Kibisu v Republic (Petition 3 of 2014) [2018] KESC 34 (KLR) (28 February 2018) (Ruling)

Robert Tom Martins Kibisu v Republic [2018] eKLR

Neutral citation: [2018] KESC 34 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 3 OF 2014

MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

FEBRUARY 28, 2018

BETWEEN

LT. COL. ROBERT TOM MARTINS KIBISU .... APPLICANT

AND

REPUBLIC .... RESPONDENT

(Being an Application for review of this Court's Judgment delivered on 25th November, 2014)

An application for correction of errors had to specifically point at the particular page/paragraph and/or portion of the judgment where the alleged error was situated.

Reported by Felix Okiri and Diana Mutunga

Jurisdiction *– jurisdiction to review judgments - jurisdiction of the Supreme Court to review its own judgments – where the Applicant alleged that the presiding judge of the Supreme Court that heard and determined the petition had a personal interest in the outcome of the petition in a matter affecting him at the High Court of Kenya in Petition No. 244 of 2014 – whether article 163(7) clothed the Court with the power to review the substance of its decision - whether the Applicant had made a case to warrant the Court reviewing its decision – Constitution of Kenya, 2010, article 163(7); Supreme Court Act, section 21(4)*

Civil practice and procedure *– review - form and manner of instituting a review -what essentials were to be contained in an application for review of a judgment?*

Words and Phrases *– definition – definition of the word bias - an inclination or prejudice for or against one thing or person - Oxford English Dictionary; the Blacks' Law Dictionary 9th edition*

Brief facts

The Applicant sought a review against the judgment of the instant Court in Petition No. 3 of 2014 on ground that the presiding judge of the Supreme Court that heard and determined the petition had a personal interest in the outcome of the petition in a matter affecting him at the High Court of Kenya in Petition No. 244 of 2014, a matter that was yet to be concluded.

The Applicant's case was that since Honorable Justice Tunoi had a case in the High Court seeking to safeguard his retirement age at 74 years as provided for under the repealed Constitution, then as a presiding judge, he was inclined to uphold section 115(3) of the Armed Forces Act, an Act of Parliament under the old constitutional order, in breach of article 50(6) of the new Constitution. It was the Applicant's preposition that the Honorable Justice was inclined to trump upon the new constitutional order, since that new Constitution was also curtailing his pecuniary interest.

Applicant had sought among other orders- a declaration that section 115(3) of the repealed Armed Forces Act (Cap. 199, Laws of Kenya) denied, violated, or infringed a right or fundamental freedom in the Bill of Rights, and was in conflict with article 24 when read together with article 25 (a) and (c), of the Constitution and was discriminatory, unfair, and therefore unconstitutional.

Issues

1. Whether the Supreme Court had jurisdiction to sit on appeal or review over its own decisions.
2. What were the circumstances upon which the Supreme Court could review, any of its judgments, rulings or orders?
3. What essentials were to be contained in an application for review of a judgment?
4. Whether the failure of the Court to cite its own decision on a particular issue could be a ground for review of its judgment.
5. Whether the mere allegation of bias was enough ground for a judge to recuse himself.

Relevant provisions of the Law

Constitution of Kenya

Article 50(1)

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

Held

1. The Court's appellate jurisdiction under article 163(4) of the Constitution did not grant it power to deal with a second appeal to itself in the same cause of action. Article 163(7) did not clothe the Court with the power to review the substance of its decision in the same matter between same parties. Article 163(7) of the Constitution could only be invoked by a litigant who was seeking to convince the Court, to depart from its previous decision, on grounds for example, that such decision was made *per incuriam*, or that, the decision was no longer good law. Article 163(7) of the Constitution could not be invoked by a losing party as a basis for the Court to review its own Judgment, decision, or order nor could it confer upon the Supreme Court, jurisdiction to sit on appeal over its own Judgment.
2. Reviewing a judgment or decision was not the same as departing from a previous decision by a Court. The application before the Court could not be anchored on article 163(7) of the Constitution.
3. The Supreme Court Rules, rule 20(4) was mischievous as it conferred jurisdiction to the Court which had not been conferred by either the Constitution or statute. Unlike section 21(4) of the Supreme Court Act, rule 20(4) of the Supreme Court Rules on its face appeared to confer upon the Court, jurisdiction or powers, to review its own judgments, or decisions beyond the confines of the *slip rule*.
4. Subsidiary legislation had to flow from either the Constitution or a parent Act of Parliament. Neither the Constitution, nor the Supreme Court Act, explicitly, or in general terms, conferred upon the Supreme Court, powers, to sit on appeal over its own decisions or to review such decisions. No rule of the Court, not even rule 20(4), as worded, could confer upon the Court, jurisdiction to review its own decisions. If that were the intent of rule 20(4), then the said rule would be of doubtful constitutional validity. Rule 20(4) was not capable of conferring upon the Court, powers to review its decisions, beyond the confines of the *slip rule*, as embodied in section 21(4) of the Supreme Court Act. At best, the rule could only be understood to be echoing section 21(4) of the Supreme Court Act.

