour of certain parties. The tribunal that heard the matter found that the allegations had been proved to the required standard. On appeal, the Supreme Court, in addition to other claims, considered claims relating to violations of the judge's rights to a fair trial before the tribunal. Examples of such claims were failure to furnish the judge with all the documents touching on his trial and the appearance of a witness, without prior notice being given, to testify before the tribunal. The Supreme Court dismissed the petition.

Reported by Beryl Ikamari

Judicial Officers *- removal of judges from office – grounds for removal of judges from office - gross misconduct or misbehaviour - claim that a judge under investigation colluded with others in order to have a pending case irregularly allocated to him, wrote a ruling in a case concerning which a complaint was pending against him before the Judicial Service Commission and tried to influence a ruling in a case pending before a different judge - whether the judge would be removed from office.*

Jurisdiction *- jurisdiction of the Supreme Court - jurisdiction relating to a tribunal appointed to investigate a judge for purposes of removal from office - questions relating to the constitution of the tribunal - claim that two out of seven members of the tribunal were appointed outside of the 14 days period allowed for such appointments - where a challenge on constitution of the tribunal had been pursued at the High Court under article 165(d)(ii) of the Constitution and an appeal was lodged against the High Court's decision at the Court of Appeal but no further appeal was lodged at the Supreme Court - whether the Supreme Court could entertain the same issue on constitution of the tribunal as part of its jurisdiction under article 168(7) of the Constitution - Constitution of Kenya, articles 165(d)(ii) and 168(7).*

Jurisdiction *- jurisdiction of a tribunal appointed to investigate the conduct of a judge for purposes of removal from office - withdrawal of complaints lodged at the Judicial Service Commission against the judge after the appointment of the tribunal - whether the mandate of the Tribunal would be affected by the withdrawal of complaints.*

Constitutional Law *- fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to a fair hearing - right to a fair hearing before a tribunal appointed to investigate the conduct of a judge for purposes of removal from office – claim that the petitioner was not provided with a list of allegations together with a summary of the supporting evidence as was required by statute, that he was not served with a document that a witness referred to and that a witness who was not scheduled to testify appeared and testified - claim that there was failure to comply with the petitioner's statutory rights relating to a fair trial - effect of a statutory provision that the tribunal was not strictly bound by rules of procedure but would have to adhere to the rules of natural justice - whether the right to a fair hearing was violated - Judicial Service Act (cap 8A), Second Schedule sections 8(2), 13 and 17(1).*

Evidence Law *- admissibility and relevance of evidence - witness testimony - evidence of an advocate whose client made a complaint but withdrew the complaint - whether the evidence ought to have been considered.*

Evidence Law *- standard of proof - standard of proof in proceedings before a tribunal established to investigate the conduct of a judge for purposes of removal from office – standard of proof for circumstantial evidence tendered before such a tribunal.*

Brief facts

The petitioner was appointed a judge of the High Court of Kenya on August 23, 2011. Starting from March 2012 to March 2013, the Judicial Service Commission (JSC) received 13 complaints against the petitioner. The committee of the JSC that investigated the complaints found that 3 of them laid a sufficient basis for the petitioner's removal from office. On May 20, 2013, the JSC sent a petition to the President recommending the petitioner's suspension and the appointment of a tribunal to investigate the allegations made against the petitioner. A tribunal was appointed and a gazette notice was issued to that effect.

The petitioner challenged the competence of the Tribunal and alleged that the JSC had not given him a fair hearing. The High Court delivered a judgment in favour of the petitioner and declared the tribunal void as two of its members were appointed outside of the prescribed 14 day period. On appeal, the Court of Appeal found that the tribunal was appointed within the terms of the Constitution and it ought to discharge its mandate. In response, the petitioner filed a notice of appeal at the Supreme Court but did not pursue the appeal further.

When the proceedings before the tribunal began, the petitioner, through a preliminary objection, challenged the tribunal's jurisdiction to handle complaints that had been withdrawn. The tribunal made the finding that after the JSC investigated the complaints they ceased to exist independently as complaints that were capable of being withdrawn. The tribunal's findings were that certain complaints were proved to the required standard

and it recommended that the petitioner ought to be removed from office. The following were the complaints that were proved:-

1. that the petitioner irregularly, inappropriately and knowingly in collusion with other parties caused Nairobi High Court Misc. (JR) application No. 305 of 2012 *Republic v Attorney General and 3 others, Ex parte Kamlesh Mansukhlal Damji Pattni* to be allocated to himself and without the knowledge and consent of the Duty Judge and the Presiding Judge of the Judicial Review Division;
2. that the petitioner proceeded to write a judgment in respect of Nairobi High Court Misc. (JR) application No. 305 of 2012 *Republic v Attorney General and 3 others, Ex parte Kamlesh Mansukhlal Damji Pattni* at a time when the Judicial Service Commission was inquiring into allegations of misconduct against him with regard to the same matter; and,
3. that the petitioner sought to influence a ruling in the case of Nairobi HCCC No 705 of 2009, *Sehit Investments Ltd v Josephine Akoth Onyango & 3 others* in favour of the plaintiff therein through oral and text messages from his cell phone to the judicial officer who was presiding over the hearing of that matter.

The petitioner filed an appeal at the Supreme Court against the findings of the tribunal. He stated that the tribunal had no jurisdiction to investigate allegations made against him as it was not properly constituted and that it could not consider allegations based on complaints that had been withdrawn. He added that the tribunal's findings were not founded on evidence; that there were unfounded presumptions made and that the evidence of some key witnesses was ignored. The petitioner added that there was failure to apply the correct standard of proof applicable to proceedings of a tribunal established under article 168(5) of the Constitution and that the tribunal erroneously considered the merits of orders that the petitioner issued in a certain matter.

Issues

i. Whether the tribunal had jurisdiction to investigate the conduct of a judge where complaints made against the judge at the JSC had been withdrawn and appointments were made to the membership of the Tribunal outside the constitutional timelines.
ii. Whether in light of allegations that the petitioner was not provided with a list of allegations together with a summary of the supporting evidence as was required by statute, that he was not served with a document that a witness referred to and that a witness who was not scheduled to testify appeared and testified, the petitioner was accorded a fair hearing before the tribunal.
iii. Whether the evidence of an advocate whose client had withdrawn its complaint against a judge ought to be considered by the tribunal that investigated the judge.
iv. What was the standard of proof for circumstantial evidence tendered before a tribunal established under article 168 of the Constitution to investigate the conduct of a judge?
v. Whether the JSC had the mandate to ask a judge to stop handling a pending case on grounds that it was inquiring into the conduct of the judge as related to that pending case.

Held

1. While exercising jurisdiction under article 168(8) of the Constitution, unlike under article 163(4) of the Constitution, the Supreme Court's mandate was expansive; it was required to re-evaluate and re-assess the evidence on record in order to establish whether the tribunal misdirected itself and whether its conclusions should stand.
2. Under article 168(5) of the Constitution, members of the tribunal were to be appointed by the President within 14 days of the receipt of the JSC petition. Five members of the tribunal were appointed within the requisite 14 days but two were appointed outside of the constitutional timelines. Those appointments raised questions on whether the tribunal was properly constituted.
3. An improperly constituted tribunal had no capacity to determine any issue since it was an unknown entity in law and its proceedings were null and void *ab initio*. Article 165(d)(ii) of the Constitution gave the High Court jurisdiction to interpret the Constitution and the petitioner sought an interpretation as to whether the tribunal was properly constituted. The High Court found that the tribunal

was improperly constituted but the Court of Appeal overturned the High Court's decision and determined that the members of the tribunal need not necessarily be appointed within 14 days after the presentation of the petition to the President by the JSC. Having failed to appeal against the Court of Appeal's decision, the petitioner was estopped from raising the same issue in the instant appeal. Once the issue concerning the jurisdiction of the tribunal was settled, the tribunal could then lawfully exercise its mandate under article 168(7) of the Constitution.

4. If there had been no attempt to utilize the mechanism provided for in article 165(3)(d)(ii) of the Constitution, the Supreme Court would have had jurisdiction to determine the question concerning the constitution of the tribunal. However, since the High Court had been approached under that provision that question would have to be determined through the appeal mechanism in the constitutionally provided hierarchy of courts. The petitioner's invitation for the Supreme Court to assume jurisdiction on that issue was not acceptable.
5. Any withdrawal of a complaint after the setting up of a tribunal would not strip the tribunal of its powers because the tribunal's role was to inquire into the matter expeditiously and report on the facts and make binding recommendations to the President. If there was evidence to support the allegations, the tribunal would have to make determinations and present its recommendations to the President.
6. The presentation of the petition to the President meant that by that point in time, the individual complaints had changed in substance and were a totality of allegations which in the opinion of the JSC disclosed grounds for the removal of a judge, subject to investigation by a tribunal. The role of the JSC would end after the presentation of the petition to the President. The subsequent withdrawal of complaints presented to the JSC would have no effect as the tribunal's point of reference would be the JSC's petition which would particularize the allegations made against the judge without reference to the specific individual complaints. The tribunals' jurisdiction was not affected by the withdrawal of individual complaints.
7. In the proceedings before the tribunal, there was evidence that a witness made reference to a letter that had not been served on the petitioner. The tribunal issued directions for the assisting counsel to provide the letter to the petitioner. There was also evidence that there was a witness who was scheduled to testify without the knowledge of the petitioner. The tribunal gave the petitioner latitude to decide on whether to cross-examine the witness a day later after internalizing his evidence.
8. Section 13 of the Second Schedule to the Judicial Service Act provided that the tribunal would not be bound by strict rules of evidence but would be guided by the rules of natural justice and relevancy. The tribunal made deliberate efforts to ensure that the petitioner's right to a fair hearing was protected.
9. Under section 17(1) of the Second Schedule to the Judicial Service Act evidence before the tribunal could be presented in the form of a memorandum, affidavit or other documentation. The petitioner had a statutory right under section 8(2) of the Second Schedule to the Judicial Service Act to be provided with a list of allegations together with a summary of supporting evidence at least 14 days before the hearing. At the pre-trial conference the petitioner complained of non-service of certain relevant documents. However, the pre-trial conference was not the commencement of the hearing but rather a time to decide on when and how to proceed.
10. The tribunal proceedings were not adversarial; they were inquisitorial. More witnesses were likely to come on board during the proceedings and in such instances the petitioner would be granted adequate time to prepare his case. Therefore, the tribunal acted within expected limits of natural justice and fair hearing.
11. Through his advocate, the petitioner confirmed the authenticity of the hansard report by signing the certificate of verification. The certificate indicated that the petitioner verified and agreed that the hansard record of the tribunal was correct and he did not dispute the certificate. The petitioner did not point out a specific error on the record that he thought had prejudiced his case in any way. Therefore, there was no merit in the petitioner's claim that the hansard report had fundamental errors.

12. Neither the Constitution nor the Judicial Service Act specified the method of investigation to be employed by the tribunal in gathering evidence before or during its proceedings. However, the tribunal was required to comply with the rules of natural justice meaning that the judge under investigation would be allowed to cross-examine all the witnesses and to tender evidence to rebut the allegations made against him.
13. It was alleged that the petitioner sent text and oral messages to a judicial officer in an attempt to influence a ruling. A lead police investigator had been contacted to confirm the allegations on sending messages to influence a ruling. It was unclear why the petitioner was against the use of police officers to investigate the allegation. The petitioner, in rebuttal, sought to rely on the evidence of an expert witness who was an inspector of police to confirm that the judicial officer concerned was unable to identify the person that called him. On the other hand, the petitioner confirmed communicating with the judicial officer concerned through his Safaricom number. What the petitioner's objection sought to achieve was unclear.
14. Section 12 (1) of the Second Schedule to the Judicial Service Act gave the tribunal discretion to summon any person to testify before it. The petitioner's wife testified before the tribunal without the petitioner's counsel objecting to it despite having known in advance that she would testify. Even though the tribunal summoned the petitioner's wife, she was not compelled to testify.
15. The evidence indicated that the advocates for the *ex parte* applicants in application No. 305 of 2012, requested for the matter to be placed before the petitioner by writing two letters. The letters contained some inaccuracies; for example, one had a false claim that the matter was part-heard before the petitioner and the other claimed that all the parties in the matter required clarification from the petitioner while in fact the DPP said that it did not require the clarification. Therefore, there was a clear scheme to have the matter mentioned before the petitioner and not any other judge.
16. The petitioner was not the vacation duty judge in August 2012 but he handled application No. 305 of 2012 on August 10, 2012. He did not have permission or authority to deal with judicial review matters. It was only the vacation duty judge that could legitimately ask another judge to stand in and handle a matter and the petitioner did not claim that he was asked to do so. Questions on how the petitioner handled the matter on August 10, 2012 remained unanswered.
17. On the cause list of September 24, 2018, application No. 305 of 2012 was listed as a civil case as opposed to a judicial review case. That faulty listing was meant to disguise the nature of the suit and to conceal the identity of the applicant.
18. It was reasonable for the petitioner to act on the letter of the *ex parte* applicant's advocate seeking clarification. It was clear from the petitioner's testimony that when the matter was mentioned, no clarification was sought. It was unclear why the petitioner failed to ask the parties questions on the nature of clarification that they sought. After realizing that no clarification was sought, the petitioner did not transmit the file back to the judicial review division but proceeded to adopt the consent of the parties and to fix the matter for hearing.
19. Considering all the relevant facts, the only inference that could be drawn was that the petitioner, while colluding with others, caused Application No. 305 of 2012 to be allocated to himself.
20. In making its determination, the tribunal set out the background that led to the filing of application No. 305 of 2012. In doing so, the tribunal did not examine the merits of the orders granted by the petitioner in Application No. 305 of 2012. Whether that background was relevant or irrelevant did not affect the substance of the tribunal's findings. Additionally, the petitioner did not point out specific instances where the Tribunal delved into the merits of the orders he issued.
21. While handling cases, judges were presumed to be independent and to act without being controlled by anyone. Judges should always ensure that their conduct was beyond reproach in the eyes of a reasonable observer and had to uphold the principle that justice had to not only be done but be seen to have been done.

22. The petitioner delivered a ruling in a matter concerning which he was facing investigations at the JSC. Generally, it would be reasonable to infer that such investigations would cause a reasonable judge in good conscience to refrain from dealing with the matter until the investigations were complete. The fact that a reasonable judge would have acted differently did not necessarily translate to a finding of gross misconduct on the part of the petitioner.
23. In the absence of any contrary information, the decision as to how a judge would proceed with a matter would rest solely on the judge's conscience guided by the Judicial Code of Conduct and Ethics. A judge would be presumed to be properly in office until the instigation of a petition for his removal and the President taking action on it. There was no reason to condemn a judge for performing his duties.
24. Any communication to suspend the participation of a judge in a matter under inquiry before the JSC should come from the Chief Justice as the head of the Judiciary as opposed to the JSC which had no mandate to make the communication. No communication was issued to the petitioner to request him to suspend his participation in Application No. 305 of 2012. In writing the ruling in question, the petitioner had not engaged in gross misconduct as provided in article 168(1)(e) of the Constitution.
25. An advocate whose client had withdrawn a complaint lodged at the JSC, testified before the tribunal. Being a witness like any other, there was a possibility that the advocate's evidence would be inconsistent with the evidence of other witnesses and the tribunal had to weigh the evidence and determine whether it was reliable. The findings of the tribunal were not based on that advocate's allegedly contradictory evidence.
26. The petitioner did not explain how evidence from the advocate in question led to a miscarriage of justice. The exclusion of that evidence would not mean that the petitioner would be exonerated from the accusations that he faced. The tribunal relied on various pieces of evidence to make an adverse finding against the petitioner. Additionally, the complaint against the advocate as a witness was based on assumptions and conjecture and was not legally sustainable.
27. At the material time, no person was registered as the owner of the Airtel number allegedly used by the petitioner to send messages to influence a judicial officer to make a ruling in favour of the plaintiff in a given case. There was contradictory evidence on whether the judicial officer who received the messages was able to identify the sender through the *True Caller* application. It was therefore not possible to rely on that evidence to identify the petitioner as the sender of the message.
28. There was evidence of call logs showing that the Airtel number was used in certain locations including Thomsons area in Nairobi, Milimani Commercial Courts and Mbui Nzau. The record showed that the petitioner lived in Thomsons area, worked at Milimani Commercial Courts and would pass through Mbui Nzau on his way to his rural home. That number was also used to communicate to the petitioner's wife. However, call logs were not a foolproof mechanism for identifying the author of a particular message. The available information made it highly probable that the petitioner was the user of that number.
29. The petitioner admitted that he used his Safaricom number to communicate to the presiding judicial officer about the pending case. The relevant evidence showed that the petitioner used his professional relationship with the concerned judicial officer to attempt to influence the outcome of a pending matter.
30. The applicable standard of proof was higher than proof on a balance of probabilities but not proof beyond reasonable doubt; it was in between proof on a balance of probabilities and proof beyond reasonable doubt. Circumstantial evidence would not require a different standard of proof but it would have to meet certain recognized principles before a verdict of guilt could be reached.
31. In principle, circumstantial evidence entailed the use of reasoning and logic to get to a conclusion. When relying on circumstantial evidence, a court or tribunal would be presented with facts through which an inference was capable of being drawn in order to prove the existence of a fact. For the instant matter, the inference should not go beyond reasonable doubt but should be higher than a balance of

probabilities. Therefore, it was not enough for an alleged fact to be far more likely to have happened but there should be a level of certainty or real possibility that it had to have happened.

Petition dismissed.

Orders

No orders as to costs.

Citations

Cases

Kenya

1. *International Centre for Policy and Conflict v Attorney General* Petition No 279 of 2011 - (Explained)
2. *Munene, Mary Wambui v Peter Gichuki King'ara & 2 others* Petition No. 7 of 2014;[2014] eKLR - (Followed)
3. *Nyong'o, Peter Anyang' & 10 others v Solicitor General* Miscellaneous 168 of 2013 - (Mentioned)
4. *Odinga, Raila & 5 others v Independent Electoral & Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Followed)

United Kingdom

R v Taylor, Weaver and Donovan [1928] 21 Cr App Rep 20 - (Explained)

India

1. *Bhagat Ram v State of Punjab* AIR 1954 SC 621 - (Explained)
2. *Bodhraj Bodha & ORS v State of Jamhu &* Kashmir (2002) 8 SCC 45 - (Explained)
3. *Nizam & Anr v State of Rajasthan* (2016) 1 SCC 550 - (Explained)

Papua New Guinea

Nara v State [2007] PGSC 54; SC1314 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 50(2)(j);165(3)(d)(ii); 168(2-10)- (Interpreted)
2. Evidence Act (cap 80) sections 107,109- (Interpreted)
3. Judicial Service Act (cap 8A), Schedule 2: sections 8(2); 12(1) - (Interpreted)

JUDGMENT

A. Introduction

1. The petitioner, a Judge of the High Court, appeals the decision of the Tribunal appointed to investigate his conduct, pursuant to article 168(5) of the *Constitution*, which recommended his removal from office.

B. Background

2. The petitioner was appointed a Judge of the High Court of Kenya on August 23, 2011. Between March 2012 and March 2013, several complaints were lodged with the Judicial Service Commission ("JSC") against the Petitioner. On December 1, 2012, the JSC constituted a Committee to investigate those allegations. After an inquiry, on May 17, 2013, the Committee submitted its report to the JSC proposing that three out of the thirteen complaints received by the JSC disclosed sufficient grounds which could possibly lead to the removal of the petitioner from office.

3. Subsequently, on May 20, 2013, the JSC sent a petition to the President, Hon Uhuru Kenyatta, recommending the suspension of the Petitioner and the appointment of a Tribunal to investigate the allegations of gross misconduct and misbehaviour levelled against him. The President suspended the Petitioner and appointed members of the Tribunal as is his obligation to do so under the Constitution. The first five members were appointed through Gazette Notice Number 7492 dated May 30, 2013 and another two through Gazette Notice Number 8279 dated June 17, 2013. All the members of the Tribunal took the requisite oath of office on June 21, 2013.

4. Aggrieved by the JSC decision to petition the President to constitute a Tribunal, the petitioner moved to the High Court on June 28, 2013 and filed HC Petition No 337 of 2013, in which he challenged the competence of the Tribunal and further argued that the JSC had not accorded him a fair hearing. On February 17, 2014, the High Court found in favour of the petitioner and declared the Tribunal proceedings void ab initio for reasons that two of its members were appointed outside the prescribed fourteen days' period.

5. The High Court decision was however overturned by the Court of Appeal which held that the appointment of the members of the Tribunal was in line with the Constitution and that the Tribunal was properly constituted and ought to carry out its mandate. Following the decision of the Court of Appeal, the petitioner filed a Notice of Appeal in the Supreme Court dated May 21, 2015. However, he did not pursue that appeal, paving way for the Tribunal to commence its operations by gazetting its rules of procedure on October 16, 2015.

6. At the commencement of the Tribunal proceedings, the Petitioner filed a preliminary objection dated February 18, 2016, contesting the jurisdiction of the Tribunal to inquire into complaints which had been allegedly withdrawn through letters addressed to both the JSC and the Tribunal. In dismissing the petitioner's objection, the Tribunal held that once the JSC has presented a petition to the President, the individual complaints that were being investigated by the JSC ceased to exist independently as complaints capable of being withdrawn and therefore, their purported withdrawal could not affect the jurisdiction of the Tribunal to proceed with its mandate.

7. With the preliminary objection out of the way, the Tribunal begun its proceedings and in its detailed report dated September 20, 2016 and presented to the President, the Tribunal was of a unanimous view that allegations number 1, 3 and 5 against the petitioner had been proved to the required standard and that the petitioner's conduct amounted to gross misconduct contrary to article 168(1)(e) of the Constitution. Consequently, it recommended that the petitioner ought to be removed from office.

8. For ease of reference, allegations 1, 3 and 5 respectively read as follows:

   (1) That the petitioner irregularly, inappropriately and knowingly in collusion with other parties caused Nairobi High Court Misc (JR) Application No 305 of 2012 *Republic v Attorney General & 3 others, Ex parte Kamlesh Mansukhlal Damji Pattni* to be allocated to himself and without the knowledge and consent of the Duty Judge and the Presiding Judge of the Judicial Review Division.

   (2) That the petitioner proceeded to write a Judgement in respect of Nairobi High Court Misc (JR) Application No 305 of 2012 *Republic v Attorney General & 3 others, Ex parte Kamlesh Mansukhlal Damji Pattni* at a time when the Judicial Service Commission was inquiring into allegations of misconduct against him with regard to the same matter.

   (3) That the petitioner sought to influence the ruling in the case of Nairobi HCCC No 705 of 2009, *Sehit Investments Ltd v Josephine Akoth Onyango & 3 others* in favour of the Plaintiff

therein through oral and text messages from his cell phone to Hon Mr Justice Leonard Njagi who was presiding over the hearing of that matter.

9. Aggrieved by the Tribunal's finding, the petitioner filed an appeal before this court on the grounds that:

   (a) The Tribunal lacked jurisdiction to conduct any investigations against him since it was unconstitutionally constituted and therefore the recommendations arrived thereafter are void ab initio.

   (b) The Tribunal erred in law and in fact by proceeding to hear and make recommendations adverse to him based on complaints that had been withdrawn by the respective complainants and which had not been re-instated.

   (c) The Tribunal erred by making adverse findings and recommendations against him based on allegations which were not supported by evidence.

   (d) The Tribunal erred by ignoring testimonies of key witnesses and the evidence adduced by various other witnesses.

   (e) The Tribunal erred by constantly making unfounded presumptions adverse to him despite there being contradictory evidence on record.

   (f) The Tribunal erred by failing to apply the correct standard of proof and the burden of proof required in proceedings of a Tribunal established under article 168(5) of the Constitution.

   (g) The Tribunal erred in taking into consideration the merits of the orders granted by the Petitioner in the case of the *Republic v the Attorney General and 3 others, ex-parte Kamlesh Mansukhlal Damji Pattni* Judicial Review Application No 305 of 2012.

C. Parties' Submissions

(1) Petitioner's case

(a) Jurisdiction of the Tribunal

10. The petitioner urges that the Tribunal lacked jurisdiction to investigate his conduct for two reasons. The first is that two of the members of the Tribunal were appointed outside the required constitutional timelines and, the second is that the complaints that initially formed the basis of the JSC Petition to the President, were withdrawn before the Tribunal begun its proceedings.

11. With regard to the appointment of members of the Tribunal, the petitioner submits that according to article 168(5) of the *Constitution*, the President had 14 days to appoint all the members of the Tribunal upon receipt of the JSC Petition. However, five out of the requisite seven members of the Tribunal were appointed within 14 days, whereas the other two members were appointed after 14 days. Therefore, the petitioner urges that the appointment of the two members outside the 14 days period, offended the Constitution and hence the Tribunal, as constituted, lacked jurisdiction to investigate his conduct.

12. Furthermore, the petitioner urges that even though the Court of Appeal had already made a finding on the issue, the question of jurisdiction is a point of law which can be raised at any stage of the proceedings. He submits therefore that he is justified to raise the same issue of jurisdiction before this court. In support of his contention, he relies on two of this court's decisions in the cases of *Mary Wambui Munene v Peter Gichuki King'ara & 2 others* SC Petition No 7 of 2014; [2014] eKLR and *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others* SC Petition No

5 of 2013; [2013] eKLR to emphasise the importance of adhering to constitutional timelines and the sanctity of the principles in the Constitution.

13. On the issue of withdrawal of complaints, the petitioner submits that the Tribunal was only bound to investigate representations that were forwarded to the President in the petition dated May 20, 2013 which representations were later withdrawn and were not re-instated in any form. According to the Petitioner therefore, the Tribunal ought to have terminated its mandate after the complaints were withdrawn by the respective complainants. This, he urges, is especially because the Petition for his removal had been initiated by the complaints of individual persons to the JSC and not by the JSC on its own motion under the first part of rticle 168(2) of the *Constitution*.

14. The petitioner further urges that the Tribunal lacked jurisdiction to consider any new allegation that arose in the course of the investigation if such an allegation was not in existence when the petition was being presented to the President. Consequently, the Petitioner submits that the Tribunal should not have considered allegations arising out of complaints made by one Mr Nelson Havi, an advocate of the High Court of Kenya, who volunteered to give evidence before the Tribunal based on information which he claimed to have been within his knowledge, even though his client, who had initially complained to the JSC against the Petitioner had subsequently withdrawn that complaint.

(b) Fair hearing

15. The petitioner on this issue urges that the proceedings before the Tribunal were in breach of the rules of natural justice and in contravention of his right to fair administrative action and a fair hearing. He submits further that the Tribunal, in the conduct of its inquiry, disregarded section 8(2) of the second schedule to the *Judicial Service Act*, No 1 of 2011 cap 185(B) ("Judicial Service Act"), which states that at least 14 days before the Tribunal commences its hearing, the Judge who is the subject matter of investigation should be served with a list of all allegations and a summary of the evidence in support of each allegation. The petitioner submits in that context that he was not provided with a summary of evidence, but only a summary of facts.

16. The petitioner furthermore submits that the assisting counsel to the Tribunal constantly ambushed him with evidence and witness statements which were being served on him haphazardly despite his numerous complaints. Indeed, he urges that some witness statements were never served on him at all, while other witnesses were called to testify without prior notice being issued to him.

17. The petitioner also submits that the Tribunal overstepped its mandate by engaging the services of the Directorate of Criminal Investigations ("DCI") to investigate him as regards the allegation of attempting to interfere and influence a Ruling under the control of another Judge, by use of text and oral messages. He submits that the use of the DCI to procure evidence is not contemplated by the Constitution or the Judicial Service Act. As a result, he urges that evidence procured by such means should be disregarded.

18. The petitioner in addition urges that the Tribunal erred by summoning and compelling his spouse to testify in proceedings adverse to him. He states that such an action is frowned upon by law and should never have been allowed.

19. It is the petitioner's further case that the Tribunal did not make rules as regards recording and safe guarding of proceedings. As a result, he submits that the Hansard recording was marred with many errors which affected the integrity of the Tribunal proceedings. He also urges that the Tribunal indeed conceded to some of the errors on record, when the petitioner's counsel objected to them, after realizing that there was an error on a particular part of the record. As a result, he argues that, at the time the Tribunal members retreated to write the decision, the record was not reliable.

(c) Alleged collusion between the petitioner, one Mr Thuku and Mr Kalove

20. The petitioner urges that the Tribunal erroneously arrived at the conclusion that there was collusion between him, one Mr Kalove and Mr Thuku with regard to the handling of Application No 305 of 2012 aforesaid. He also urges that the Tribunal erroneously found that he allocated himself that application and criticises the Tribunal for disregarding all the evidence in rebuttal, which if considered, would have shown that he, at all times, acted in accordance with known procedures of law and that he handled Application 305 of 2012 like any other case before him.

21. In this regard, he submits that the Tribunal ignored Mr Kalove's explanation for not filing a certificate of urgency on July 26, 2012, the day of filing Application No 305 of 2012, and the fact that Mr Kalove's actions had nothing to do with him. The Petitioner also urges that his decision to grant stay orders on the Certificate of Urgency Application filed on August 10, 2012, was purely based on merit and that any aggrieved party had the opportunity to appeal or seek a review of his decision.

22. The petitioner furthermore faults the Tribunal for not calling as a witness Hon Lady Justice Florence Muchemi, who was allegedly the Vacation Duty Judge at the Judicial Review Division, to testify as to whether she was away on the afternoon of August 10, 2012, when the Certificate of Urgency in Application No 305 of 2012 was filed. The petitioner also questions why none of the Judicial Review Division Registry staff who manned the station on that day, failed to appear as witnesses and explain why the application under Certificate of Urgency was taken to his chambers. It is for those reasons that the petitioner challenges the Tribunal's finding that Mr Kalove schemed to have the matter placed before him.

23. The petitioner submits in addition that he did not at any given time direct that the file be placed before him. He states that when the parties appeared before him, they recorded a consent for the matter to be disposed of by way of written submissions. He urges therefore that the Tribunal failed to appreciate that the two letters dated September 14, 2012, requesting for a mention date before him were not authored by him and he cannot provide any explanation about them and no adverse finding should have been made with regard thereto.

24. Lastly on this issue, the petitioner urges that he did not have control over preparations of cause lists and therefore any questionable conduct on the part of one Mr Thuku cannot be attributed to him.

(d) Allegations not supported by evidence and erroneous findings by the Tribunal

25. The petitioner submits that the evidence adduced at the tribunal did not merit a finding of guilt. He states that the Tribunal only found fault in him for failing to follow the administrative guidelines regulating the operations of the various divisions in the High Court which cannot be a ground for removal of a Judge.

26. The petitioner also criticises the Tribunal for placing much reliance on circumstantial evidence against him. He, in that regard, states that even where circumstantial evidence was relied upon, there were massive gaps in the narratives, which gaps the Tribunal filled with presumptions thereby arriving at wrong conclusions.

27. The petitioner further challenges the Tribunal's finding that it had no doubt that Lady Justice Muchemi was actively at the Milimani Court station on August 10, 2012, yet it recognised that the said Judge, although a key witness was never called to testify. He further faults the Tribunal for disregarding the evidence of Mr Kalove who informed the Tribunal that Justice Muchemi had already left the Milimani Court precincts by the time the matter was placed before the petitioner in the afternoon.

He, in any event, urges that it is only the Deputy Registrar of the Judicial Review Division and not himself who could explain why the file was taken to the petitioner for hearing of the application under Certificate of Urgency. The petitioner also submits that none of the court registry staff testified on the availability of Justice Muchemi on the said afternoon, yet the Tribunal found as a matter of fact, that Justice Muchemi was active in the station that afternoon. The petitioner, thus, urges the point that the Tribunal's finding in this respect is erroneous.

28. The petitioner in addition faults the Tribunal for finding that one Mr Havi was a key witness and based on his testimony, the Tribunal found two allegations as having been proved. He states that the Tribunal should have instead taken into consideration the fact that Mr Havi's complaint had neither been lodged with the JSC as required under article 168(2) & (3) of the *Constitution* nor was it part of the petition forwarded to the President. The petitioner thus submits that Mr. Havi was testifying in his personal capacity since his client, the International Centre for Policy & Conflict ("ICPC"), had subsequently withdrawn its complaint.

29. The petitioner also submits that Mr Havi's complaints were manifest with irregularities and were biased against him. By way of example, the petitioner states that the Tribunal acknowledged that according to Mr Havi, one Mr Obendo, the former Executive Officer at the Commercial and Admiralty Division of the High Court at Milimani who had custody of Application No 305 of 2012 was instructed by the petitioner to strictly hold the concerned file under lock and key. However, the petitioner submits that the said Mr Obendo did not admit in his testimony before the Tribunal that the petitioner ever made the impugned statement.