5. Taking into account the edicts and values embodied in chapter 10 of the Constitution, as a general rule, the Supreme Court had no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated above. However, in exercise of its inherent powers, the Court may, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances were limited to situations where:
    a. the judgment, ruling, or order was obtained, by fraud or deceit;
    b. the judgment, ruling, or order, was a nullity, such as, when the Court itself was not competent;
    c. the Court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;
    d. The judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.
6. The Applicant had not alleged any fraud or deceit in the making of the judgment. He had also not claimed that the judgment subject of the instant application was a nullity. That judgment was also not a product of consent between the Applicant and the Respondent. The judgment was also not based on a repealed law save for the fact that the judgment had an aspect of repealed law (Armed Forces Act, Cap. 199), as one of the laws under which the subject matter was determined since the cause of action arose in the High Court. However, that did not in any way render the judgment subject to review a nullity as even the Applicant in making his case through all the superior courts was cognizant that his rights could only be legally and procedurally be ventilated within the legal framework that prevailed when the cause of action arose. So that at the time of determining the matter, the applicable law was still fully in force and it was the basis upon which it was determined. The matter before the Court had failed to meet any of the exceptional circumstances under which a review might lay to the Court as elaborated in the *Outa case.*
7. While the application before the Court was framed as one seeking review for correction of errors apparent on the face of the record, the mischief was in the details. An application could not be said to be for correction of errors when it was anchored and replicate with allegation of discontentment with the Court's finding and/or appreciation of legal principles and their interpretation thereof. Such dissatisfaction was normally a ground for appeal. Unfortunately for the Applicant, even that appeal option had been exhausted as the instant Court was the apex court of the land.
8. In an application for correction of errors, the focal point was usually the judgment of the Court/tribunal which was sought to be corrected. An Applicant was thus duty bound to specifically point at the particular page/paragraph and/or portion of the judgment where he opined that the alleged error was situated. An error could not be apparent on the face of the judgment when that error required evidence to be adduced so as to enable the Court to discern it.
9. It was not necessary that an application for correction of errors drew such a huge record like the one that was before the Court. The precision of such an application and its clear nature was what clothed the Court with the jurisdiction to even move *suo motto* for what was erroneous was occasionally glaringly obvious.
10. An application for review of a Court's judgment could not call for the changing and/or altering of the Court's final orders and findings drawn from the reasoning in the entire judgment.
11. Section 21(4) of the Supreme Court Act, did not confer upon the instant Court, jurisdiction, or powers, to sit on appeal over its own judgments. Neither, did it confer upon the Court, powers to review any of its judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. Any corrections made pursuant to section 21(4) of the Supreme Court Act became part of the Judgment or Order as initially rendered. The main purpose of section 21(4) of the Supreme

Court Act was to steer a Judgment, decision, or Order of the instant Court, towards logical, or clerical, perfection.

12. The fact that the Supreme Court (or any other court) did not cite its own decision on a particular issue could not be a ground for review of its judgment. The mere fact that the Supreme Court did not, in its decision, expressly cite the *Communication Commission of Kenya & 5 others v. Royal Media Services & 5 others [2014] KLR-SCK, eKLR, (CCK case)* on the issue of legitimate expectation did not in any way warrant a case for review. The Applicant had not alleged that the failure to cite the *CCK case* led the Court to making a contrary decision in total disregard of that earlier decision. The Applicant had not contended that the Court developed a new jurisprudence on the same issue while the Court had already rendered itself on the law. If that were the case, then it would *prima facie* form a case for review as the error or contradiction would have been quite glaring.

13. As a general principle, each case that came before a court of law was decided on its own facts and merit. While the *CCK* case laid down the Court's jurisprudence on legitimate expectation, it was not true that in any subsequent case where a litigant raised the issue of legitimate expectation, the *CCK* case had to be cited verbatim however remote the issue of legitimate expectation was. It was inaccurate to argue therefore that that had to be done notwithstanding that the case was decided on other issues or even where the Court determined that the issue of legitimate expectation, as framed by a litigant, was not an issue for determination. It was the discretion of the Court to frame issues for determination that a particular case presented before it.

14. The doctrine of *stare decisis* was articulated in article 163(7) of the Constitution: all courts, other than the Supreme Court, were bound by the decisions of the Supreme Court. The Applicant was in essence unlawfully inviting the Court to be bound by the decisions of the High Court, failure to which the Court's decisions would be subject to review. The Supreme Court was not bound by decisions of lower Courts. Those decisions only retained their persuasive nature before the instant Court.

15. Bias was *prima facie* a factor that might lead to a judge recusing himself from a matter. Such an action was meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. That was what was provided for in article 50(1) of the Constitution. As one of the fundamental tenets of the rule of law, bias was impartiality of the judiciary. In circumstances where bias was alleged and proved, then the pragmatic practice was that the particular judge or magistrate would as a matter of course recuse/remove himself from the hearing and determination of the matter.

16. When interrogating a case of bias, the test was that of a reasonable person and not the mindset of the judge. In considering the possibility of bias, it was not the mind of the judge which was considered but the impression given to reasonable people. When the courts were faced with proceedings for the disqualification of a judge, it was necessary to consider whether there was a reasonable ground for assuming the possibility of a bias and whether it was likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test was objective and the facts constituting bias had to be specifically alleged and established. In such cases the Court had to carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they were unable or unwilling to see the correctness of the verdict and were apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal.

17. The Court dealing with the issue of disqualification was not and could not, go into the question of whether the officer was or would be actually biased. All the Court could do was to carefully examine the facts which were alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge was biased or was likely to be biased. The single fact that a judge had sat on many cases involving one party could not be sufficient reason for that judge

to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself.

18. Mere apprehension of bias could not be a ground for recusal. The allegations of bias had to be factual and proved. The apprehension by the Applicant that he would not get justice in court was a normal apprehension whereby each party who had a matter in court was apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty made parties to be apprehensive. If a party interpreted his apprehension and concluded that the court would be biased then that was taking the wrong dimension unless allegations of bias were proved by facts. The aspect of judging encompassed the unpredictability of the decision. If that aspect was missing then parties would be able to make their own predictions and make conclusion as to how the court was likely to decide a matter.

19. No cogent evidence had been placed before the Court to warrant a finding of bias being made on the part of the presiding judge even if the Court had the jurisdiction to entertain such a complaint. While a petition filed by Justice Tunoi had been cited for the Court, that was not sufficient as evidence of bias. The Applicant's allegations were not only based on apprehension, but on conjuncture. It could never be that the mere fact that a Judge, who as rightly submitted by the Respondent, had rights under the Bill of Rights, he would be biased by the mere fact that he too was pursuing his rights in a different court at the same time he was hearing a different matter touching on issues of rights under the Bill of Rights. The office of a judge did not indeed strip a judge from the enjoyment of rights under the Bill of Rights.

20. The correct approach to an application for the recusal of members of the instant Court was objective and the onus of establishing it rested upon the Applicant. The question was whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge had not or would not bring an impartial mind to bear on the adjudication of the case, that was a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension had to be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It had to be assumed that they could disabuse their minds of any irrelevant personal beliefs or predispositions. They had to take into account the fact that they had a duty to sit in any case in which they were not obliged to recuse themselves. However, an impartial judge was a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there were reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

21. The case for bias as presented by the Applicant was thus dead on arrival because the Applicant had completely failed to show that the fact that Justice Tunoi was challenging the judges' retirement age under the Constitution, 2010 had raised perceptions of bias in the minds of reasonable people who had notice that the Honourable judge was presiding over the Applicant's petition. What the Applicant raised were his own bias perceptions and not perceptions in the public domain. If a party interpreted his apprehension and concluded that the Court would be biased then that was taking the wrong dimension unless allegations of bias were proved by facts. The allegation of bias on the part of the presiding judge had not been proved and neither could they fall within the exceptional circumstances that might warrant the Court reviewing its judgment.

22. While the application before the Court was framed as one seeking review, it fell short of the exceptional circumstances under which that jurisdiction might be invoked. The application was a disguised appeal against the instant Court's own judgment calculated towards availing to the Applicant a second bite at the cherry. The elaborate access to justice that the Constitution had granted every person under the Bill of Rights should not be taken as a panacea for endless litigation. The rights in the Bill of Rights remained to be enjoyed and pursued within the laid down legal doctrines and principles.

Application dismissed.

Orders

No order as to costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

I. Background

1. On 25th November, 2014, this Court delivered a Judgment in Petition No. 3 of 2014: Tom Martins Kibisu v. Republic, [2014] eKLR. The applicant herein, (petitioner in that case) had appealed against the Judgment of the Court of Appeal at Nairobi delivered on 7th February, 2014 upholding the Judgment and Decree of the High Court (Mumbi Ngugi, J) dated 16th March, 2012.

2. In the appeal before this Court, the applicant had sought the following orders inter alia:

   a. A declaration that the court martial that tried and imprisoned him for one year (reduced to 102 days by the High Court), had no jurisdiction to try him, and so the penalty was illegal, null and void;

   b. A declaration that his rights guaranteed under Article 25 (a) & (c) of the Constitution of Kenya, 2010 not to be subjected to torture or to inhuman or degrading treatment or punishment, or denied a fair trial, were breached, in the court martial process;

   c. A declaration that Section 115(3) of the repealed Armed Forces Act (Cap. 199, Laws of Kenya) denied, violated, or infringed a right or fundamental freedom in the Bill of Rights, and was in conflict with Article 24 when read together with Article 25 (a) and (c), and was discriminatory, unfair, and therefore unconstitutional;

   d. A declaration that the appellant is entitled to restoration of military rank, benefits, honours and decorations, and to a new trial;

   e. A declaration that the appellant is entitled to a pension on retirement;

   f. A declaration that the appellant is entitled to damages, as redress in respect of each of the rights allegedly violated, to his detriment;

   g. An order consequential on the declarations sought, quantifying the amount of damages appropriate in each instance;

   h. An order of mandamus, to compel the Defence Council to conclude the appellant's pending redress appeal dated 13th September 2004;

   i. Costs;

   j. Interests on (f) and (g);

   k. Further/ other orders as the Court shall deem just.

3. Upon hearing the appeal, in a judgment delivered on 25th November, 2014, the Supreme Court made the following orders:

    i. The appellant's appeal dated 28th March, 2014 is hereby dismissed.

    ii. Each party to bear their own costs.

4. It is pursuant to that Judgment that the current application was lodged. The application is dated 4th December 2014 and was brought under Article 163(3)(b)(ii) of the Constitution and section 21(4) of the Supreme Court Act. The applicant seeks the following orders, produced verbatim:

    1. That this application be certified urgent.

    2. That this Honourable Court be pleased to hear this application ex-parte in the first instance.

    3. That this Honourable Court be pleased to correct errors apparent on its Judgment delivered on 25th November, 2014.

    4. That costs of this application be provided for.

5. The application was premised on six (6) grounds summarized as follows:

    1. That the errors complained of are reversible errors and substantial errors as defined in the Black's Law Dictionary. That the applicant is suffering untold misery and unless the correction of errors on the Judgment is made, miscarriage of justice will continue.

    2. That there is a plain error on the face of the record as regards the legality of the trial process of the appellant from the summary trial to the court Martial, to the High Court appeal and the subsequent appellate courts. It is trite that courts cannot enforce illegalities.

    3. There is a manifest error on the record as regards the legitimate expectation by the appellant on the pending redress appeal to the Defence Council, an appeal that is yet to be heard and determined in accordance with the law.

    4. There is a plain error on the principles involved in interpreting the Constitution as regards section 115(3) of the repealed Armed Forces Act Cap. 199, with the Court adopting a narrow view as opposed to a wide view as has already been determined in Supreme Court, Pet. No. 14 of 2014, the Digital Migration case. The error arises from failure to consider the effects of Articles 2(1)(2), 10, 24, 25 and section 115(3) of the repealed Armed Forces Act Cap 199.

    5. The finding of the Court on service of the stay orders in Misc App. No. 365 of 2005 on Lt. Gen Kianga "even if served" as being of no effect on the charges proves that the Court Martial had no jurisdiction to try the applicant/appellant and therefore, its decision was a nullity and there are no degrees of nullity.

    6. That the presiding judge of the Supreme Court that heard and determined the Petition of Appeal No. 3 of 2014 had a personal interest in the outcome of the petition in a matter affecting him at the High Court of Kenya in Petition No. 244 of 2014, a matter that is yet to be concluded. This matter involves the interpretation of the Constitution as regards his retirement age, as pertaining to the new Constitution vis-à-vis the repealed Constitution.

6. The application was supported by an affidavit sworn by the applicant on 4th December 2014 in which he reiterates the grounds set out in the application.