30. The petitioner also submits that Mr Havi's complaints against him were driven by extraneous factors and that he, Mr Havi, had always held a grudge against Mr Kamlesh Pattni, the applicant in Application No 305 of 221 and at one time, attempted to extort money from Mr Pattni. He urges further that his ruling in favour of Mr Pattni must have triggered Mr Havi's ill motive against him as a way of getting back at Mr Pattni.

31. The petitioner also paints Mr Havi as a man of erratic behaviour and in proof of this allegation he submits that, as acknowledged by the Tribunal, Mr Havi lodged a complaint against him when he declined to receive him in chambers. He further submits that Mr Havi's persistent efforts in pursuing a complaint against him even after his client had already withdrawn the complaint shows that he was acting with ulterior motives. The petitioner also argues that if Mr Havi really wanted to ventilate issues before the petitioner, he should have sought enjoinment in the suit much earlier and not wait for a whole month as he did.

32. As further proof of dishonesty, the petitioner makes reference to Mr Havi's testimony before the Tribunal where he claimed to have informed the petitioner that he had filed a complaint against him. However, the petitioner asserts that such allegations were not in the proceedings and therefore the only inference to be drawn was that Mr Havi must have been lying. He stated that all advocates present on that day do not also recall Mr Havi making such statement.

(e) Consideration of the merits of the decision in Application No. 305 of 2012

33. The petitioner submits that the Tribunal erred by considering the merits of the orders granted by him in Application No 305 of 2012. He avers that by the Tribunal taking that trajectory, it was laying a basis for incriminating him based on the social outcry that arose from the Goldenberg Scandal. He argues that the question before the Tribunal remained whether the internal processes of filing that Application and allocating it to him was properly followed and not whether he was to blame for the events that followed his ruling.

34. The petitioner further urges that in any case, the complaint filed with the JSC against him had nothing to do with the merits of the decision he made on that application. Therefore, he submits, the Tribunal erred by failing to address the gist of the complaint but instead concentrated on the merits of the decision and the notoriety of the parties in that application.

(f) Adjudication of Application No 305 of 2012 and writing of Ruling when the JSC was inquiring into allegations of misconduct concerning that Application.

35. The petitioner submits that at the time he wrote the ruling on Application No 305 of 2012 on March 20, 2013, there were no directions from the JSC requiring him to refrain from dealing with the said matter. As a result, he finds fault with the Tribunal's finding to the effect that he wrote a ruling on a matter which was the subject of investigation by the JSC.

36. The petitioner in addition submits that the alleged letter from the JSC dated April 24, 2013 (which letter he states was never produced) was written after he had written his ruling. The JSC had by that letter requested that the file be placed under lock and key pending its investigations.

37. Further, he urges that the Tribunal having exonerated him of allegation two (that he irregularly caused Application No 305 of 2012 to be retrieved from the safe custody of the High Court and taken by him to the High Court in Kericho) and thereby affirming that there was nothing wrong with him retrieving the file, it contradicted itself by turning around and finding that he was guilty of gross misconduct for writing a Ruling on Application No 305 of 2012.

(g) The standard and burden of proof required in proceedings of a Tribunal established under article 168(5) of the Constitution

38. The petitioner submits that circumstantial evidence requires a higher standard of proof than direct evidence. As such, he challenges the Tribunal's finding that allegation one (colluding with other parties to allocate himself Application No 305 of 2012 without the consent of the duty Judge) and allegation No.3 (writing a Judgment when the JSC was inquiring into allegations of misconduct against him with regard to Application No 305 of 2012) satisfied the circumstantial burden yet they were only based on guess work and conjecture. In submitting so, he relies on the Supreme Court of India decision in the case of *Nizam & another v State of Rajasthan* (2016) 1 SCC550 where the Court stated that:

> " In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his evidence."

39. Further, he relies on the case of *Bodhraj Bodha & ORS v State of Jambu & Kashmir* (2002) 8 SCC 45, where the Supreme Court of India pronounced itself as follows:

> " The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."

40. The petitioner in that context submits that, the Tribunal's finding of guilt, which was based on circumstantial evidence was in error since it was not proved to the required standard.

(h) petitioner's alleged Inquiry into the progress of Civil Case No 705 of 2009, Sehit Investments Ltd v Josephine Akoth Onyango & 3 others

41. The petitioner submits that the Tribunal erroneously found him guilty of gross misconduct for seeking to influence the decision in the case of Sehit Investments Ltd v Josephine Akoth Onyango & 3 othersCivil Case No 705 of 2009 by inquiring into its progress. Furthermore, the petitioner disassociated himself with Airtel mobile phone number 0732 571 592 which allegedly was used to communicate with Hon Justice Leonard Njagi on the progress of that case. The petitioner however admitted that he made an inquiry on the case by communicating to Justice Njagi through his Safaricom mobile phone number. The petitioner in addition, and nonetheless, submits that the testimony of Justice Njagi on this issue was not impartial and was replete with material inconsistencies. He argued that Mr Fredrick Musili, an Inspector of Police attached to the Cyber Forensic Unit of the Criminal Investigations Department testified that Justice Njagi's handset was incapable of holding an application known as True Caller, yet Justice Njagi said that he used True Caller to find out who the author of the message sent from the particular Airtel mobile phone number was.

42. In the above regard, the petitioner questions the affirmative finding by the Tribunal that mobile phone number 0732 571 592 belonged to or was at the material time being used by him. He also faults the Tribunal for disregarding his testimony as well as that of Mrs Mbalu (his wife), Ms Mulwa (a director of Sehit Investments Ltd) and Hon Bidali (former Judiciary Ombudsman) which all pointed to the fact that his first contact with Ms Mulwa was around November 2012 when he and Justice Njagi were in Naivasha for the Judiciary Working Committee on Electoral Dispute Resolution Training held on 16th and November 17, 2012. He thus contends that despite that evidence, the Tribunal still found that the phone data in respect of mobile phone number 0732 571 592 showed that he had been in communication with Ms Mulwa as early as September 2012 on the same mobile phone number.

(2) Respondent's case

(a) Jurisdiction of the Tribunal

43. The respondent submits that the petitioner is estopped from raising the issue of jurisdiction before this court and especially with regard to the appointment of members of the Tribunal. The respondent urges so because the issue was first raised by the petitioner in High Court proceedings — Petition No 337 of 2013 — when he attempted to prevent the Tribunal from commencing its proceedings. The High Court made a finding on that issue and held that the Tribunal, as constituted by the President, was void ab initio.

44. The High Court decision was subsequently overturned on appeal and the Court of Appeal conversely held that the appointment of two (2) additional members of the Tribunal was lawful, thus making the appointment of all the members of the Tribunal, lawful. The respondent further submits that since the petitioner had failed to appeal the Court of Appeal's decision to this court, even though he was lawfully entitled to do so, the right of appeal on that issue of appointment of members of the Tribunal lapsed and the Court of Appeal decision remains final and binding. As a result, the respondent urges that the petitioner is estopped from raising that issue now before this court.

45. In addition, the respondent urges that the issue of composition of the Tribunal was not a matter that was decided by the Tribunal and therefore the issue does not qualify for determination before this court since article 168(5) of the Constitution requires an aggrieved Judge to appeal the decision of a Tribunal and not of any other agency including the Court of Appeal.

46. Furthermore, the respondent urges that the Tribunal did not have jurisdiction to determine how it is composed and therefore if it did not have such jurisdiction, then the Supreme Court cannot also have jurisdiction on that matter. According to the respondent, if a constitutional issue arises from the JSC process, the first point of reference to address that issue would be the High Court, whereas if a constitutional issue arises from a decision of the Tribunal, then the Supreme Court would have jurisdiction under article 168(8) of the *Constitution*, to determine such an issue.

47. On the question of withdrawal of complaints, the respondent submits that the provisions of article 168(5) of the *Constitution* are sequential on how proceedings under that article should be carried out. It argues that the JSC and the Tribunal are not synonymous and each has a distinct role to play. The respondent furthermore urges that once the JSC has petitioned the President, and a Tribunal is formed, the Tribunal cannot institute its own charges and its mandate would be confined to investigating the allegations detailed in the JSC petition. In this particular case, the Tribunal was formed before the alleged withdrawal and the respondent thus submits that the Tribunal did not consider any new allegations, but rather confined itself to the allegations that were raised in the petition which was forwarded to the President by the JSC.

(b) Fair hearing

48. The respondent submits that the petitioner was accorded a fair hearing in accordance with the law. It states in that regard that the petitioner was served with a list of allegations at least 14 days before the commencement of the Tribunal hearings in accordance with the Tribunal's Rules of Procedure.

49. The respondent also submits that at no particular time was a witness called without the petitioner being given prior notice of that fact, and, witness statements issued to him. The petitioner was also accorded an opportunity to cross-examine all the witnesses and to call witnesses in rebuttal.

50. With regard to the role of the DCI, the respondent submits that the DCI was called to provide expert evidence in an attempt to investigate the owner of the mobile phone number which was being attributed to the petitioner. It argues that the said action is lawful and caused no prejudice to the petitioner.

51. The respondent, in addition, disputes that the petitioner's spouse was called to testify before the Tribunal. According to the respondent, the Tribunal wrote a letter addressed to the Clerk of the National Assembly, where the petitioner's spouse was working, seeking clarification on an issue in which she had been implicated by one of the witnesses. The respondent submits that the petitioner's spouse's response was specific to the question asked in that letter and that she also physically appeared before the Tribunal to respond to that specific issue.

52. Furthermore, the respondent submits that, unlike in criminal proceedings where a spouse cannot be compelled to give evidence, in inquisitorial proceedings such as the Tribunal proceedings, a spouse can be compelled to testify in order to ascertain particular facts, though such a witness may still refuse to answer some questions.

(c) Allegations not supported by evidence and erroneous findings by the Tribunal

53. The respondent submits that the Tribunal considered oral, documentary and circumstantial evidence from all the witnesses in arriving at its decision. It states that all the evidence relied upon was admissible evidence and that circumstantial evidence was still good evidence as long as it meets the legal standard required.

54. The respondent also submits that even though Lady Justice Muchemi never testified before the Tribunal, the Deputy Registrar gave evidence that Justice Muchemi was sitting on the material day and that the said evidence was never controverted.

55. The respondent further urges that Mr Havi's testimony before the Tribunal was corroborated by the court record. It states that Mr. Havi categorically informed the petitioner when he appeared before the petitioner that Application No 305 of 2012 was supposed to be heard before the Judicial Review Division, yet the petitioner ignored his protests and continued with the hearing.

(d) Consideration of the merits of the decision in Application No 305 of 2012

56. The respondent submits that the Tribunal did not at any given time delve into the merits of Application No 305 of 2012. It states that the case is of certain notoriety and the fact that the Tribunal took judicial notice of it does not mean that it considered the merits of that decision.

(e) Adjudication of Application No 305 of 2012 and writing of Ruling when the JSC was inquiring into allegations of misconduct concerning that Application.

57. The respondent submits that the petitioner was aware that the JSC was inquiring on a complaint concerning his conduct with regard to Application No 305 of 2012, and yet before the JSC could make a determination on that issue, the petitioner went ahead to issue a ruling.

58. The respondent also submits that it was wrong for the petitioner to proceed as if there was no complaint against him concerning that case. Yet, in his defence, the petitioner only says that the JSC never ordered him to stop the hearing of that case which powers it did not, in any event, have. The respondent thus submits that the petitioner's actions were unexpected and only confirms that the petitioner was determined to personally deal with that case.

(f) The standard and burden of proof required in proceedings of a Tribunal established under article 168(5) of the Constitution

59. The respondent urges that the Tribunal applied the correct standard of proof which standard was also adopted by the Tribunal appointed to investigate the conduct of former Deputy Chief Justice, Nancy Makokha Baraza. That the Counsel Assisting the Tribunal thus discharged the evidential burden placed upon him to prove the allegations against the petitioner.

(g) Petitioner's alleged inquiry into the progress of Civil Case No 705 of 2009, Sehit Investments Ltd v Josephine Akoth Onyango & 3 others

60. The respondent submits that the petitioner admitted that he made an inquiry from Justice Njagi concerning the progress of Civil Case No 705 of 2009. Indeed, the petitioner admitted that he informed Justice Njagi on whose behalf he was scouting for information regarding the case. The respondent urges that the evidence on record and the actual text messages he exchanged with Justice Njagi corroborate each other and proves that the petitioner attempted to influence the outcome in Civil Case No 705 of 2009.

D. Analysis

61. Flowing from the above submissions, the following issues arise for consideration and determination:

    (a) Did the Tribunal have jurisdiction to investigate the conduct of the petitioner?

    (b) Was the petitioner accorded a fair hearing during the Tribunal proceedings?

(c) Did the Tribunal arrive at a correct finding with regards to allegations touching on Application No 305 of 2012?

(d) What is the status of Mr Havi's testimony before the Tribunal?

(e) What was the effect of the petitioner making an inquiry into the progress of a case which was before another Judge?

(f) Did the Tribunal apply the correct standard and burden of proof?

(g) What reliefs should ensue?

62. Before we undertake the determination of these issues, we recognise the fact that this is the first time that this court's jurisdiction under article 168(8) of the Constitution has been invoked. Unlike our jurisdiction under article 163(4), we are called upon to act as the first and only appellate Court, hence our mandate is more expansive in that we are required to re-evaluate and re-assess the evidence on record with a view of establishing whether the Tribunal misdirected itself and whether the Tribunal's conclusion should stand. We begin the analysis sequentially.

(a) Whether the Tribunal had jurisdiction to investigate the conduct of the Petitioner?

63. The petitioner's argument on jurisdiction is two-fold. Firstly, he contends that the Tribunal was not properly constituted because two of its members were appointed outside the constitutional timeframes. Secondly, that the complaints that formed the basis for the establishment of the Tribunal were subsequently withdrawn and hence, he urges that at the time of the commencement of the Tribunal proceeding, there were no live allegations against him. We shall deal with these two limbs one after the other.

i. Legality of the Tribunal as constituted ? were the Tribunal Proceedings null and void ab initio?

64. The petitioner urges that the President did not comply with the provisions of article 168(5) of the Constitution, with regard to the appointment of the members of the Tribunal. He takes the view that, the President was mandated to appoint all the members of the Tribunal, within 14 days of receipt of the JSC Petition. However, only five members out of the requisite seven were appointed within the 14 days. The other two members were appointed, after those 14 days. Therefore, the petitioner submits that the appointment of the two members outside the 14 days rendered the Tribunal proceedings void ab initio.

65. The petitioner also submits that even though the Court of Appeal in the case of Joseph Mbalu Mutava v Attorney General & another, Civil Appeal No 337 of 2013, had made a finding on this issue, the question of jurisdiction is a point of law and can be raised at any stage of judicial proceedings.

66. On its part, the respondent submits that the petitioner elected not to appeal the decision of the Court of Appeal on this issue and so, he is estopped from raising the same before this Court. According to the respondent therefore, the Court of Appeal decision remains binding and this court's jurisdiction in this matter is limited to hearing any appeals against the decision of a Tribunal appointed under article 168 and not an appeal from the decision of the Court of Appeal.

67. Furthermore, the respondent urges that the issue of composition of the Tribunal is not a matter that was decided by the Tribunal and hence there is no "decision of the Tribunal" on that issue for this court to exercise its appellate jurisdiction under article 168(8) of the *Constitution*. In addition, the respondent urges that in any case, the Tribunal has no jurisdiction to determine whether it is validly

constituted, and equally the Supreme Court would have no jurisdiction over a matter that the Tribunal has no power to decide on.

68. On our part, we are alive to the fact that an important issue has been raised by the respondent worthy of reflection. that is: does a tribunal constituted under article 168(5) of the *Constitution* have the competency to inquire into the issue of its jurisdiction, if such a question arises?

69. In that context, article 168(7) provides:

> " A Tribunal appointed under clause (5) shall?
>
> (a) Be responsible for the regulation of its proceedings, subject to any legislation contemplated in clause (10); and
>
> (b) Inquire into the matter expeditiously and report on the facts and make binding recommendations to the President."

70. Article 168(7)(b) clearly delineates the role of a Tribunal once it has been constituted which is to inquire into the alleged misconduct of the Judge in question and make binding recommendations. But what happens where the body created does not strictly conform to the prerogatives of the *Constitution*? Would such a body still qualify to be a Tribunal in the constitutional sense? And if there is no properly constituted Tribunal and hence no "Tribunal", can the processes contemplated of a Tribunal under article 168(7) of the *Constitution* be triggered? How then would a "non-existing" body make a determination on any issue? The only logical conclusion is that, an improperly constituted Tribunal has no capability to determine any issue since it is an unknown entity in law and its proceedings remains null and void ab initio. However, that is not to say that there is no recourse where such an illegality occurs. Article 165(d)(ii) of the *Constitution* clothes the High Court with the jurisdiction to hear any question with respect to the interpretation of the Constitution including determining whether anything said to be done under the authority of the Constitution is consistent with the Constitution.