7. In response to the application, the respondent filed a Notice of Preliminary Objection dated 24th March, 2015 in which it relied on the following grounds:

    1. That the application does not disclose any issue that merits consideration in terms of the provisions of section 21(4) of the Supreme Court Act 2011.

    2. That the application is incompetent as it is based on the misconception of Article 163(3)(ii) of the Constitution.

    3. That the application is incompetent as being both frivolous, vexatious and an abuse of the Court process.

Ii. Procedural Posture

8. It is worth stating from the onset that the hearing and determination of this matter was beset by several hiccups. While some were instigated by the applicant himself, others were occasioned by the transitional challenges that befell the Court. For instance, on 10th February, 2016 when this matter was set down for hearing, the applicant made an oral application for the recusal of one of the justices: (Rtd) Lady Justice Kalpana Rawal, DCJ.

9. Upon that oral application, the Court directed that the applicant lodges a formal application, which was filed via a Notice of Motion dated 23rd February, 2016 and filed on 25th February 2016. The respondent responded to the said application on 8th March, 2016. However that application for recusal was 'frustrated' upon the retirement of the Hon. Lady Justice Rawal. The hearing of the application was thereby overtaken by events as a new bench was constituted to hear it.

10. Related to the first, the second hiccup that occasioned delay was the lack of quorum at the Court. This was because of the vacancies that were created by the retirement of 3 Judges of the Court: the Chief Justice Hon. Justice Willy Mutunga, the Deputy Chief Hon. Lady Justice Kalpana Rawal, and one Justice of the Court, Hon. Justice Philip Tunoi. The matter thus had to await the appointment of new Judges to fill the vacancies after which it was then that it was set down for hearing.

11. Lastly, while we reiterate the equality of all litigants before this Court to access justice, it is worth stating also that the delivery of this judgment was further delayed because of the hearing and determination of the 2017 Presidential Election Petitions Nos. 1, 2 and 4 of 2017, Raila Odinga & Another v. IEBC and Others, and John Harun Mwau & Others v. IEBC and Others which had to take precedent of all matters pending before the Court given the stringent constitutional timelines within which they had to be filed, heard and determined.

III. Submissions

12. The applicant filed his Written Submissions on 22nd June 2015 together with a List of Authorities; while the respondent filed its Written Submissions and List of Authorities on 2nd July 2015. The matter was canvassed before the Court on 25th May, 2017 with the applicant, Lt. Col. Kibisu appearing in person, as he had done in previous proceedings. The Court notes his industrious submissions before the Court given that he is not a lawyer.

a. Applicant's

13. The applicant relied on all his documents on record. First, he responded to the preliminary objection filed by the respondent and argued that the said preliminary objection had been overtaken by events based on this Court's decision in Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others, Petition

No. 6 of 2014 case (the Outa Case). Particularly, he argued that in that case, the Court had held that it may, upon application by a party or on its own motion, review its judgment only in exceptional circumstances. He submitted in that regard that there were two exceptional circumstances in the Outa case, applicable to his application, namely:

iii. Where the Judgment itself is a nullity, such as when the Court itself was not competent, and;

iv. Where the Judgment or Ruling was rendered on the basis of a Repealed law as a result of a deliberately concealed statutory provision.

14. The applicant further submitted that the Preliminary objection was not premised on any provision of the Constitution, the Supreme Court Act or even Rules. It was therefore incompetent since a preliminary objection cannot be raised where both facts and law have to be ascertained. It was his other contention that the application for correction of errors has not abetted since the judgment delivered on 25th November, 2014 has not been perfected and is therefore amenable to the Court's jurisdiction for correction of errors as understood by the Court within the purview of its Rules.

15. He also urged that the preliminary objection was time barred as the application for correction of errors has already been accepted by the Court and it was therefore found fit for hearing and determination on merits.

16. Citing the case of The Board of Governors, Moi High School Kabarak and others v. Daniel Torotich Arap Moi, Supreme Court Case No. 6 & 7 of 2013, [2013] eKLR, (Moi Kabarak case) he also submitted that the concept of abuse of process of Court bears no fixed meaning but has to do with the motives behind the guilty party's actions with a perceived attempt to maneuver the Court's jurisdiction in a manner incompatible with the goals of justice. Hence it was his submission that, to contend that his application was an abuse of process of Court, facts have to be ascertained and none had been placed on record before the Court. He consequently reiterated that his application was competent.

17. Furthermore, submitting on the jurisdiction of the Court to hear and determine this application, the applicant urged that the gist of grounds (ii) and (iv) for review of this Court's own decision as contained in the Outa case was that there ought to be evidence of bias and miscarriage of justice for the review to be granted. It was thus his contention that under section 16(2) of the Supreme Court Act, this Court has jurisdiction to look at instances of miscarriage of justice and grant review of its past decisions.

18. The applicant in addition submitted that the jurisdiction of the Court under section 21(4) of the Act envisages three (3) components namely: correction of errors of juridical oversight; errors of typos and computation; and correction of errors apparent on the face of the record. He urged that the nature of this jurisdiction is that it is slightly below appellate but above review and is grantable in his case.

19. Lt. Col. Kibisu has also urged the point that notwithstanding this Court's finding at paragraph [91] of the Outa case, such a finding does not render the Court helpless in granting relief where circumstances so demand. He argued that while as matter of course litigation must come to an end, it cannot come to an end when there is an absurdity. That the Court is in any event clothed with inherent powers which it must invoke in the demand to do justice and that this was the finding of the Court at Paragraph [91] of the Outa case where it stated:

> " 91. Having reached this conclusion, based largely on the fact that, neither the Constitution, nor the law, explicitly confers upon the Court, powers to review its decisions, does this render this Court entirely helpless? Aren't there situations, so grave, and exceptional, that may arise, that without this Court's intervention, could seriously distort its ability to do justice? Of course,

> litigation must come to an end. But should litigation come to an end, even in the face of an absurdity? The Supreme Court is the final Court in the land. But most importantly, it is a final Court of justice. This being the case, the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all."

20. The applicant in furthering the above point cited the case of Taylor and another v. Lawrence and another [2002] 2 AII ER 353 (Taylor case) and submitted that the Supreme Court was created in the new Constitution with two principle objectives: first, the private objective of correcting wrong decisions so as to ensure justice between litigants involved; and secondly, a public objective to ensure public confidence in the administration of justice not only by remedying wrong decisions but also clarifying and developing the law and settling precedent. He thus urged that this Court has jurisdiction to hear the application and that the impugned decision of this Court has occasioned a miscarriage of justice which should be looked at and immediately corrected.

21. Submitting on the issue of bias, the applicant urged that the presiding Judge during the hearing and determination of his petition, Hon. Justice (Rtd) Tunoi, had a personal interest in the outcome of the case and was thus biased. Asked by the Court why he did not raise the issue of bias on the part of the Honourable Judge at the time he was the Presiding Judge, the applicant stated that he did not raise it because the bias was not within his knowledge at that time. That he came to know about it later when browsing the internet and discovered that the Judge was indeed biased.

22. In the above context he cited this Court's case of, Kalpana H. Rawal & 2 others v. Judicial Service Commission & 3 others, Civil Application No. 12 of 2016, [2016]eKLR, (Retirement case) and urged that Justice Tunoi was a litigant, applicant, in that matter in as far as the interpretation of the Constitution as to when he should retire. He thus contended that this question (as regards the constitutional retirement age for Justice Tunoi) was similar to the one raised in the applicant's appeal and in which he had argued that section 115(3) of the Armed Forces Act was unconstitutional in as far as it was discriminatory as against him.

23. The applicant further submitted that his contention as far as Justice Tunoi's position was that: what was done under the repealed Constitution was cast in stone and consequently, for him (Justice Tunoi) to sit as a judge in the applicant's matter, given the fact that Supreme Court decisions are clothed with finality and binds lower courts, amounted to the judge sitting as a judge in his own matter. He therefore urged that where bias is proved, the decision appealed against succeeds. He furthermore contended that the question of Justice Tunoi's retirement at the age of 74 years under the repealed Constitution had a financial and property interest, hence an interest in the outcome in the applicant's appeal.

24. It was urged in the above context that judges should at all times act independently and impartially and where there is lack of impartiality, perceptions of bias may arise, such that members of the public may think that justice has not been rendered. Hence, it is only fair and equitable that the Court declines to adjudicate the matter in such instances. He thus reiterated that Justice Tunoi was biased, hence this application should be allowed for that reason alone.

25. Probed further by the Court on the issue at hand, the applicant sought to relate Justice Tunoi's alleged bias thus: that when he filed his matter in the Court, the repealed Armed Forces Act was still in force and when the new Constitution came into being, the Armed Forces Act was subject to the Constitution by dint of section 7 of the sixth schedule: as all laws in force were to continue in force with the necessary adaptations to make them in conformity with the new Constitution. He thus urged

the point that the aspect of fair trial which section 115(3) of the Repealed Armed Forces Act negated and that once a trial had ended, there was only one appeal to the Court of Appeal, yet under Article 25(c) of the Constitution, one cannot limit the right to fair trial including an appeal.

26. For the above reasons, the applicant urged that his application be allowed and the Court reviews its previous Judgment in his favour.

b. Respondent's

27. The respondent submitted on its preliminary objection and raised three issues namely: that section 21(4) of the Act does not allow for review; the application was brought under a misconception of Article 163(3)(2) of the Constitution; and the application is an abuse of court process as it attempts to unprocedurally re-open an appeal.

28. Counsel for the respondent in that context submitted that issues raised by the applicant do not amount to issues encapsulated under section 21(4) of the Act: that there is no sufficient demonstration of errors of over sight, clerical, or of computation.

29. It was also submitted that the issues of legality of the Court Martial trial were issues that were canvassed and dealt with and that the issues of legitimate expectation that were to be addressed before the Defence Council were also issues that had already been dealt with in the interpretation of section 115(3) of the repealed Act, by the Court. Counsel further referred to the Indian case of Kamlesh Verma v. Mayawaki & others, (2012) Supreme Court of India Review Petition (CRL) No. 453 of 2012 in urging that while the Supreme Court has powers to review its judgments, there were clearly enumerated principles under which correction of errors can be entertained and the applicant had failed to invoke those principles.

30. As regards the issue of bias, the respondent noted that a recusal application had been lodged against Rawal, DCJ (Rtd) and submitted that the same grounds have now been leveled against Justice Tunoi but belatedly so. Further, it was submitted that the issues raised seeking recusal cannot fall for determination under section 21(4) of the Act. That the applicant had not demonstrated that there was any error apparent on the face of the record to bring his application within the realm of section 21(4) of the Act. And that what he had stated were issues that had already been encapsulated under the various points that fell for consideration before the Court and the applicant was merely trying to re-open a concluded matter.

31. The respondent in addition argued that there was neither discovery of new evidence which might warrant the Court to come to a conclusion that there is an injustice that was committed, nor was there a manifestation of bias on the issues raised by the applicant. That the applicant's submissions on that issue are therefore misguided.

32. Counsel further submitted that the applicant's trial was conducted and concluded during the operation of the old Constitution and equally, the appeal allowed under section 115 of the Armed Forces Act (repealed) was availed to the applicant and exhausted during the operation of the old Constitution. Consequently, his right to a fair trial was extinguished henceforth and what came for consideration in the constitutional court (the High Court via a constitutional petition) was an application under Article 50(6) of the Constitution where the applicant had alleged new and compelling evidence after exhausting his appeal chances and not an appeal of his trial at the Court Martial.