71. It is our finding therefore, that the petitioner rightly approached the High Court to seek a determination on whether the Tribunal was properly constituted. The High Court found the Tribunal to have been unlawfully constituted, and on appeal, the Court of Appeal overturned the High Court decision and held that all members of the Tribunal need not have been necessarily appointed within 14 days after the JSC had presented its petition to the President. That matter would have ended there but for the fact that the petitioner, although aggrieved, chose not to challenge the decision of the Court of Appeal in this court. The issue of the constitution of the Tribunal, being a question of interpretation of the Constitution, is generally appealable to this court as of right under article 163(4)(a) of the *Constitution*.

72. The above general proposition of the law notwithstanding, the respondent submits that by the petitioner failing to appeal to this court, from the decision of the Court of Appeal, he is estopped from raising that same issue of jurisdiction in this appeal. We are inclined to agree with the Respondent for the following reasons; we have already established that an improperly constituted Tribunal would have no competency to determine a question of jurisdiction or any other issue and its proceedings are void ab initio. Therefore, that question can only be properly raised before the High Court in its exercise of jurisdiction under article 165(3)(d)(ii) of the *Constitution*. Any person aggrieved by the determination of the High Court would have an opportunity to approach the Court of Appeal and indeed the Supreme Court for a final pronouncement on that issue. Once the issue of jurisdiction of the Tribunal is settled, the Tribunal would then lawfully exercise its mandate under article 168(7) of the *Constitution*. Consequently, if a Judge ? who is the subject matter of the Tribunal ? is aggrieved by the decision of the Tribunal, then article 168(8) gives her or him a right of appeal to the Supreme

Court. The safeguards of article 165(3)(d)(ii) as read with article 168(7) ensures that only a substantive finding of the Tribunal finds its way on appeal before the Supreme Court.

73. What then happens if the mechanism provided for under article 165(3)(d)(ii) of the *Constitution* is not triggered? Would it mean that in the absence of any challenge at the High Court, an improperly constituted Tribunal and hence an "unconstitutional Tribunal" has *prima facie* jurisdiction to perform its constitutional mandate? Wouldn't the decision of such a Tribunal be nullity ab initio?

74. Even though the High Court is the first point of reference with regard to issues of constitutional interpretation, the Supreme Court in exercise of its various jurisdictions is still clothed with that same power. For example, where questions of constitutional interpretation arise in exercise of the Supreme Court's original jurisdiction such as when issuing advisory opinions or in a presidential election petition, the Supreme Court has the power to interpret such questions for the very first time. With regard to the present case, it is clear that in its exercise of the jurisdiction under article 168(8) of the *Constitution*, the Supreme Court has concurrent jurisdiction with the High Court with regard to determining the constitutionality of the body created under article 168(5). However, where a party first approaches the High Court under article 165(3)(d)(ii) of the *Constitution*, as should be the case, that dispute should be conclusively determined through the contemplated appeal mechanism in the constitutionally provided hierarchy of courts. If therefore the High Court jurisdiction is triggered in that regard, then the Supreme Court cannot assume jurisdiction over that same issue in its exercise of jurisdiction under article 168(8) of the *Constitution*. Consequently, since the question of constitutionality of the Tribunal was conclusively determined by the Court of Appeal, we decline the petitioner's invitation to assume jurisdiction on that issue at this point.

ii. The effect of the alleged withdrawal of the respective individual complaints against the petitioner

75. The petitioner on this issue submits that the complaints that formed the basis for the establishment of the Tribunal were withdrawn by the complainants before the Tribunal commenced its proceedings. He urges therefore that the Tribunal lacked jurisdiction to consider any new allegations that arose in the course of investigation, since those allegations had not arisen by the time the Tribunal was being constituted.

76. In that context, the petition by the JSC to the President recommending suspension from office of the petitioner and the appointment of a Tribunal to investigate the petitioner's conduct was based on the following allegations:

    (1) That the Judge irregularly, inappropriately and knowingly in collusion with other parties caused Nairobi High Court Misc (JR) Application No 305 of 2012 *Republic v Attorney General and 3 others, ex parte Kamlesh Mansukhlal Damji Pattni* to be allocated to himself and without the knowledge and consent of the Duty Judge and the head of Judicial Review Division.

    (2) That the Judge irregularly and inappropriately caused Nairobi High Court Misc (JR) Application No 305 of 2012 *Republic v The Attorney General and 3 Others, ex parte Kamlesh Mansukhlal Damji Pattni* to be retrieved from the safe custody of the High Court's Judicial Review Division in Nairobi and taken by him to the High Court of Kenya at Kericho.

    (3) That the Judge proceeded to write a Judgement in respect of Nairobi High Court Misc (JR) Application No 305 of 2012 *Republic v The Attorney General and 3 Others, ex parte Kamlesh Mansukhlal Damji Pattni* at a time when the Judicial Service Commission was inquiring into allegations of misconduct against him with regard to the same matter.

(4) That the Judge solicited for a bribe of Kshs 2.5 Million allegedly on behalf of Hon Justice Leonard Njagi (now retired) from one Rose Mbithe Mulwa (a director of the plaintiff company) in Nairobi HCCCNo 705 of 2009, *Sehit Investments Ltd v Josephine Akoth Onyango & 3 others*, so as to influence the outcome of the case.

(5) That further, the Judge sought to influence the ruling in favour of the plaintiff in the said suit through oral and text messages from his cell phone to Hon Justice Leonard Njagi.

(6) That the petitioner was seen in Karen area, Nairobi, in the company of one of the directors of the Applicant Company in Nairobi HCCC No 5 of 2012, *East African Portland Cement Company Ltd v PS Ministry of Industry & others*, on a weekend preceding the granting of orders in favour of the applicant, whereas similar orders had been denied by a different Judge in Nairobi High Court Misc. Application (JR) No 337 of 2011, *Mark Ole Karboro & 3 others v Minister of Industry & another*.

77. At the commencement of the Tribunal proceedings, the petitioner filed a preliminary objection dated February 18, 2016, contesting the jurisdiction of the Tribunal to inquire into complaints which had allegedly been withdrawn by the respective complainants. The petitioner submitted in that regard that three complaints out of the six that formed the basis of the JSC petition to the President had been withdrawn by February 10, 2016. By a ruling dated March 30, 2016, in answer to the petitioner's protests on the issue, the Tribunal observed that once the JSC receives individual complaints from members of the public, it inquires into those allegations and if satisfied that they disclose a ground for the removal of a Judge, the JSC formulates a petition with an "appropriate recommendation" to the President and those complaints form the basis for the Tribunal's inquiry. In particular, the Tribunal pronounced itself as follows [paragraph 34]:

> " The three complaints or allegations which form the basis of the reference before us were subsumed and merged into the JSC's petition dated May 20, 2013 and presented to the President. In the circumstances, we hold that once the JSC prepared its said petition, the individual complaints investigated by the JSC ceased to exist independently as complaints capable of being withdrawn after the petition was presented to the President and as such their purported withdrawal could not affect the Petition presented to the President or the Jurisdiction of this Tribunal."

78. In concluding this issue, the Tribunal stated thus:

> " We therefore find and hold that since the Petition presented by the JSC to the President led to the establishment of the Tribunal, the jurisdiction of the Tribunal is not affected by any action taken on the allegations individuals lodged with JSC once the Tribunal has been appointed by the President."

79. We are in agreement with the above finding but would only add that once complaints have been instituted against a Judge, the JSC must, in view of its constitutional mandate of promoting accountability and transparency in the administration of justice, investigate the veracity of the identified allegations and if it is satisfied that the complaints discloses a ground for the removal of a Judge, petition the President to appoint a Tribunal to investigate the conduct of the concerned Judge. As in any other disciplinary and quasi-judicial proceedings however, a complainant can lawfully withdraw a complaint before a determination on it is made by the JSC. Once the President has received a petition from the JSC, he is constitutionally bound to appoint a Tribunal. In this particular case, the mandate of the Tribunal was contained in Gazette Notice No 7492 dated May 31, 2013 which was to

investigate the "allegations contained in the petition by the JSC dated May 20, 2013" and presented to the President.

80. The petitioner alleges that three complaints against him were withdrawn before the Tribunal commenced its proceedings. In our view, any withdrawal of a complaint upon the setting up of a tribunal would not have the effect of stripping the Tribunal of its powers, since its mandate is well cut out in the Constitution and its role is to "inquire into the matter expeditiously and report on the facts and make binding recommendations to the President." Therefore, if there is tangible evidence to sustain the allegations made, then the Tribunal must make the consequent determination and present its recommendations to the President.

81. Furthermore, as was correctly observed by the Tribunal, by the time a petition is presented to the President for the appointment of a Tribunal, the individual complaints would have changed in form and substance such that it would no longer be a combination of individual complaints but rather a totality of the allegations raised which in the opinion of the JSC disclose grounds for the removal of a Judge, subject to investigation by a Tribunal. Indeed, once the JSC presents a petition to the President, its role ends there. Since the individual complaints are made to the JSC, any subsequent withdrawal would have no impact as the JSC would have already acted on them by passing them over to the next stage of investigation to another body. At the same time, seeking refuge upon "withdrawal" from the Tribunal itself would have no effect as the point of reference of the Tribunal is the petition to the JSC which particularises the allegations against the concerned Judge without reference to the specific individual particulars that formed the basis of the recommendation by the JSC.

82. Consequently, we agree with the finding of the Tribunal that the jurisdiction of the Tribunal was not affected by the subsequent "withdrawal" of some individual complaints once the Tribunal was appointed by the President.

(b) Was the Petitioner accorded a fair hearing by the Tribunal?

i. Did the proceedings before the Tribunal comply with section 8(2) of the second schedule to the Judicial Service Act?

83. The petitioner submits that the proceedings before the Tribunal were in breach of the rules of natural justice and were in contravention of his right to a fair hearing. He alleges that there was disregard of section 8(2) of the second schedule to the *Judicial Service Act* ("Second Schedule"), in that he was not served with a summary of each allegation and their supporting evidence. He states further, that the assisting counsel did not timeously issue him with relevant documents to the extent that some witness statements were never served on him at all, while other witnesses appeared for hearing without notice.

84. The respondent disputes the petitioner's claim and submits that the petitioner was served with a list of all allegations 14 days before the commencement of the hearing. It states that the petitioner had in all instances been given notice before any witness was called to testify and that all witness statements were issued in advance.

85. Of relevance in addressing the above issue is section 8 of the Second Schedule which provides that:

    (1) The Tribunal shall serve on each Judge whose conduct is the subject of an investigation, a hearing notice, at least fourteen days before the date of hearing.

    (2) The counsel assisting the Tribunal shall draw up a list of the allegations against each subject of the investigation, together with a summary of the evidence in support of the allegations and

shall serve the document containing the allegations and the summary of the evidence on the Judge who is the subject of the investigation, at least fourteen days before the date of hearing.

86. The petitioner referred the court to proceedings before the Tribunal recorded at pages 766 to 767 at Vol. 2 thereof, in which the petitioner's counsel complained about a letter, which a witness had made reference to, without that letter being served on the petitioner. For avoidance of doubt, the relevant part of that transcription reads as follows:

> " Lead Assisting counsel: What did that letter say?
>
> Lady Justice Ongeri:...
>
> Counsel Nyachoti: ...Mr, Chair, we've not seen that letter. We've not been served with the letter, we've just seen it in the witness statement.......
>
> Chairman: Is that letter anywhere...?
>
> Lead Assisting Counsel: Mr Chair, it's right on the court file which Mr Nyachoti has said that he had wanted to peruse and he had been told he can peruse it whenever he wants....We had assumed he had perused it by now.
>
> Chairman: Mr Nyachoti, you have been shown that letter now?
>
> Counsel Nyachoti: Yes..."

87. In the end, the Chairman of the Tribunal directed the assisting counsel to henceforth provide the petitioner's Counsel with all the documents that he wished to rely on even if such documents could be found in court files which the petitioner's counsel had been allowed to peruse and make copies of.

88. Further, at page 1241, Vol 3 of the record, the petitioner's counsel complained about not being informed of a witness who was scheduled to testify. The relevant part of the record reads:

> " Counsel Nyachoti: My Lord Mr Chair, before the witness carries on...I think it is fair for the assisting counsel, and we have requested this many times, to notify us who is coming to testify. I spoke with Mr Bitta yesterday and he gave me an order of the witnesses who were coming....We have not even had the name of this witness. So I think it is fair that we are put in notice so that we also know psychologically how to prepare...
>
> Chairman: Ms, Malik, I thought you were communicating this information?
>
> Lead Assisting Counsel: Chair, to the best of my knowledge, <u>I think we had said we were going to call him tomorrow but he actually came earlier, which is why we called him earlier.</u> I think Mr Bitta was not around; Mr Bitta did communicate that to Mr Nyachoti.
>
> Counsel Nyachoti: That is not correct...The sequence of the witnesses who are coming is not the one I was given by Mr Bitta. So the whole morning I was preparing for one witness, yesterday <u>I was preparing for another and we don't know what he is about to say because we don't even have his witness statement."</u> [Emphasis ours.]

89. Eventually the record shows that the witness was allowed to testify and the petitioner's counsel was given latitude to decide whether to cross-examine the witness at a later day if he still needed more time to internalize his evidence. In fact, after the testimony of the said witness, the petitioner's counsel chose not to cross-examine him at all, but only requested to be issued with his written statement.

90. With regard to the first identified incident, it confirms the petitioner's position that he had not been supplied, in advance, with a document which a witness made reference to in her testimony. However,

we also note, as the Chairman of the Tribunal has noted that the document in question was not entirely a new document as it had been extracted from the court file which the petitioner had the opportunity to peruse. That fact notwithstanding, that did not absolve the Assisting counsel from his obligation to provide, in advance, all the documents that he sought to rely on so that the petitioner could adequately prepare his case. The issue was in any event resolved by the Tribunal and no legitimate complaint in that regard can now arise.

91. With regard to the second highlighted incident, it is clear that the petitioner had not been informed in advance about a witness who had come to testify. Further, he had not been issued with the witness statement. We also note that in its submission, the respondent strongly denied that any witness was called without prior notice.

92. The Hansard recording would show that the petitioner's counsel objected to not being informed in advance about the sequence of witnesses to testify and another case in point is where he also complained about a letter which a witness was supposed to comment on but which turned out to be a different letter from the one on record.

93. Section 13 of the second schedule provides that the Tribunal shall not be bound by strict rules of evidence but shall be guided by the rules of natural justice and relevancy. This means that Tribunal proceedings being quasi- judicial in nature are not exempt from the constitutional safeguards of a fair hearing. In this case, on appraisal of the evidence on record and especially from the highlighted examples, we find that the Tribunal made deliberate efforts to ensure that the petitioner's right to fair hearing was protected. For example, the Tribunal recognised that it was unfair to bring a witness without notice and in that particular case, gave the petitioner's counsel the right to decide when to cross-examine the witness. The Tribunal also consistently reminded assisting counsel to always ensure that all the documents that the witnesses would produce before the Tribunal were given to the petitioner in advance. We cannot fault such conscientious action on the part of the Tribunal.

94. The petitioner also submits that, he was not issued with a summary of each allegation together with the evidence in support, but instead, he was given a summary of facts and not the evidence. Section 17(1) of the second schedule provides that "evidence before the Tribunal may be presented in the form of memorandum, affidavit or other documentation". Further, section 8(2) of the second schedule requires the petitioner to be provided with a list of allegations together with a summary of supporting evidence at least 14 days before the hearing.

95. We note that during the pre-trial Conference, the petitioner's counsel protested over non-service of certain relevant documents. The petitioner urged that he had only been served with the petition and some witness statements only a day before the start of the said Conference. With regard to this issue, we note that the Tribunal correctly appreciated that the purpose of a pre-trial Conference was to agree on how the Tribunal would proceed with the inquiry. It was also a time to seek clarification on any relevant issue.

96. According to the rules, the expected time of service was 14 days before the hearing. The Pre-trial Conference was not the commencement of hearing, but rather, as noted by the Chairman of the Tribunal, a time to decide on how and when to proceed. Indeed, during the Conference, it was directed that all documents ought to be served on the petitioner within the required timeframe. Hence, up to that time, there was compliance with the law.

97. We also note that the assisting counsel's opinion throughout the proceedings was that the Tribunal proceedings were not adversarial but rather inquisitorial, hence he stated that more witnesses were likely to come on board along the way and it was likely that some new documents would come to light in the course of proceedings. Therefore, even in such instances, the petitioner was not to be left

in a state of jeopardy but rather would at all times be granted adequate time to prepare his case. The Tribunal agreed and acted, in our view, within expected limits of natural justice and fair hearing.

ii. Was the Hansard recording a true reflection of the Tribunal's proceedings?

98. The petitioner has questioned the authenticity of the Tribunal's Hansard Report and alleges that at the point when the Tribunal retired to write the decision, it was relying on a record that was neither complete nor authentic. The petitioner's Counsel in that context has referred us to pages 861 to 869 of Vol 2 of the Tribunal's record where he raised the concern of missing transcription from the record. At that point, from the same record, the person in charge of recording had admitted that proceedings of one session had been omitted in the document that was given to the petitioner's Counsel. Following that admission, the Chairman of the Tribunal directed that the Hansard report ought to be supplied to the petitioner's Counsel every two or three days and any mistakes or errors found should be brought to the attention of the Tribunal. The Chairman also explained that both the members of the Tribunal and the Secretariat together with the petitioner's Counsel would go through the record to satisfy themselves about its correctness before the final copy was supplied.

99. As can be deduced from the record, the petitioner's counsel was arguing that if he discovered one mistake, it then meant that it was possible that many other mistakes went undiscovered. He thus submits that all those omissions cumulatively led to a miscarriage of justice since it raised doubts as to the integrity of the record that was relied upon by members of the Tribunal in making their decision.

100. In response, the respondent submits that the petitioner does not claim that the record that is before this court has errors. Furthermore, the respondent's counsel referred us to the Certificate for Verification of the Hansard Report signed by one Mr Mwangi Kinuthia on behalf of the Advocates for the petitioner as well as the Tribunal Secretary as evidence that both parties to this appeal verified the correctness of the Hansard Report.

101. On this issue, we find that the petitioner, through his Counsel, confirmed the authenticity of the record by signing the Certificate of Verification. That Certificate confirmed that the Hansard record of the Tribunal had been verified and agreed to be correct by the parties on August 12, 2016. The petitioner does not dispute that Certificate. In any case, the petitioner has not pointed to us any specific error on the record which he thinks has prejudiced his case in any way. We therefore find no merit in the petitioner's claim that the Hansard recording that formed the basis of the Tribunal's decision had fundamental errors that affected the outcome of the Tribunal's proceedings.

iii. What is the place and role of the Directorate of Criminal Investigations with regards to proceedings before the Tribunal?

102. The petitioner challenges the use of the police to partly investigate him. He urges that the Tribunal thus overstepped its mandate by engaging the services of the Directorate of Criminal Investigations ("DCI") to investigate him as regards the allegation that he attempted to influence a Ruling which was being written by Justice Njagi by use of text and oral messages. He further argues that the Tribunal has no such mandate under the Constitution or the Judicial Service Act. As a result, he urges that the evidence that is procured by such means should be disregarded.

103. On its part, the respondent urges that there was nothing wrong with inviting the services of the DCI to assist in the identification of the owner of a phone number which was allegedly used to contact Justice Njagi.

104. In addressing the above issue, we note that article 168(7)(a) of the *Constitution* provides that the Tribunal shall be responsible for the regulation of its proceedings, subject to any legislation

contemplated in article 168(10). Article 168(10) also provides that Parliament shall enact legislation to provide the procedure of a Tribunal appointed to investigate the conduct of a Judge. Parliament has indeed enacted the Judicial Service Act and its Second Schedule which provides the procedure that governs the conduct of a Tribunal appointed under article 168(5) of the *Constitution*.

105. Section 11 of the second schedule provides that "the counsel assisting the Tribunal will present evidence relating to the conduct of the subject and any matter relevant to the investigation." Further, section 17 provides that, "evidence before the Tribunal may be presented in the form of memorandum, affidavit or other documentation."

106. It is thus clear that neither the Constitution nor the Judicial Service Act specify the method of investigation to be employed by the Tribunal in gathering evidence before or during its proceedings. The Tribunal is however required to comply with the rules of natural justice such that the Judge who is the subject of investigation is entitled to cross-examine all the witnesses brought forth and bring evidence in rebuttal of allegations made against him.

107. We take note that allegation five implicated the petitioner in an alleged attempt to influence a ruling, which was being written by Justice Njagi, in the case of Sehit Investment Ltd v Josephine Akoth Onyango & 3 others, Civil Case No 705 of 2009. The particulars of that allegation were that the petitioner allegedly sent text messages to Justice Njagi to influence bias in favour of the plaintiff.

108. One of the pieces of evidence impugned by the petitioner in this regard is a statement written by one, Mr Jonathan Naze Visao, who stated that police officers had interrogated him concerning his ownership of the sim card for mobile phone number 0701584691. The petitioner also challenges a statement by Mr David Cheruiyot, the lead police investigator, who was tasked with the obligation to investigate the ownership of the mobile phone number which had allegedly been used to send text messages to Justice Njagi.

109. In his statement, Mr David Cheruiyot stated that he was instructed to conduct investigations in order to confirm the veracity of Justice Njagi's testimony in which he had stated that he received a text message from the petitioner concerning a case that was before him. The investigations by the DCI implicated Mr Jonathan Visao and that is why Visao was also questioned regarding his ownership of a mobile phone number which had been registered in his name.

110. We are at pains to understand why the petitioner is against the use of police investigators. The purpose of the investigation in issue was limited to unearthing the true ownership of the mobile phone number through which Justice Njagi allegedly received a text message and other communications with regard to a Ruling that was before him. We say so because the petitioner does not claim that he was not accorded an opportunity to present evidence in rebuttal. Interestingly, in his written submissions before the Tribunal and indeed his evidence before this court, the petitioner seeks to rely on the expertise of one Mr Fredrick Musili, an Inspector of Police attached to the Cyber Forensic Unit of the Criminal Investigations Department who allegedly confirmed that Justice Njagi's cell phone did not have the True caller application and hence Justice Njagi could not positively identify the person who sent him the concerned text message. Besides, the petitioner conceded to having communicated with Justice Njagi through his Safaricom phone number. It is therefore unclear what the petitioner's objection is supposed to achieve in this regard.

111. For the above reasons, we find no basis in the petitioner's claim on this issue and hereby dismiss it.

iv. Did the Tribunal compel the petitioner's spouse to testify before it, if so, what are the consequences thereof?

112. The petitioner urges that it was illegal to summon and compel his spouse to testify before the Tribunal. On its part, the respondent argues that no summons were issued to the wife of the petitioner but rather a letter was addressed to the Clerk of the National Assembly seeking her attendance within Parliamentary Standing Orders since the petitioner's wife was and is a Member of the National Assembly.

113. Without delving into much detail on this issue, we note that section 12 (1) of the Second Schedule provides that:

> "The Tribunal may, at its sole discretion, summon any person or persons to testify before it on oath or to produce such documents as the Tribunal may require, and the person so summoned shall be obliged to attend and to testify or produce the required documents and the provisions applying to witnesses summoned by ordinary courts of law shall apply to such person."

114. In this case, the petitioner's counsel did not object to the petitioner's wife appearing as a witness, despite having known in advance of her intention to testify. Indeed, on more than one occasion, during her testimony, the petitioner's wife explained that she was happy to clarify the particular issue that implicated her and which was the subject of investigation by the Tribunal. However, at the end of her testimony, the petitioner's wife expressed concern in the manner in which she was 'summoned' to appear before the Tribunal since the relevant letter had been addressed to the Clerk of the National Assembly and not directly to her. She thus lamented that her personal information was being publicised to parties that had no interest in it. The Chairman of the Tribunal apologised in the way she was served with the communication from the Tribunal and also informed her that the Tribunal could not compel her to testify.

115. We find that even though the Tribunal summoned the petitioner's wife, she was not compelled to testify and her only concern was the way in which the communication was passed to her. We say no more on this issue.

(c) Whether the Tribunal arrived at a correct finding with regards to allegations touching on Application No 305 of 2012.

116. A proper determination of this issue requires us to first appreciate the allegations that were attributed to the petitioner arising from his interaction with Application No 305 of 2012. Out of the six allegations that formed the basis for the establishment of the Tribunal, three imputed impropriety on the petitioner based on the way he was perceived to have handled Application No. 305 of 2012. For a clearer understanding of issues, we reproduce those particular complaints as follows:

    (1) That the petitioner irregularly, inappropriately and knowingly, in collusion with other parties, caused Application No 305 of 2012 to be allocated to himself and without the knowledge and consent of the Duty Judge and the Head of the Judicial Review Division.

    (2) That the petitioner irregularly and inappropriately caused Application No 305 of 2012 to be retrieved from the safe custody of the High Court's, Judicial Review Division, in Nairobi and taken by him to the High Court of Kenya at Kericho.

(3) That the petitioner proceeded to write a ruling in respect of Application No 305 of 2012 at a time when the Judicial Service Commission was inquiring into allegations of misconduct against him with regard to the same matter.

117. The three allegations arose out of a letter dated October 11, 2012 by Mr Havi, complaining to the JSC on behalf of his client, International Centre for Policy and Conflict (ICPC), about the petitioner's conduct in respect of proceedings in Application No 305 of 2012. The genesis behind the complaints as deduced from the Tribunal report is as here below.

118. M/s Kalove & Company Advocates, acting for the *ex parte* applicant, filed a Judicial Review Application No 305 of 2012 at the Judicial Review Division of the High Court on July 26, 2012. On August 10, 2012, the said Advocates then filed a certificate of urgency alongside an application seeking to have Application No. 305 of 2012 heard during the August court vacation which had commenced on August 1, 2012. The two Applications were heard by the petitioner, who was then the Vacation Duty Judge at the Commercial and Admiralty Division. He granted leave to the *ex parte* applicant in Application No 305 of 2012 to be heard during vacation and to seek judicial review orders. He also directed that leave so granted should operate as a stay order as prayed in the application.

119. On September 14, 2012, the same Advocates wrote two letters to the Deputy Registrar, Judicial Review Division, requesting that the matter be mentioned before the petitioner. The first letter requested that the matter be placed before the petitioner "for directions." The second letter, stated in part; "We refer to the above matter which was heard by Hon. Justice Mutava on August 10, 2012. There is some clarification required by all parties from the honourable court in respect to the orders issued by the Hon. Judge."

120. The Deputy Registrar of the Judicial Review Division testified that she only saw the second and not the first letter. On September 19, 2012, she endorsed the second letter with directions that the file ought to be taken to the Commercial and Admiralty Division for mention before the petitioner. On the other hand, counsel for the DPP testified that he never saw the second letter that allegedly sought a clarification from the petitioner but that the DPP was only served with the first letter which requested for the matter to be placed before the petitioner for directions.

121. On September 24, 2012, the matter was listed in the cause list for the Commercial and Admiralty Division. On that day, Mr Kalove for the applicant and Mr Warui for the DPP appeared before the petitioner and informed him that they had agreed to have the matter determined on the basis of written submissions. Consequently, the petitioner directed the parties to file and exchange written submissions by October 8, 2012 and the same be highlighted on November 5, 2012.

122. Before the above events, the International Centre for Policy and Conflict ("ICPC"), represented by Mr Havi, had filed High Court Petition No 279 of 2011, the *International Centre for Policy and Conflict v Attorney General* in the Judicial Review Division seeking to restrain the Attorney General and the DPP from compromising or withdrawing Criminal case No. 518 of 2006 against one Mr Kamlesh Pattni and others. Mr Pattni was the *ex-parte* applicant in Application No 305 of 2012.

123. While that petition was pending for hearing, Mr Havi testified that he found out through the media that on 10th August, 2012, the petitioner had, through Application No 305 of 2012, granted a stay of all matters relating to Mr Pattni including Criminal case No 518 of 2006 which was the subject of his client's Petition No 279 of 2011.

124. Consequently, when Application No 305 of 2012 came up for highlighting of submissions on 5th November, 2012, ICPC sought to be enjoined as an interested party. Despite protest from all parties,

the petitioner allowed ICPC to participate in the proceedings and directed the parties to proceed to highlight their written submissions.

125. Mr Havi, who had no time to file written submissions, protested that the matter should in any event have been heard in the Judicial Review Division and not at the Commercial and Admiralty Division where the petitioner was stationed. However, the petitioner proceeded to hear the matter and after the hearing, he reserved the Ruling for December 6, 2012. It was delivered on March 23, 2013, by Justice Havelock on behalf of the petitioner who had by then been transferred to the High Court in Kericho.

126. With regard to Application No 305 of 2012, the Tribunal found the petitioner culpable of colluding to adjudicate over that matter and ultimately writing a ruling on it when the JSC was still inquiring into allegations of misconduct against him with regard to that Application. The petitioner now challenges that finding before this Court.

i. Did the Tribunal correctly conclude that there was collusion between the petitioner, Mr Thuku and Mr Kalove to have Application No 305 of 2012 allocated to the petitioner without the knowledge and consent of the Duty Judge and Head of Judicial Review Division?

127. The Petitioner impugns the finding of the Tribunal in this regard and submits that none of the evidence tendered disclose a pre-determined scheme involving him, Mr Thuku and Mr Kalove. He also urges that the Tribunal disregarded all the evidence tendered by him in rebuttal.

128. For instance, the petitioner avers that the Tribunal ignored Mr Kalove's explanation for not filing the Certificate of Urgency on July 26, 2012, the day of filing Application No 305 of 2012, and that the actions or inactions of Mr Kalove had nothing to do with him. The petitioner also testified before the Tribunal that his decision to grant stay orders on the Certificate of Urgency filed on August 10, 2012, was purely based on merit and that any aggrieved party had the opportunity to appeal against his decision.

129. From the record, we find that Mr Kalove stated in his testimony that at the time he filed Application No 305 of 2012 on July 26, 2012, he did not consider it necessary to file it under a certificate of urgency. However, since the Application was seeking judicial review orders against the decision of the Director of Public Prosecutions ("DPP") made on January 27, 2012, it had to be filed within 6 months from the date of the DPP's decision. He thus testified that the urgency arose two weeks after filing necessitating him to file a certificate of urgency on August 10, 2012.

130. Contrary to the petitioner's assertion, the Tribunal did not make any adverse finding on the petitioner based on Mr Kalove's decision to file a Certificate of Urgency two weeks after filing the main application. However, in finding that Mr Kalove schemed to have the matter placed before the petitioner, the Tribunal reasoned that after the petitioner granted the *ex parte* orders, Mr Kalove subsequently wrote two letters of even date; one stating that the matter was part-heard before the petitioner and was seeking a mention for parties to take directions and the other letter sought clarification of the orders earlier issued. The first letter, the Tribunal noted, falsely referred to the matter as part-heard before the petitioner and was the only letter which was brought to the attention of the DPP. The Tribunal concluded that the said letter was intended to ensure that the DPP attended Court when the matter came up for mention before the petitioner after the High Court vacation but for purposes other than that the matter was part-heard or that any directions were necessary. The Tribunal also noted that although that letter was duly stamped as having been received by the court, it was not placed in the court file.

131. In addition, the other letter allegedly seeking clarification of orders was the only letter that was brought to the attention of the Deputy Registrar of the Judicial Review Division. Interestingly, Counsel for the

DPP testified that his office was never served with that letter. And indeed, he stated that even though that letter indicated that a “clarification was required by all parties”, he had issued no such instructions. And, since the letter was seeking clarification in respect of the orders issued by the petitioner, the matter had to be referred to the petitioner for the alleged directions only known to Mr. Kalove’s client and not all parties. The Tribunal rejected Mr. Kalove’s contention that the orders given by the petitioner implied that the negotiations between Mr Pattni and the DPP were still ongoing, and hence the need for clarification. In concluding so, the Tribunal noted that Mr Kalove extracted the Order on the day that it was made and only attempted to seek clarification over a month later. Furthermore, Mr Kalove stated in the letter that all parties were seeking clarification yet Mr Warui, Counsel for the DPP was categorical that he did not require any clarification. The Tribunal further noted that Mr Kalove admitted in his testimony that there was an oversight on his part in writing the letter and that he also did not in fact require any clarification of the orders issued. The Tribunal rejected his claim that there was an oversight and held that Mr Kalove’s actions were a scheme to have the matter mentioned before the petitioner and no other Judge. We agree with the Tribunal in this regard and have no other finding to make in the face of all the evidence before us.