33. Learned counsel for the respondent also distinguished the applicant's case from the Rawal and Tunoi Retirement cases and urged that the issue that arose in the Retirement cases was the retirement age of the Judges of the Supreme Court, which issues were governed under the constitutional provision in

the new Constitution. That the two applicants (Judges) were serving judges and the issue complained upon was a continuing issue. Consequently, it was urged that this was distinguishable from the applicant's cause which was already extinguished under the old Constitution. That therefore no nexus existed between the two scenarios and his complaints ought to be ignored.

34. Counsel has also urged that it cannot be suggested that by sitting on the bench, judges lose their right to make applications for determination of issues affecting them, before the courts of law. In essence, it was the respondent's case that a person does not lose his/her right to move a court of law where he/she feels that his/her rights are contravened. In this regard, counsel posed a question: If a judge was to be assaulted, does it mean that for the time he is a complainant in that case, he cannot deal with an appeal on any case that touches on assault because it will affect the outcome of a case in which he is a party?

35. It was furthermore urged that the pecuniary interest in a claim of bias cannot be equated to the salary that judges will continue to draw if the case on their retirement age succeeded. Counsel thus urged that the pecuniary interest envisaged in law for bias to be proved must be direct and arising from the case which is complained of.

36. It was also submitted that neither Lady Justice Rawal nor Justice Tunoi was in control of their cases in the High Court as they were not judges in those matters but merely parties. That in alleging bias, one should avoid anticipating the outcome of the case complained of, as the applicant had done in this application. That bias as an allegation should not be premised on an anticipatory outcome. It should be based on cogent evidence and facts in existence.

37. Regarding section 21 of the Supreme Court Act on which the application was premised, it was submitted that the correction envisaged under section 21(4) has a rider: the exercise of correction does not mutilate the essence of the judgement of this Court and whatever correction that is to be done must be demonstrated point by point. Counsel in that context cited the Outa case; in particular that one has to demonstrate exceptional circumstances for the Court to review its previous judgment. He further submitted that bias, as argued by the applicant, does not form an exceptional circumstance to warrant this Court sitting on review over its own judgment. That the issues raised herein points towards reopening the appeal by the applicant and urged that the Court should not be drawn into making findings of facts afresh having already heard and determined them in the main petition that came before this Honourable Court.

For the above reasons, the respondent prays that the application be dismissed with costs.

IV. Issue(s) For Determination

38. The issues for determination in this application:

i. Whether the applicant has made a case to warrant this Court reviewing its decision rendered on 25th November, 2014; and

ii. If (i) is in the affirmative, whether the application should be granted.

V. Analysis

a. The Law

39. The legal position as regards this Court's power to review its own decision was settled in the case of Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others [2017] eKLR, a case that both parties have gladly taken note of. In that case, the Court found itself in a position similar to the present one, where it was being called upon to review a decision it had earlier made in a matter involving the same parties.

Determining the matter in a decision rendered on 24th February 2017, the Court noted that that was the first time it was being called upon to address itself on the question whether it could review its own decision in the same 'matter' involving the same parties. In interrogating its mandate, the Court first interrogated the comparative jurisprudence from Nigeria, South Africa, England and India as regards the powers of apex courts to review their own decisions.

40. The Court then looked at local jurisprudence and first interrogated the relevant parts of the Constitution. It made a finding that the Constitution, in regard to this Court's appellate jurisdiction under Article 163(4), does not grant it power to deal with a second appeal to itself in the same cause of action. It further observed that Article 163(7) did not clothe the Court with the power to review the substance of its decision such as the one sought in the present application, that is, in the same matter between same parties. The Court stated thus:

> " 83. 83] It is clear to us that Article 163(7) of the Constitution can only be invoked by a litigant who is seeking to convince this Court, to depart from its previous decision, on grounds for example, that such decision was made per incuriam, or that, the decision is no longer good law, and so on. This provision cannot be invoked by a losing party as a basis for the Court to review its own Judgment, decision, or Order. Nor, can it confer upon the Supreme Court, jurisdiction to sit on appeal over its own Judgment. In our view, reviewing a Judgment or decision, is not the same as departing from a previous decision by a Court. We therefore hold that the application before us cannot be anchored on Article 163(7) of the Constitution."

41. Having found no express constitutional basis for the exercise of the review jurisdiction, the Court proceeded to interrogate the statutory regime and Rules. It interrogated section 21(4) of the Act and rendered itself thus:

> " 85. 85] This Section as quoted, embodies what is ordinarily referred to as the "Slip Rule". By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior Courts demonstrates, this is the true import of the Slip Rule.
>
> 86. We therefore hold that, Section 21(4) of the Supreme Court Act, does not confer upon this Court, jurisdiction, or powers, to sit on appeal over its own Judgments. Neither, does it confer upon the Court, powers to review any of its Judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. Indeed, any corrections made pursuant to this section become part of the Judgment or Order as initially rendered. The main purpose therefore, of Section 21(4) of the Supreme Court

Act, is to steer a Judgment, decision, or Order of this Court, towards logical, or clerical, perfection."

42. With no express basis in either the Constitution or the Act, the final inquiry was the application of the Court's Rules to the matter at hand. In that context of the Supreme Court Rules, Rule 20(4) was found to be mischievous as it was deemed to confer jurisdiction to the Court which had not been conferred by either the Constitution or Statute. Debunking this notion, the Court held:

> " 88. Unlike Section 21(4) of the Supreme Court Act, Rule 20(4) of the Supreme Court Rules would on its face, appear to confer upon this Court, jurisdiction or powers, to review its own Judgments, or decisions beyond the confines of the Slip Rule.
>
> 89. Yet, the issue is not as simple or direct as it appears, given the fact that, here, we are dealing with subsidiary legislation. Such legislation must flow from either the Constitution or a parent Act of Parliament. Neither the Constitution, nor the Supreme Court Act, explicitly, or in general terms, confers upon the Supreme Court, powers, to sit on appeal over its own decisions or to review such decisions. This being the case, no rule of the Court, not even Rule 20(4), as worded, can confer upon this Court, jurisdiction to review its own decisions. If this were the intent of Rule 20(4), then the said Rule, would be of doubtful constitutional validity. We must therefore hold, that Rule 20(4) is not capable of conferring upon this Court, powers to review its decisions, beyond the confines of the Slip Rule, as embodied in Section 21(4) of the Supreme Court Act. At best, this Rule can only be understood to be echoing Section 21(4) of the Supreme Court Act."

43. In conclusion thereof, the Court found that there was no basis in which it could be held that this Court, being the final Court in the land, "has jurisdiction to sit on appeal over, or to review its own Judgments, Rulings, or Orders, save in the manner contemplated by Section 21(4) of the Supreme Court Act."

44. Despite this clear conclusion, the Court proceeded to interrogate, given the spirit and values of our Constitution, particularly the values in Article 10, whether there were circumstances in which the Court might be forced to review its own judgment. The question was answered in the affirmative thus:

> " 92. Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:
>
> i. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
>
> ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
>
> iii. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;

iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of , a deliberately concealed statutory provision."

We reiterate the above findings and shall apply them in determining the present application.

b. Whether the applicant has made a case to warrant this Court reviewing its decision rendered on 25th November, 2014

45. Premised on the foregoing jurisprudence as regards the power of this Court to review its judgements, it follows that in determining whether the application before this Court should be granted or not, that is, whether our judgment dated 25th November, 2014 should be reviewed, the following questions arises for consideration:

i. Was that judgment obtained by fraud and or deceit?

ii. Is that judgment a nullity?

iii. Was the judgment delivered based on a misconceived consent between the parties? And,

iv. Was the judgment based on a repealed law?

46. The first three questions would obviously attract a negative answer because the applicant has not alleged any fraud or deceit in the making of the judgment. He has also not claimed that the judgment subject of this application is a nullity. As a matter of fact, that judgment was also at no time a product of consent between the applicant and the respondent.

47. Equally, the fourth question attracts a negative answer save that it has an aspect of repealed law as one of the laws under which the subject matter was determined since the cause of action arose in the High Court was the now repealed, Armed Forces Act, Cap. 199 Laws of Kenya. However, this does not in any way render the judgment subject to review as even the applicant in making his case through all the superior courts was cognizant that his rights could only be legally and procedurally be ventilated within the legal framework that prevailed when the cause of action arose. So that at the time of determining the matter, the applicable law was still fully in force and it was the basis upon which it was determined.

48. In a nutshell, the matter before us has failed to meet any of the exceptional circumstances under which a review may lay to this Court as elaborated in the Outa case. On this solid finding alone, we find that the application is for dismissal.

49. Be that as it may, we are inclined to consider the application before us, more so the allegations therein, so as to clearly put everything into context. In that regard, while the application before the Court is framed as one seeking review for correction of errors apparent on the face of the record, the mischief is in the details. An application cannot be said to be for correction of errors when it is anchored and replicate with allegation of discontentment with the Court's finding and/or appreciation of legal principles and their interpretation thereof. Such dissatisfaction is normally a ground for appeal. Unfortunately for the applicant, even that appeal option has been exhausted and as this is the apex court of the land, and as he himself has correctly observed, litigation has to come to an end.

50. Further, in an application for correction of errors, the focal point is usually the judgment of the Court/ tribunal which is sought to be corrected. An applicant is thus duty bound to specifically point at the particular page/paragraph and/or portion of the judgment where he opines that the alleged error is situated. Suffice it to say, an error cannot be apparent on the face of the judgment when that error requires evidence to be adduced so as to enable the Court to discern it. Needless to say, we fail to fathom

why an application for correction of errors could even draw such a huge record like the one before us in this application. The precision of such an application and its clear nature is what clothes the Court with the jurisdiction to even move suo motto: for what is erroneous will occasionally be glaringly obvious.

51. We thus reiterate that an application for review of a Court's judgment cannot call for the changing and/ or altering of the Court's final orders and findings drawn from the reasoning in the entire judgment. That is why in the Outa case, we emphatically stated that:

> 86. ... Section 21(4) of the Supreme Court Act, does not confer upon this Court, jurisdiction, or powers, to sit on appeal over its own Judgments. Neither, does it confer upon the Court, powers to review any of its Judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. Indeed, any corrections made pursuant to this section become part of the Judgment or Order as initially rendered. The main purpose therefore, of Section 21(4) of the Supreme Court Act, is to steer a Judgment, decision, or Order of this Court, towards logical, or clerical, perfection."

52. In the above context, the applicant also alluded to the failure of this Court to cite its earlier decision in Communication Commission of Kenya & 5 others v. Royal Media Services & 5 others [2014] KLR-SCK, eKLR, (CCK case) as a ground in support of his application. The fact of the Supreme Court (or any other court for that matter) not to cite its own decision on a particular issue cannot be a ground for review of its judgment. The mere fact that the Supreme Court did not, in its decision, expressly cite the CCK case on the issue of legitimate expectation does not in any way warrant a case for review. In fact, the applicant has not alleged that the failure to cite that earlier decision led to the Court making a contrary decision. It was not his case that while the Court had already rendered itself on the law as regards the doctrine of legitimate expectation, in total disregard of that earlier decision, that the Court 'developed' a new jurisprudence on the same issue. Clearly, if that were the case, then it will prima facie form a case for review as the error or contradiction will be quite glaring.

53. We hasten to add that as a general principle, each case that comes before a court of law is decided on its own facts and merit. While the CCK case thus laid down this Court's jurisprudence on legitimate expectation, it is not true that in any subsequent case where a litigant raises the issue of legitimate expectation, the CCK case must be cited verbatim however remote the issue of legitimate expectation is. It is inaccurate to argue therefore that this must be done notwithstanding that the case is decided on other issues or even where the Court determines that the issue of legitimate expectation, as framed by a litigant, is not an issue for determination. After all, is it not the discretion of the Court to frame issues for determination that a particular case presents before it?