132. The Tribunal furthermore found the Judge culpable because it reasoned that when the letter seeking clarification of the orders was brought to the attention of the Deputy Registrar of the Judicial Review Division, the Deputy Registrar directed that the concerned file ought to be placed before the petitioner for directions. Specifically, the Deputy Registrar endorsed on the letter as follows:

> “ File may be placed before the Judge. Let the file be placed before the DR Commercial to confirm date.”

133. Acting on those instructions, Mr Obendo, former Executive Officer of the Commercial and Admiralty Division of the Milimani High Court sought guidance from Ms Nyambu, the former Deputy Registrar at the Commercial and Admiralty Division who referred him to the petitioner. Mr Obendo testified that when he went to the petitioner to seek directions, the petitioner directed that the matter ought to be fixed for mention before him on the September 24, 2012. The petitioner however denies giving any instructions directing that the matter ought to be fixed for mention before him. According to the petitioner, the letter seeking clarification was also never brought to his attention before the date of the mention. He testified that the first time he came into contact with that letter was on September 24, 2012, the day the matter was fixed for mention. He again stated that he is not the one that directed that the matter ought to be fixed for mention before him.

134. In disregarding the petitioner’s testimony in this regard, the Tribunal stated thus:

> “ When the letter seeking clarification of the orders was received, Gicheha endorsed on its foot instructions that it be taken to the Judge to give directions. Acting on those instructions Obendo sought guidance from Nyambu who referred him to the Judge. The Judge directed the matter be fixed for mention before him on September 24, 2012. In light of this testimony, it is our view that the Judge’s contention that he had nothing to do with the file being placed before him is untenable. The three officers acted in the normal course of their administrative duties. Their narration was consistent and they had no reason to lie against the Judge. We therefore hold that the Judge directed that the matter be placed before him for mention on September 24, 2012.”

135. Again, we agree with the finding of the Tribunal that the evidence of the three officers on how the matter came to be fixed for mention was credible and consistent. We also do not understand why the petitioner saw the need to be untruthful on this issue. There was nothing wrong, so to speak, with

an advocate seeking clarification of the orders he had issued. It was only natural that the letter would somehow find its way to the petitioner since it sought clarification on orders that he had given. The question then is whether the petitioner unprocedurally directed that the matter ought to be fixed before him for mention. What course of action should the petitioner have taken after realizing that the parties wanted a clarification on orders that he had issued? We examine this issue in more detail later in this Judgment.

136. A different but related issue also raised by the petitioner was why Justice Muchemi was never called to testify on whether she was away on the afternoon of August 10, 2012. The petitioner submits that none of the Judicial Review Division Registry staff who manned the station on that day were called to testify and explain why the certificate in Application No.305 of 2012 was taken to his chambers. Yet, he urges that despite all that, the Tribunal still found that "Kalove schemed to have the matter placed before [him]".

137. In response, the respondent states that, even though Justice Muchemi was never called to testify, a perusal of the court records for that day showed that Justice Muchemi handled the case of *Prof Peter Anyang' Nyong'o & 10 others v Solicitor General* HC (JR) Misc 168 of 2013 amongst others on that day. However, the petitioner urges that the fact that Justice Muchemi heard some applications on that day did not prove that she was in court the whole day as opposed to only part of the day.

138. At paragraph 102, the Tribunal noted that although Justice Muchemi was never called to testify, the petitioner did not say that he had Justice Muchemi's authority to handle Application No 305 of 2012. In holding so, the Tribunal stated that according to the vacation duty roster, Justice Muchemi was the Vacation Duty Judge dealing with, inter alia, matters from the Judicial Review Division. Affirmatively, the Tribunal also reasoned that:

> " [Justice Muchemi] handled the case of *Prof. Peter Anyang' Nyong'o & 10 others v Solicitor General* HC (JR) Misc 168 of 2013 amongst Judicial Review matters as is clear from the cause list for that day. That being the case, there was no reason why HC Misc (JR) 305 of 2012 could not have been placed before Justice Muchemi as Kalove had filed the Certificate of Urgency on the morning of August 10, 2012."

139. The Tribunal furthermore rejected the petitioner's testimony that he had been requested by Justice Korir to handle matters from the Judicial Review Division. This is because, Justice Korir confirmed in his testimony that he was not the Vacation Duty Judge in the Judicial Review Division and hence, from the evidence on record, we affirm the finding by the Tribunal that Justice Korir only requested the petitioner to handle matters arising from the Civil Division, and the Land and Environment Division, but not from the Judicial Review Division.

140. The evidence of the former Deputy Registrar at the Judicial Review Division at the time Application No 305 of 2012 was filed confirmed that Justice Muchemi, is the one who handled Judicial Review matters on 7th, 8th and August 9, 2012. She testified that she confirmed that position from the Coram page of the various Certificate of Urgency Applications that were filed on those days. She stated that she was not able to get the duty roster for that August vacation and could not confirm whether indeed Justice Muchemi was still the duty Judge in charge of Judicial Review matters on August 10, 2012, because on that day, she stated that only one Judicial Review matter was filed and that was Application No 305 of 2012.

141. The Deputy Registrar's testimony in that regard, was as follows:

> " ...I went back to the Registry because I also wanted really to confirm which Judge was on duty. I was not able to trace the duty roster 'cause it has been quite some time. But I decided to sit down and peruse a number of files which came for certificate during the same region. I traced files for...7th for 8th and for 9th. ...For 10th, this was the only file that came up. And for 7th and 8th and 9th, the Judge who was doing the Judicial Review and Constitution Review in Human Rights matters was actually Justice Muchemi. That is now what I confirmed from the quorum (sic). But I do not want to talk about the 10th, because 10th I was not able to...there was only one file and this was the only file that came up for certificate on the 10th."

142. In her further testimony, the Deputy Registrar explained that she perused the register of movement of files so that she could be sure how many Certificate of Urgency Applications were filed during that period. She stated that she only saw the Applications for 7th, 8th and 9th and they were all placed before Justice Muchemi. She explained that since Application No 305 of 2012 was not a new file, it could not have appeared on the register but should have been recorded on the movement register for August 10, 2012. However, that was not done. She further confirmed that the register did not have any entry for August 10, 2012. She was categorical that on that day, there was no matter that was filed in the Judicial Review and Constitutional and Human Rights Divisions. She however confirmed that the cause list for August 10, 2012 indicated that Justice Muchemi heard a Judicial Review matter on that day, although she did not explain when that Judicial Review matter was filed.

143. The petitioner further submits that the Tribunal disregarded Mr. Kalove's testimony to the effect that the Certificate of Urgency in Application No 305 of 2012 was placed before the petitioner since Justice Muchemi only heard Judicial Review matters on the morning of August 10, 2012 and that she had already left the court station when that application was placed before the petitioner in the afternoon. Mr Kalove's evidence in this regard is unfortunately of no probative value. We do not know on what basis Mr. Kalove, as a party's advocate, would be in possession of information regarding the presence or absence of a Judicial Officer from a duty station unless Justice Muchemi had specifically communicated to him about her alleged absence. That is however not the case here.

144. Indeed, the petitioner correctly observes that it is only the Deputy Registrar Judicial Review who could explain why the Certificate of Urgency in Application No 305 of 2012 was "taken" to the petitioner for hearing. Unfortunately, the Deputy Registrar could not provide that answer because the evidence reviewed so far clearly shows that there was a lapse in the Registry in the way in which the filing of the Certificate of Urgency in Application No 305 of 2012 was handled and that marked the beginning of an emergence of a conspiracy. Questions arise as to why the Certificate of Urgency Application was not recorded in the movement of files Register, as the Deputy Registrar testified that it should have been. Was that a deliberate action to conceal its filing and to what end would such an action be necessary? Be that as it may be, the anomalies notwithstanding, we now confirm, with some level of certainty, that Justice Muchemi heard at least one Judicial Review matter on August 10, 2012. However, it is unclear when that Judicial Review matter was filed. This is because the Deputy Registrar confirmed that from her records, no Certificate of Urgency Application was filed on August 10, 2012. Nevertheless, nothing turns on that lack of clarity in the face of all other evidence before the Tribunal.

145. We also have no doubt in our minds that Justice Korir was neither the Vacation Duty Judge in the Judicial Review Division nor did he hear any Judicial Review matter during that August Vacation and hence he could not have requested the petitioner to handle Judicial Review matters on his behalf. However, we recognise that the petitioner was categorical that Justice Korir instructed him to

adjudicate on any Judicial Review matter that may have arisen on August 10, 2012. Justice Korir's testimony that he only asked the petitioner to handle matters arising from the Civil Division and the Land and Environment Division is uncontested. This is because he was the Vacation Duty Judge in those Divisions and in any case, the Deputy Registrar, Judicial Review Division, confirmed that as regards all the Judicial Review matters that were filed between 7th and August 9, 2012, only Justice Muchemi heard them. Why then would Justice Korir ask the petitioner to hear matters arising from the Judicial Review Division? And what would have happened to matters in the Civil Division and the Land and Environment Division? No plausible explanation was placed before the Tribunal and we are therefore unable to find merit in the petitioner's narrative. To his credit however, the petitioner does not claim that Justice Muchemi asked him to stand in for her. However, even assuming that the petitioner acted on humanitarian grounds, that he was the only Judge within the vicinity of the Milimani Law Courts as he claims to have been, the question that lingers is why Application No 305 of 2012 was not registered in the movement register and how did he get hold of it completely outside known administrative procedures?

146. In his testimony, the petitioner stated that Application No. 305 of 2012 was brought to him by his Court Clerk while he was in Court. That may very well be true. However, the relevant issue at this juncture is that the petitioner admitted that he willingly adjudicated over a Judicial Review matter on the August 10, 2012. Having disregarded the petitioner's testimony on the "role" of Justice Korir in leading him to adjudicate over any Judicial Review matter, it is clear that there was a conspiracy from the beginning to have Application No 305 of 2012 find its way before the petitioner. This is because the petitioner was not the Vacation Duty Judge at the Judicial Review Division during the August 2012 vacation. Further, the petitioner did not have permission nor any authority to deal with Judicial Review matters from Justice Muchemi whom we now confirm as a fact based on the evidence on record that she was the Vacation Duty Judge for Judicial Review Division. Yet, Justice Muchemi was the only legitimate Judge who could have asked another Judge to stand in for her in her absence.

147. The petitioner does not claim that Justice Muchemi asked him to stand in for her. Hence, the lack of Justice Muchemi's testimony on her whereabouts on that material day does not exonerate the petitioner from the allegation that he unlawfully took possession of the concerned application. The question as to how the petitioner ended up adjudicating over a Judicial Review matter on August 10, 2012 remains unanswered, and the petitioner has not provided any plausible explanation on how he could have legitimately taken over that Judicial Review matter. To make matters worse, Application No 305 of 2012 was not recorded in the movement register as it should have been done, adding more doubts, to an already tainted scenario. The petitioner needed not be part of this conspiracy, but of all things he failed to explain how he presided over a Judicial Review matter without express permission from the Vacation Duty Judge. Unfortunately therefore, the petitioner's account raises more questions than answers exposing the petitioner as more than just an innocent bystander in the already created murky web of misgivings.

148. The Tribunal also found that Mr. Thuku, the person in charge of preparing the cause list, was culpable for the manner in which the matter was listed on the cause list on September 24, 2018. The Tribunal found that the matter was curiously listed as CC 305/012 (meaning Civil Case No 305 of 2012) and therefore properly before the Commercial and Admiralty Division to disguise it as a civil case whereas it was a Judicial Review case and ought to have been listed as JR Application No 305 of 2012. The Tribunal found that Mr Thuku, an Assistant Executive Officer, with more than 10 years' experience was unable to explain how a Judicial Review matter was so listed as a civil matter. The Tribunal rejected his attempt to shift blame to a Ms Ndung'u, whose only mandate in this regard was to type the cause list as it appeared on the handwritten draft given to her by Mr Thuku. The Tribunal found that Mr Thuku's demeanour during his testimony showed that he was not candid. In

the circumstances, the Tribunal held that Mr Thuku deliberately listed the matter as "CC 305/012 *K. Damji v Honourable Attorney General*" in order to disguise the nature of the suit and to conceal the identity of Mr Kamlesh Pattni as the applicant. In addition, the Tribunal was also concerned that the petitioner was not bothered by the way the matter was listed in the cause list.

149. The petitioner on his part testified that he had no control with the way the cause list was prepared and that even though all Counsel that appeared before him on November 5, 2012, protested against the admission of Mr Havi's client, he still went ahead and enjoined Mr Havi's client in the proceedings of November 5, 2012.

150. In the end, the Tribunal found that allegation one had been proved to the required standard. The basis of the Tribunal finding was stated in the following words: [para 112]:

> " On the basis of the evidence, we find that the Judge was not an innocent bystander in this matter. He dealt with a Judicial Review application for leave when he was not the vacation Duty Judge for Judicial Review Division and without the authority of Justice Muchemi who was the vacation Duty Judge in the Judicial Review Division. Thereafter he allocated himself the matter by fixing it for mention for directions on September 24, 2012. He ignored the fact that the matter came before him under the pretext of counsel for Pattni seeking clarification and with the knowledge that the Cause List for that day disguised the nature of the suit and concealed the identity of the applicant, Kamlesh Mansukhlal Damji Pattni, the Judge went ahead and fixed the matter for hearing before himself. At the hearing he ignored protestations from Havi that the file ought to have been returned to the Judicial Review Division and heard there. He heard the Judicial Review matter after the vacation when he was a Judge sitting in the Commercial and Admiralty Division."

151. Consequently, the Tribunal concluded that in the circumstances, there was compelling evidence that showed that the petitioner without the knowledge and consent of the Vacation Duty Judge colluded with other persons including Mr Kalove and Mr Thuku to have the matter allocated to him.

152. Further, even if we are persuaded by the evidence on record that the petitioner specifically directed that Application No 305 of 2012 be fixed for mention before him, it was reasonable for the petitioner to act on Mr Kalove's letter dated September 14, 2012 which sought clarification on the orders which the petitioner had issued on August 10, 2012. To this extent, we are hesitant to find any fault with the petitioner in this regard.

153. However, the gravity of the matter is compounded by the fact that the *ex parte* applicant's advocate subsequently wrote two letters of even date seeking different directions and whereas the DPP received one letter, the Deputy Registrar Judicial Review Division received another. Obviously, the petitioner would not have control over an advocate's conduct in a matter or the correspondences between advocates and the court through the recognised officers. But here lies our dilemma. Let us assume, and correctly so, that the only letter which was brought to the attention of the petitioner was the letter seeking clarification of the orders earlier issued by the petitioner since that was the only letter which was placed on the court file. As a result of that letter, a mention date was fixed with a view of granting audience to the parties so that they could seek the clarification alluded to.

154. Interestingly, the cause list for that day captured the details of Application No. 305 of 2012 in a very unusual way. That is "CC 305/012 *K Damji v Honourable Attorney General*". "CC" denotes that the Application was a civil case. Yet, it was obviously a Judicial Review matter hence the proper initials should have been "J.R". Furthermore, the Applicant's name was abbreviated as K Damji. The applicant's full names as they appeared on the Application were Kamlesh Mansukhlal Damji Pattni.

Mr Thuku, the then officer in charge of preparing the cause lists testified that in certain cases, he used initials to describe the parties. He explained that in this case the correct initials should have been KMD Pattni yet he was unable to explain why then the name Pattni did not appear on the cause list. The Tribunal then concluded that, the cause list for that day disguised the nature of the suit and concealed the identity of the applicant. We agree with the Tribunal in that regard.

155. Another notable thing that happened on the day of the mention is that when the parties appeared before the petitioner, no clarification was sought. The testimony of the petitioner in that regard is aptly captured as follows:

> " None of the lawyers moved me in terms of clarification, and I am not the one to move them to move me...The parties appeared before me, they said they had discussed the matter and they wished to take directions. That is what happened..."

156. With regard to this, Mr Kalove testified that he discussed the matter with Mr Warui, who was appearing for the DPP, who told him that they need not waste time on the clarifications but rather should take directions and go to the merits of Application No 305 of 2012. On his part, Mr Warui for the DPP stated that he did not receive any letter seeking clarification, and so when he appeared for mention, all the DPP expected was to take a date for inter partes hearing. The petitioner admitted that he saw the letter seeking clarification since it had been placed in the court file and he knew that the purpose of the mention was to clarify the orders he had issued. However, when the parties appeared before him, they did not seek any clarification but instead proceeded to record a consent on how to proceed with the matter. We do not understand why the petitioner failed to ask the parties on what clarification they required or why they had indicated that they required clarification. Yet the petitioner testified that he was "shocked" to have seen that the file had been placed before him.