54. Further, the applicant cites High Court cases, particularly Wilson Thirimba Mwangi v Director of Public Prosecution, JR Misc App. No. 271 of 2011, [2012] eKLR, and submits that by the Supreme Court not following this case, an error was committed and that should be corrected. The least we say on this ground the better. Save to only direct the applicant to the doctrine of stare decisis as articulated in Article 163(7) of the Constitution: "[A]ll courts, other than the Supreme Court, are bound by the decisions of the Supreme Court". The applicant in essence unlawfully is inviting this Court to be bound by the decisions of the High Court, failure to which this Court's decisions will be subject to review. Since indeed the making of the decision in Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others [2012] eKLR, this Court has recognized the constitutional competence of other superior courts in the judicial hierarchy to determine matters that comes before them. However, this constitutional deference does not amount to the Court being bound by decisions of these Courts. They only but retain their persuasive nature before this Court.

Bias

55. Another ground on which the review application was premised was allegation of bias on the part of the presiding judge Hon. Justice Tunoi. It was argued that the said presiding judge was biased and ought to have recused himself. The Judge having not recused himself, the applicant thus argued that the entire process and judgment were a nullity as it amounted to a miscarriage of justice.

56. It was further contended that at the time of hearing and determination of the petition, Justice Tunoi had filed a matter in the High Court, Petition No. 244 of 2014, in which he was challenging his retirement age of 70 years as provided for in the Constitution 2010. The applicant contended that this petition was similar to his and he argued that the Honourable Justice sought to safe guard his retirement age of 74 years as 'safeguarded' by the old Constitution. That this was similar to the applicant's application that invoked Article 50(6) of the Constitution challenging the constitutionality of section 115(3) of the repealed Armed Forces Act, Cap. 199.

57. In essence, the applicant's case was that since Honourable Justice Tunoi had a case in the High Court seeking to safeguard his retirement age at 74 years as provided for under the repealed Constitution, then as a presiding judge, he was inclined to uphold section 115(3) of the Armed Forces Act, an Act of Parliament under the old constitutional order, in breach of Article 50(6) of the new Constitution. In essence, it is the applicant's preposition that the Honourable Justice was inclined to trump upon the new constitutional order, since this new Constitution was also curtailing his pecuniary interest.

58. The applicant further urged that the presiding Judge was inclined to reach a finding that would have preserved the old Constitution and this would curtail the applicant's rights under Article 50(6) of the new Constitution since decisions of the Supreme Court are binding on other courts. Hence the applicant's contention was that of bias on the part of the Judge and the allegation that his action amounted to the judge sitting in his own case, contrary to the principles of natural justice.

59. We agree that bias is prima facie a factor that may lead to a judge recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of the Constitution thus:

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

60. What is bias? The Oxford English Dictionary defines bias thus: "as an inclination or prejudice for or against one thing or person". The Blacks' Law Dictionary 9th edition defines the word bias as "Inclination; prejudice; predilection". Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.

61. From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in Tumaini v. Republic [1972] EA LR 441 Mwakasendo J held that "in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people.

62. Further in Nathan Obwana v. Robert Bisakaya Wanyera & 2 others [2013] eKLR, Chitembwe J, outlined the local jurisprudence on seeking recusal of a judge thus:

> "In Kenya the Court of Appeal in the case of Republic v. Mwalulu & 8 Others: [2005] 1 KLR the court did set up the principles on which a judge would disqualify himself from a matter and stated as follows:
>
> 1. When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.
> 2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.
> 3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.
> 4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself."

63. Chitembwe J, in that case proceeded to hold that more apprehension of bias cannot be a ground for recusal. That the allegations of bias must be factual and proved. In that context, he stated thus:

> "I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter."

64. We fully agree with the foregoing jurisprudence as regards allegations of bias on the part of a judge and in the application before us, no cogent evidence has been placed before the Court to warrant a finding of bias being made on the part of the presiding judge even if we had the jurisdiction to entertain such a complaint. While a petition filed by the Justice has been cited for the Court, we find this not sufficient as evidence of bias. The applicant's allegations are not only based on apprehension, but on conjuncture. It can never be that the mere fact that a Judge, who as rightly submitted by the respondent, has rights under the Bill of Rights, he will be biased by the mere fact that he too was pursuing his rights in a different court at the same time he was hearing a different matter touching on issues of rights under

the Bill of Rights. The office of a judge does not indeed strip a judge from the enjoyment of rights under the Bill of Rights.

65. In that regard, the Constitutional Court of South Africa has adopted a similar approach on allegations of bias. Thus in President of The Republic of South Africa and others v. South African Rugby Football Union and others, 1999(4) SA 147 (CC), CCT 16/98 the Court stated:

> " 48. It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

66. The case for bias as presented by the applicant is thus dead on arrival because the applicant has completely failed to show that the fact that Justice Tunoi was challenging the judges' retirement age under the Constitution 2010 could have raised perceptions of bias in the minds of reasonable people who had notice that the Honourable judge was presiding over the applicant's petition. In fact, what the applicant raises are his own bias perceptions and not perceptions in the public domain. Those personal perceptions of bias are what Chitembwe J warned about in Republic v. Mwalulu (above) thus: "If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts."

67. Consequently, and for the above reasons we find that the allegation of bias on the part of the presiding judge have not been proved and neither can they fall within the exceptional circumstances that may warrant this Court reviewing its judgement.

VI. Findings

68. The upshot is that we find that the application before this Court while framed as one seeking review, falls short of the exceptional circumstances under which that jurisdiction may be invoked. At best, it is a disguised appeal against this Court's own judgment calculated towards availing to the applicant a second bite at the cherry. The applicant must be stopped in his tracks and told in no uncertain terms that litigation must come to an end. The elaborate access to justice that the Constitution has granted every person under the Bill of Rights should not be taken as a panacea for endless litigation. The rights in the Bill of Rights remain to be enjoyed and pursued within the laid down legal doctrines and principles.

VII. Final Orders

69. In the circumstances, the application dated 4th December, 2014 is hereby dismissed but we make no orders as to costs.

70. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2018

..

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

..

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

..

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

..

N. S. NJOKI

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