157. We would understand why the petitioner was shocked. That was a Judicial Review matter and he had only dealt with it during Vacation and hence, under normal circumstances, that file should never have found its way back to him since he was not assigned to the Judicial Review Division. After Vacation, the matter should have been taken over by his colleagues in the Judicial Review Division, irrespective of the parties' consensus on how the matter should proceed. However, even after the petitioner realised that no clarification was required, he failed to transmit the file back to the Judicial Review Division but rather proceeded to adopt the consent of the parties and fixed the matter for hearing before him. Fast forward to the day of the hearing, an interested party sought to be enjoined in the suit and Mr. Havi, the party's advocate pleaded with the petitioner to have the matter transferred to the Judicial Review Division. The petitioner testified that Mr. Havi did not make a formal application in that regard but only made a passing request asking that the matter be transferred to the Judicial Review Division. Again, not even the said request from Mr. Havi nudged the petitioner to reflect on the possibility of sending the matter back to the correct Division.

158. In our view therefore, when all the above relevant facts are taken together the only inference which can legitimately be drawn is that the petitioner, through the tactics of Mr. Kalove and Mr Thuku (in charge of cause lists) caused Application No. 305 of 2012 to be allocated to himself and wilfully continued to adjudicate over that application against the known administrative procedures. Consequently, we agree with the finding of the Tribunal that allegation one was proved to the required standard.

ii. Did the Tribunal consider the merits of the Orders granted by the petitioner in Application No 305 of 2012, and if so, what are the consequences?

159. The petitioner submits that the Tribunal went to great lengths to explain the relationship between the ex parte applicant, in Application No 305 of 2012 and a company known as the Goldenberg

International Limited ("Goldenberg") which was the subject of investigation for fraud in an inquiry which came to be known as the Goldenberg scandal. The petitioner argues that the said background was irrelevant to the issues at hand and only portrayed the bias of the Tribunal from inception.

160. The petitioner submits that by recounting that background, the Tribunal laid a basis for incriminating him from what he describes as the "social outcry" that arose following the Goldenberg scandal. He submits that the question that was before the Tribunal was whether the internal processes of filing a Judicial Review Application were followed and whether he was properly allocated Application No 305 of 2012 and not whether he was to blame. As a result, he urges that the background introduced by the Tribunal was totally irrelevant yet, he submits, the said information took the centre stage of the Tribunal's decision.

161. In response, the respondent denies that the Tribunal delved into the merits of Application No 305 of 2012. It urges that the Goldenberg scandal was of certain notoriety and the fact that the Tribunal took judicial notice of it does not mean that it considered the merits of that decision.

162. We find that at paragraph 38 of the Tribunal's decision, it remarked as follows:

> " Since the three allegations [allegation 1, 2 and 3] arise from the same case, we shall consider them jointly, but before we set out and analyse the relevant evidence, it is important to appreciate the background that led to the filing of the case, its conduct once it was filed, and the salient undisputed facts regarding the proceedings in issue."

163. The Tribunal then went on to explain the circumstances that led to the filing of Application No 305 of 2012 which principally sought to stop the DPP from preferring criminal charges against the *ex parte* Applicant following the illegalities that were unearthed by the Goldenberg Commission of Inquiry. In that context, the Tribunal explained that Mr. Pattni, through his lawyers, entered into negotiations of a plea-bargaining nature but the DPP rejected those proposals leading the *ex parte* applicant to file Application No. 305 of 2012 with a view of quashing the DPP's decision.

164. We have looked through paragraphs 38 to 57 of the Tribunal's finding, which forms the subject of the petitioner's contention and find that they set the background as aforesaid which led to the filing of Application No 305 of 2012. We do not find anything in those paragraphs where the Tribunal examined the merits of the Orders granted by the petitioner in Application No 305 of 2012. The petitioner also contests that the said background was irrelevant in the determination of the issues before the Tribunal. On this we state that whether the said background was relevant or not, does not affect the substance of the Tribunal's finding and in any case, the petitioner does not point out with specificity instances where the Tribunal delved into the merits of the Orders issued by him. Consequently, we dismiss the petitioner's claim in this regard.

iii. What is the effect of the petitioner writing a ruling on Application No 305 of 2012 at a time when the JSC was inquiring into allegations of misconduct concerning that Application?

165. The Tribunal found the petitioner culpable for writing a ruling in respect of Application No 305 of 2012, at a time when the JSC was inquiring into allegations of misconduct against him with regard to that application. In holding so, the Tribunal noted that a week after the petitioner testified before the JSC concerning allegations of misconduct on Application No 305 of 2012, the petitioner called for the file and wrote the Ruling on that matter.

166. Indeed, the petitioner wrote the Judgment on Application No 305 of 2012, when that matter was still under inquiry by the JSC. The JSC started inquiring into that matter before the petitioner commenced the writing of the ruling. The petitioner testified that he proceeded to write the ruling because he

wanted to clear his backlog of cases and also because the JSC had not instructed him to refrain from handling that matter further.

167. It is our considered opinion that Judges are presumed to be independent and acts without the control of anyone while handling the cases that are before them. At the same time, Judges should always ensure that their conduct is beyond reproach in the eyes of a reasonable observer and must always uphold the principle that justice must not only be done but be seen to be done. In this case, there was an inquiry by the JSC on the conduct of the petitioner with regard to a matter that was pending for delivery of a ruling/judgment before him. In such a case, at a purely general level, it would be reasonable to infer that such investigations on an ongoing matter would trigger a reasonable Judge in good conscious to refrain from dealing with the concerned matter until such a time when the investigations are complete. Still, the fact that a reasonable Judge would have acted differently does not necessarily translate to an automatic finding of gross misconduct on the part of the petitioner.

168. The Committee of the JSC appointed to consider the complaints against the petitioner noted that it received a complaint by Mr Havi on behalf of his client, the ICPC on October 12, 2012 complaining about the petitioner's conduct with regard to Application No 305 of 2012. On December 19, 2012, the Committee forwarded the complaint to the petitioner who filed his response on January 8, 2013. Thereafter, on February 7, 2013 the petitioner appeared before the Committee to give his testimony. It appears that the Committee had on 11th January, 2013 called for the file and by that time, the petitioner had not written a Ruling on that matter. The file was later returned to the Judicial Review Division on February 19, 2013. By that time, the petitioner had been transferred from the Milimani Commercial Court to the High Court in Kericho effective January 1, 2013. The hearing of that application had been concluded on November 5, 2012. It is after the file was returned back to the Judicial Review Division that the petitioner retrieved it and subsequently wrote the ruling which was delivered on March 20, 2013 by Justice Havelock.

169. The petitioner testified that when he retrieved the file for writing the ruling, he did not find any comment from the JSC asking him to refrain from writing it or taking any action pertinent to that file. On the other hand, the Committee report indicates that the JSC had by a letter dated February 19, 2013 instructed that the file be kept in the Judicial Review Division under safe custody in view of the ongoing inquiries. The petitioner testified that he did not see any letter requesting him to refrain from further handling of that file and indeed the final report of the Committee was submitted to the JSC on May 17, 2013, two months after the petitioner had delivered the concerned Judgment.

170. In finding the petitioner culpable for gross misconduct the Tribunal held as follows [paragraph 115]:

> " [W]e cannot help but wonder why the Judge, against whom there was a petition for dismissal on account of impropriety would go ahead and determine the matter before he was cleared of that complaint. We reject the Judge's claim that he did that because he wanted to finalise his Nairobi matters before he got bogged down with work in Kericho. Since he had stayed proceedings in the criminal case and in all other matters related to the Goldenberg Affair, there was clearly no urgency in the matter."

171. From the facts before us, it is clear that the petitioner wrote a ruling on a matter which was still under the inquiry by the JSC pursuant to allegations of misconduct levied against him. Even though the JSC claims to have directed that the file ought to be safeguarded pending the outcome of its investigation, there is no clear evidence on record to show that the petitioner was informed about that decision. Most importantly, a Judge is presumed to be properly in office until such a time when a petition for his removal is instigated and the President acts on it. Then, that Judge is temporarily reprieved of his duties, pending the outcome of the Tribunal's investigation. In a case such as this therefore, in the absence

of any contrary information, the decision of how a Judge proceeds with the matter rests solely on his conscious as guided by the Judicial Code of Conduct and Ethics. At this point therefore, contrary to the Tribunal's finding in this regard, we do not find any solid reason why a Judge should be condemned for performing his duties. We say so because at all material times, until the time when the Tribunal was formed, the petitioner was a Judge with the right to perform all the duties that pertain to the office of a Judge. We are aware that there may be justifiable grounds on why a Judge should refrain from dealing with a matter which is directly under investigation by the JSC. However, any communication to suspend a Judge's participation in a matter which is under such inquiry, should be instigated by the Chief Justice, as the head of the Judiciary as opposed to the JSC which has no such mandate. In this case, no such communication was issued to the petitioner requesting him to suspend his participation in Application No 305 of 2012. Consequently, we find that the petitioner's action of writing a ruling on a matter that was under investigation by the JSC does not amount to gross misconduct as provided for under article 168(1)(e) of the *Constitution*.

(d) What is the status of Mr. Havi's testimony before the Tribunal?

172. The petitioner faults the Tribunal for finding that one, Mr Havi was a key witness and further submitted that based on Mr Havi's testimony, the Tribunal found two allegations as having been proved against him. In stating so, the petitioner makes reference to paragraph 58 of the Tribunal's finding where the Tribunal remarked that Mr Havi was a key witness with regard to the first three allegations. However, we find that the petitioner, other than just stating that two allegations were found to be proved against him, does not identify the said two allegations. Furthermore, the remark by the Tribunal that Mr. Havi was a key witness seems to have been misplaced at that juncture since, soon after that proclamation, the Tribunal went on to reproduce Mr Havi's testimony without necessarily examining its probative value or applying it to the facts of the case.

173. The petitioner further submits that the Tribunal should have taken into consideration the fact that Mr Havi's complaint had neither been lodged with the JSC as required under article 168(2) & (3) of the *Constitution* nor was it part of the petition forwarded to the President. The petitioner thus submits that Mr Havi was testifying in his own personal capacity since his client, the ICPC had subsequently withdrawn its complaint.

174. We have already made a finding on the effect of the alleged withdrawal of complaints and at this point we are not dealing with any individual complaints made to the JSC but only the sum total of allegations forwarded to the President which later became the subject of investigation by the Tribunal. The petitioner does not state that the Tribunal dealt with an allegation that was not the subject of the JSC petition to the President and he also does not state precisely what new complaint, if any, was instituted by Mr Havi and which he claims formed the subject of the Tribunal's finding.

175. The petitioner also submits that Mr Havi's complaints were manifest with irregularities and were biased against him. By way of example, the petitioner states that the Tribunal, acknowledged that according to Mr Havi, one Mr Obendo, the former Executive Officer at the Commercial and Admiralty Division of the High Court at Milimani who had custody of Application No 305 of 2012 was instructed by the petitioner to strictly hold the concerned file under lock and key. However, the petitioner submits that the said Mr Obendo did not admit in his testimony before the Tribunal that he ever made the impugned statement.

176. Regarding the above, we hold that Mr Havi was a witness like any other. Thus, there is a possibility that part of his evidence was inconsistent with the testimony of other witnesses. In such a case, it was upon the Tribunal to weigh the evidence on record and determine which of the evidence was more reliable and believable based on the surrounding circumstances. We also find that the adverse findings

made by the Tribunal against the petitioner do not turn on the identified instance where Mr. Havi is said to have given contradictory evidence.

177. The petitioner also submits that Mr Havi's complaints against him were driven by extraneous factors and that he, Mr Havi, had always held a grudge against Mr Kamlesh Pattni the applicant in Application No 305 of 2012 and at one time, attempted to extort money from Mr Pattni. He urges further that his Judgment in favour of Mr Pattni must have triggered Mr Havi's ill motive against him as a way of getting back at Mr Pattni.

178. The petitioner also paints Mr Havi as a man of erratic behaviour and in proof of this allegation, he submits that as acknowledged by the Tribunal, Mr Havi lodged a complaint against him when he declined to receive him in his chambers. He further submits that Mr Havi's persistent efforts in pursuing a complaint against him even after his client had already withdrawn the complaint shows that he was acting with ulterior motives. The petitioner also argues that if Mr Havi really wanted to ventilate on issues before the petitioner, he should have sought enjoinment in the suit much earlier and not wait for a whole month as he did.

179. As further proof of dishonesty, the petitioner makes reference to Mr Havi's testimony before the Tribunal where he claimed to have informed the petitioner that he had filed a complaint against him. However, the petitioner asserts that such allegations were not in the proceedings and therefore the only inference to be drawn was that Mr Havi must have been lying. He states that all advocates present on that day do not also recall Mr Havi making such statement.

180. Even though the petitioner's perception of Mr Havi may be truthful, nothing really turns on this because the petitioner does not explain how, based on Mr Havi's testimony, there was a miscarriage of justice which is sought to be corrected. The petitioner wholesomely taints the evidence of Mr Havi, but even by the exclusion of Mr Havi's testimony, the petitioner does not show how he is exonerated from the accusations that faced him. The Tribunal relied on different pieces of evidence which when sewed together ultimately produced an adverse finding against the petitioner. We have also independently reviewed that evidence and have made our own finding based on the information before us. Above all, we find that the petitioner's complaint in this regard is based on assumptions and conjectures and hence this submission is not legally sustainable. We say no more on this.

(e) What was the effect of the petitioner making an inquiry into the progress of a case which was before another judge?

181. The Tribunal found the petitioner culpable of allegation five in which the petitioner was accused of seeking to influence the Ruling in the case of Nairobi HCCC No 705 of 2009, Sehit Investments Ltd v Josephine Akoth Onyango & 3 others ("Sehit") in favour of the plaintiff through the use of oral and text messages from his cell phone. The evidence in support of the allegation included a text message allegedly received by Justice Njagi on telephone number 0732 571 592 stating "HCC 705 of 2009, Sehit Inv v Josephine Onyango. I am for plaintiff, Sehit Thanks." Justice Njagi testified that he perceived that the sender of the message wanted him to write a ruling in favour of the plaintiff in that matter. He also testified that, even though he had not saved the petitioner's mobile number on his phone, he was able to identify the sender of the message as the petitioner through the use of an application known as True Caller which he had installed on his phone. He explained that, as a result of that application, his phone was able to immediately pick the sender of the text message as Mutava J, the petitioner herein. Justice Njagi also testified that he was convinced that it was the petitioner who sent him the text message since the petitioner had previously asked him about the progress of the Sehit matter.

182. The petitioner admits that he orally enquired from Justice Njagi about the progress of the Sehit matter, however, he submits that he did not write any text message to Justice Njagi through the Airtel number 0732 571 592. The petitioner submits that he communicated to Justice Njagi about the Sehit matter through the use of his Safaricom mobile phone number. The petitioner further urges that one Mr. Musili, an Inspector of Police at Cyber Forensic Unit testified that Justice Njagi's handset was incapable of holding the True Caller application. As such, he urges that Justice Njagi could not claim that he identified him as the author of the message through the use of the True Caller application.

183. The respondent on his part, submits that the petitioner admitted that he made an inquiry from Justice Njagi concerning the progress of the Sehit matter and he also informed Justice Njagi on whose behalf he was scouting for information regarding the case.

184. We find that the petitioner admits that he enquired from Justice Njagi about the progress of the concerned case. He also admits that though he informed Justice Njagi on whose behalf he was enquiring about the case he did not ask Justice Njagi to rule in any particular way. Therefore, what is in contention is whether the petitioner wrote the impugned text message to Justice Njagi and whether his conduct in relation to the Sehit matter, was an attempt to influence the decision in that case.

185. In the above context therefore, the evidence on record shows that one Mr Nduati, the head of Information Technology at Airtel Kenya, testified that he could not ascertain who the registered owner of mobile phone number 0732 571 592 was for the period between January 2012 to February 2013. However, he confirmed that one Mr Jonathan Bissau was the registered owner of the number as at June 11, 2014. The alleged text message was sent to Justice Njagi on September 9, 2012. By then, there was no known registered owner. Mr Nduati testified that an outgoing message was sent to mobile phone number 0723 151 756 (belonging to Justice Njagi) on September 9, 2012 at 9.27 am from Nairobi's Thomsons area. The petitioner confirmed that he lives in Thomsons area in Nairobi.

186. The Tribunal was convinced that the mobile phone number 0732 571 592 belonged to the petitioner because even though there was no proof that the number was registered in his name during that material time, the evidence by one Mr Cheruiyot, a Chief Inspector at the Directorate of Criminal Investigation showed that a record of phone data disclosed that calls from that Airtel number were made from various localities such as Milimani Law Courts, Thomsons Nairobi and Mbui Nzau. The Tribunal noted that the petitioner confirmed that he lives in Thomsons area and his rural home is in Mbui Nzau, though the record shows that the petitioner only stated that he passes by Mbui Nzau on his way to his rural home in Kibwezi. The Tribunal therefore concluded that the coincidence of call logs showing communication from places where the petitioner was affiliated to was too much to ignore.

187. The Tribunal also relied on the testimony of Mr Musili, the Inspector of Police at Cyber Forensic Unit, who testified that the True caller application is able to identify a caller even when the recipient has not saved the caller's phone number. Mr Musili even demonstrated that using his True Caller application, the cell phone number 0735 ******** was identified to belong to the petitioner. The Tribunal therefore concluded that when the evidence of Mr. Musili is taken alongside all the other evidence, it supported the conclusion that the phone number belonged to or was used by the petitioner.

188. In holding so, the Tribunal noted that there was a lot communication between the petitioner and Justice Njagi both by mobile phone conversation and face to face communication which the petitioner admitted to. Consequently, the Tribunal pronounced that [paragraph 138]:

> " The use of the words "I am for the plf" in the text message sent by the Judge to Justice Njagi is, in itself, quite telling. In our view, it suggests that the Judge had more than a passing interest in the matter. This text message taken together with the communications revealed

by the phone data and the evidence of the Judge's persistent inquiries about the ruling, leads us to the irresistible conclusion that the Judge sought to influence Justice Njagi to rule in favour of Mulwa. That act violated rules 3(5) and 12(1) of the *Judicial Code of Conduct and Ethics*. In the circumstances, we find that Allegation No. 5 has been proved."

189. On our part, we find that at the material time, no known person had been registered as the user of Airtel mobile number 0735 ********. It was not until June 11, 2014 when a Mr Bissau was registered as the owner. When Mr. Bissau appeared before the Tribunal, he testified that he has never had an Airtel number but he admitted to have lost his Identity Card at some point in time. Either way, it was confirmed that at the time when the concerned text message was sent to Justice Njagi, there was no known registered owner of that Airtel number.

190. In the absence of that information, the Tribunal placed reliance on the evidence of Mr Cheruiyot who testified that several calls were made from that Airtel number to Hon. Jessica Mbalu and Ms Rose Mbithe, the petitioner's wife and a director in the plaintiff company in the Sehit matter respectively. Mr. Cheruyoit was also able to identify that some of the physical locations from which various communication were made through the use of that Airtel number were closely associated with the petitioner such as the Milimani Courts, Mbui Nzau and Thomsons area in Nairobi. That notwithstanding, the petitioner distanced himself from that concerned phone number and stated that any user of the phone number would still be able to access the three identified locations as they are public places. He referred the Tribunal to several other locations which were also identifiable from the call logs such as Imara Daima, Villa Franca, Kilimanjaro Road and Nthawe and which he stated that he had no connections with, yet the Tribunal did not take that into consideration.

191. The Tribunal also relied on the evidence of Mr Musili who testified that according to the True Caller application, the concerned phone number still belonged to the petitioner as at the time of the Tribunal hearing. That is not withstanding the fact that Mr Nduati had testified that one Mr Bissau was registered as the owner of that mobile number on June 11, 2014. Mr Musili's testimony explained how information gets to True Caller. He stated that once a person installs the True Caller application, they surrender their phone data to that application. He explained that how a person's information is reflected on True Caller would depend on two things; how another person saves their contacts on their phone book and how the individual person has registered their contacts on True Caller. As a result, there may be a disconnect between the registered owner of a phone number according to the service providers record and the "user/owner" of the phone number as identified by True Caller.

192. Mr Musili also testified that Justice Njagi's phone handset did not have the True Caller application and hence as explained by Mr Musili, unless a person has saved another person's number on their phone, in the absence of the True Caller application, the receiver of the message or call would not be in a position to tell the identity of the originator of that communication. Justice Njagi's testimony however is at variance with Mr Musili because he testified that his phone had the True Caller application and that's how he was able to identify the petitioner as the sender of the challenged message. Furthermore, Justice Njagi also testified that when he received the concerned text message his phone automatically captured the name Mutava J as the sender of that message notwithstanding the fact that he had not saved that Airtel number as belonging to Mutava J. That position is in conflict with Mr Musili's understanding of how a True Caller application operates since according to Mr. Musili, as long as one has not saved another person's phone number, even if a person has the True Caller application, if such a person receives a text message from an "unknown" person, that message would not carry with it the name of the sender. He explained that one must have saved another person's phone number for such a message to have an indication of the identity of the sender. However, where a person later saves the phone

number in the name of a particular person, the subsequent display of a text message would always indicate the name of the sender as the person who was assigned that phone number.

193. Arising from the above, it is evident that there are irreconcilable contradictions in the evidence adduced by different witnesses regarding: whether Justice Njagi had installed the True Caller application on his phone; whether Justice Njagi had, prior to receiving the impugned text message, saved on his mobile phone the concerned Airtel phone number in the name of the petitioner; and whether the True Caller application could conclusively identify the petitioner as the author and hence the owner of the Airtel phone number that allegedly sent a text message to Justice Njagi. Therefore, considering all the foregoing, and especially taking into consideration that none of the witnesses on record could conclusively address the operations or set up of the True Caller application beyond what they perceived themselves, we are hesitant to rely on any evidence which seeks to identify the petitioner as the user of the concerned phone number through the use of the True Caller application.

194. Having disregarded the evidence relating to the True Caller application with regard to establishing the identity of the user of the concerned Airtel phone number, the only remaining evidence on this issue is the use of call logs. The record shows that the petitioner lives in Thomsons area in Nairobi. He passes through Mbui Nzau on his way to his rural home. At the material time, he was working at the Milimani Commercial Courts. That information presumably places the petitioner right at the centre of this puzzle since the evidence presented shows that the concerned Airtel number was actively in use at those locations. In addition, that phone number was also used to communicate to the petitioner's wife and Ms. Rose Mbithe of Sehit who are all affiliated with the petitioner. The petitioner submits that it was misleading for the Tribunal to concern itself with only those locations identified from the call logs that are associated with him and ignore other random locations also identified from the call logs, which could not be directly linked to him.

195. We agree with the petitioner that the use of call logs is not a foolproof mechanism for identifying an author of a particular text message. However, it is one of the ways through which the user of a particular phone number can be identified. In this particular case, we take into consideration the fact that the Airtel phone number through which a text message was written to Justice Njagi, was found to have been used in at least three locations which are connected to the petitioner and also the fact that there was communication through that number to the petitioner's wife and Ms. Rose Mbithe. This undisputed information makes it highly probable that the petitioner was at the material time the user of that concerned Airtel number, even though that number had never been registered in his name. Furthermore, the petitioner admitted that he walked into Justice Njagi's chambers and enquired about the status of the Sehit case. He stated that he did not see any harm in making such an enquiry. The petitioner also admitted that he used his Safaricom number to communicate to Justice Njagi about the Sehit matter.

196. We are aware that the complaint facing the petitioner in this regard is that he sought to influence the ruling in the Sehit matter in favour of the Plaintiff therein through oral and text messages from his cell phone to Hon Mr Justice Njagi who was presiding over the hearing of that matter. Having analysed above evidence on this issue and after excluding the evidence regarding the use of the True Caller application, it is our finding that the extracts from the call logs of the concerned Airtel number shows that there was communication from several locations and with numbers which are closely connected with the petitioner. This factual position, coupled by the petitioner's own admission that he inquired from Justice Njagi about the progress of the Sehit matter shows that the petitioner had manifest interest in the Sehit case and he took steps to communicate to Justice Njagi about that position. Consequently, we find that all the relevant evidence taken into totality, points to the fact that the petitioner used his

professional relationship with Justice Njagi to attempt to influence the outcome of the Sehit mater. We are thus unable to fault the Tribunal on its findings on this allegation.

(f) Did the Tribunal apply the correct standard and burden of proof?

197. The petitioner agrees with the Tribunal that the applicable standard of proof in proceedings for the removal of a Judge is one that is between "beyond reasonable doubt" and a "balance of probabilities." However, he submits that the said standard mostly relates to factual evidence and hence, in his opinion, circumstantial evidence requires a higher standard of proof in proceedings of this nature. He urges that the Tribunal erred by failing to take note of the threshold that circumstantial evidence is supposed to meet in order to be accurate. In that regard, the petitioner urges that the burden of proof based on circumstantial evidence is higher than the burden of proof based on factual evidence since a finding of circumstantial evidence requires that "inculpatory facts have to be so incompatible with the petitioner's innocence as to leave no other inference other than that of guilt." It is on that basis that the petitioner submits that the Tribunal grossly erred in its decision when it found that the evidence with respect to allegations one and three to be circumstantial but went on to make a finding on the basis of the same evidence which was merely comprised of suspicion and conjecture despite the fact that there was considerable evidence to the contrary which proved the petitioner's innocence. As a result, he submits that the two allegations were not proved to the required standard.

198. The respondent urges that the Tribunal applied the correct standard of proof which standard was also adopted by the Tribunal appointed to investigate the conduct of former Deputy Chief Justice, Nancy Makokha Baraza. In that regard, it submits that the Tribunal did not consider extraneous facts but properly appraised itself of the evidence and arrived at just and fair deductions and conclusions in totality of the evidence adduced.

199. Looking at the submissions on record, it seems that parties are in agreement about the applicable standard of proof required in proceedings such as this; that is a standard which is neither that of criminal law of beyond reasonable doubt nor that of civil proceedings, which is on a balance of probabilities. The petitioner however questions the application of that standard where a case is built on circumstantial evidence and he submits that such a case would require a higher standard of proof.

200. In support of his proposition, the petitioner relies on the decision of the Supreme Court of India in the case of *Nizam & another v State of Rajasthan* (2016) 1 SCC 550 where the court held that:

> " In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his evidence."

201. A further case relied upon by the petitioner is the case of *Bhagat Ram v State of Punjab* AIR 1954 SC 621 where the Supreme Court of India proclaimed thus:

> " In a case like this depending on the conclusions drawn from circumstances, it is well settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offences home to him beyond any reasonable doubt."

202. Thus, the petitioner attacks the Tribunal for relying on the case of *R v Taylor, Weaver and Donovan* [1928] 21 Cr App Rep 20 (R v Taylor) for the proposition that circumstantial evidence is capable "of

proving a proposition with the accuracy of mathematics". The petitioner submits to the contrary that the Tribunal ought to have first addressed itself on the accuracy of that circumstantial evidence.

203. We understand the petitioner to say that the Tribunal did not properly satisfy itself on whether a firm case had been established against him, based on the evidence on record with regards to allegations one and three both touching on Application No 305 of 2012. And hence, the petitioner invites us to interrogate whether the conclusion reached by the Tribunal, satisfied the principles for the reliance on circumstantial evidence. In that context, we need to state that once a standard of proof has been agreed upon, the evidence on record whether circumstantial or direct must be tested against that accepted standard. Therefore, contrary to the petitioner's submissions, circumstantial evidence would not require a different standard of proof, but such evidence must meet certain recognized principles before a verdict of guilt is reached.

204. To our mind therefore, all the cases cited by the petitioner, including the case of *R v Taylor*, speak to one thing; they reaffirm the principle that circumstantial evidence is the use of reasoning and logic to get to a conclusion. When relying on circumstantial evidence, a court or Tribunal is presented with a set of facts through which an inference may be drawn to prove an existence of a fact. That inference, must be supported by the facts presented. Since both parties agree on the applicable standard of proof, the evidence on record must then be tested against that standard. In this case, the inference should not go beyond reasonable doubt but should be higher than a balance of probabilities. In essence, it is not enough that an alleged fact is far more likely to have happened but there should be a level of certainty or real possibility that it must have happened.

205. The Supreme Court of Papua New Guinea in the case of *Nara v State* [2007] PGSC 54; SC1314 (28 November 2007) aptly captured the principles guiding the application of circumstantial evidence as follows:

> "What these principles say in simple terms is that where a case against an accused person is only circumstantial, he must be acquitted unless such a person's guilt is the only rational and reasonable inference open within the four corners of the circumstantial evidence that is actually before the court on the required standard of prove, beyond any reasonable doubt. This means the court must consider only the evidence properly adduced and presented before the court and nothing else."

206. The petitioner submits that the Tribunal's reliance on circumstantial evidence with regard to allegations one and three did not meet the required precepts required of such evidence. As can be seen above, we have reviewed and re-evaluated the evidence on record and have arrived at various conclusions on each of the allegations facing the petitioner. We are cognisant that this case is largely dependent on circumstantial evidence and have carefully pieced together the evidence in a bid to establish its consistency, relevance and veracity. Our finding therefore is as a result of a well thought process which is anchored on clear legal principles and we have largely agreed with the Tribunal's findings as can be deduced from our analysis of the reliefs sought herebelow.

E. Relief

207. The petitioner prays for the following:

(a) A declaration that the appointment of two additional members of the Tribunal after the expiry of 14 days of the receipt of the petition from the JSC was in contravention of article 168(5)(b) of the *Constitution* and the composition and constitution of the Tribunal was therefore unconstitutional and its entire proceedings and recommendation is null and void. In answer

to this prayer, we have explained why we have declined to assume jurisdiction to determine the constitutionality of the Tribunal. As such, the petitioner's prayer in this regard is dismissed. On Prayer number two which sought a declaration that the Tribunal lacked jurisdiction to inquire into complaints against the petitioner that had since been withdrawn, we have explained that the Tribunal's jurisdiction was not affected by the said withdrawal.

(b) Prayer three was a declaration that the complaints in respect of allegations one and three did not follow the mandatory procedure set out in article 168(2) and (3) and the Respondent therefore erred in considering and making adverse recommendations based on the same. Article 168(2) and (3) provides that the removal of a Judge may be initiated only by the JSC acting on its own motion or on the petition of any person to the JSC and that a petition by a person to the JSC should set out in writing the alleged facts constituting the grounds for the removal of the Judge. We do not understand on what basis the petitioner seeks this prayer since he has not expounded on how those provisions were breached. The same is therefore dismissed.

(c) Prayer four was a declaration that the findings of the Tribunal to the effect that the conduct of the petitioner amounted to gross misconduct were not supported by any evidence on record and are therefore unfounded and bad in law. We have reviewed and analysed all three allegations that led to a finding of gross misconduct on the petitioner and on two of those allegations we have affirmed the Tribunal's finding. This prayer is also dismissed.

(d) The fifth prayer was a declaration that the respondent acted in violation of the requirements of article 50(2)(j) of the *Constitution*, sections 107 and 109 of the *Evidence Act* and paragraph 11 of the second schedule to the *Judicial Service Act*. After analysing the relevant facts on record, we confirmed that the Tribunal acted within the expected limits of natural justice and fair hearing. We have also affirmed that the correct standard of proof remains that of below beyond reasonable doubt but higher than a balance of probability and that the Tribunal applied the correct rules of evidence as provided in the second schedule to the *Judicial Service Act* with regard to how evidence before the Tribunal ought to be adduced and who bears the burden of producing such evidence. This prayer is therefore dismissed.

(e) The sixth prayer was a declaration that the findings and recommendations of the respondent to His Excellency Hon Uhuru Kenyatta, the President and Commander in Chief of the Defence Forces of the Republic of Kenya, that the petitioner be removed from office be quashed. In light of our findings with regard to two allegations, this prayer cannot be sustained.

(f) The last prayer sought the costs of these proceedings. Noting the nature of the appeal, we shall make no orders with regard to costs.

F. Orders

208. Arising from the above, the consequential orders to be made are that:

(a) The petition of appeal dated September 29, 2016 is hereby dismissed.

(b) The Tribunal's finding with regard to allegations one and five is hereby affirmed. Consequently, we hold that the petitioner's conduct amounted to gross misconduct contrary to article 168(1)(e) of the *Constitution*.

(c) For the avoidance of doubt, the Tribunal's recommendation to the President for the petitioner's removal from office under article 168(7)(b) of the *Constitution* is also affirmed.

(d) No orders as to costs.

209. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH, 2019

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

……………………

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA