REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. 10 (E013) OF 2022

—BETWEEN—

HON. LADY JUSTICE MARY MUTHONI GITUMBI.....PETITIONER

-AND-

THE TRIBUNAL APPOINTED TO INVESTIGATE THE CONDUCT OF HON. LADY JUSTICE MARY MUTHONI GITUMBI, JUDGE OF THE ENVIRONMENT AND LANDS COURT OF KENYA.....RESPONDENT

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*(**Being an appeal** against the **decision and recommendation of the Tribunal**, appointed under Article 168 (5)(b) of the Constitution of Kenya to Inquire into the inability of Hon. Lady Justice Mary Muthoni Gitumbi, , to perform the functions of her office due to mental incapacity dated 13th April 2022)*

Representation:

Mr. Colbert Ojiambo, Dr. Omondi Owino & Mr. Nyaboma for the Petitioner

(Acorn Law Advocates LLP)

Mr. Emmanuel Bitta & Ms. Mbilo Schola for the Respondent

(Office of the Hon. Attorney General)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] By the Petition of Appeal dated 19th May 2022, this Court is being asked to exercise its jurisdiction under Article 163(3) and (8) of the Constitution. The appeal challenges the Report and Recommendation issued by the Tribunal appointed to inquire into the Petitioner's inability to perform the functions of her office due to mental incapacity.

[2] Part A of the Petition of Appeal specifies that the petition is premised on the following grounds:

i) *That the inability of the Petitioner to perform the functions of her office due to mental incapacity was not established as contemplated under Article 168(1)(a) of the Constitution;*
ii) *That the Honourable Tribunal erred in law and fact in holding that Judicial Service Commission had discharged its mandate as contemplated under Article 168(4) of the Constitution;*
iii) *That in all circumstances of the case, the findings of the Honourable Tribunal and the recommendation thereto is not supported in law by the evidence adduced.*

B. BACKGROUND

[3] The Petitioner was nominated to serve as a Judge of the Environment and Land Court (ELC) in the year 2012. Before her appointment, the Judicial Service Commission (JSC) through one of its Commissioners, reported that it had received information from unnamed lawyers that the Judge had a medical history of mental illness. The JSC resolved to have the Petitioner, who was then a nominee for appointment as a judge, undergo a medical examination conducted by a medical board constituted by the Director of Medical Services to determine her suitability for the position.

[4] The Medical Board assessed the Petitioner on 1st November 2012. Its findings were communicated to the JSC on 2nd November 2012. The findings of the report indicated that:- *"the Judge was sane, coherent in speech, had a good memory of current affairs, and was fairly eloquent in addressing issues raised by the board members*." The Board then concluded that, "*even though records indicate that the Judge had a history of mental illness, she had been declared by her psychiatrist as having fully recovered and was therefore fit to take up the position of a Judge*."

[5] The Petitioner was subsequently appointed as a Judge of the ELC and posted to Kakamega Law Courts. She was later transferred to Milimani Law Courts in January 2013 and then to the Judiciary Training Institute (JTI) in January 2018.

[6] Following complaints received by the JSC *inter alia* regarding delay of delivery of rulings and judgment, the Commission in a meeting held on 2nd May 2019 resolved to inquire further into the matter. In this regard, the JSC sought reports of the performance of the Judge from the acting Registrar of the ELC, the Director of the JTI, and lastly, a report by the acting Director of Planning and Organizational Performance (DPOP). The JSC also called for her medical record which medical file was availed by the Human Resource Directorate.

[7] Subsequently, upon deliberations, the JSC resolved that the Petitioner appears before a Medical Board (second Medical Board) which was to be constituted by the Director of Medical Services for examination of her fitness to continue serving as a Judge. The second Medical Board was constituted and it examined the Judge on 28th November 2019 at the National Spinal Injury Hospital.

[8] It submitted its report dated 24th July 2020 and concluded that:- "*Based on the fact that the Hon. Lady Justice Mary Gitumbi was on treatment for Schizophrenia with evidence of several relapses, evidence of lack of insight*

during the period of relapses leading to absence from duty. She also had evidence of below-average performance. She is not fit for further service as a Judge."

[9] The JSC held a meeting on 16th September 2020 and deliberated on the report and findings of the second Medical Board. It resolved to institute proceedings against the Petitioner for her removal pursuant to Article 168 (1)(a) of the Constitution. The Petitioner was invited on 28th September 2020 to make her representation on the findings of the second Medical Board and the contemplated action of her removal from office.

[10] Following the hearing of the Petitioner and the deliberations on the matter, the JSC Committee that had been established to consider her removal from office concluded that the ground for removal of the Petitioner on the basis of her inability to perform the functions of the office arising from mental incapacity under Article 168 (1) of the Constitution had been established. Consequently, on 23rd March 2021, the JSC considered and deliberated on the Committee's findings and recommendations and adopted the same through a majority decision. Thus, a petition dated 12th April 2021 was submitted to the President recommending the suspension of the Judge and the appointment of a Tribunal in terms of Article 168 (5)(b) of the Constitution to consider the removal of the Petitioner from office.

[11] His Excellency, President Uhuru Kenyatta, (as he then was) by a Gazette Notice No. 8625 dated 20th July 2021 and published on 23rd August 2021, suspended the Petitioner from office with immediate effect and appointed a Tribunal to inquire into the matter of her removal. The Composition of the Tribunal included three Judges, and two psychiatrists amongst others.

[12] The Tribunal concluded its hearing and deliberations and, in a report dated 13th April 2022 stated that the allegations, that the Judge has mental incapacity and therefore unable to perform the functions of the office of Judge of the ELC,

were established to the required standard of proof. The Tribunal unanimously recommended that the Petitioner be removed from office of Judge of ELC.

[13] Aggrieved by the decision of the Tribunal, the Petitioner filed a Petition of Appeal dated 19th May 2022 before this Court pursuant to Article 168(8) of the Constitution.

C. PROCEEDINGS BEFORE THE SUPREME COURT

i) The Petitioner's case and submissions

[14] The Petition of Appeal raises a total of 33 grounds of appeal which are summarized as follows, that the Honourable Tribunal erred in law and fact:-

a) *When it failed to consider or give weight to the totality of the evidence adduced and the submissions filed on behalf of the Petitioner and thereby recommended the Petitioner's removal.*
b) *When it equated mental illness to mental incapacity and thereby failed to consider the requisite standard of proof set for establishing mental incapacity as required in Article 168(8)(1)(a) of the Constitution. Further, the Tribunal relied on biased opinions, unsubstantiated hearsay evidence, and extraneous factors not pleaded in the petition or proved in arriving at its findings.*
c) *When it erroneously shifted the burden of proof to the Petitioner to demonstrate that the allegations against her were false, instead of requiring the allegations to be proved to the required standard.*
d) *In finding that the Petitioner failed to challenge the findings by the Medical Board, despite the Petitioner putting questions to the witnesses and adducing evidence and submissions challenging the said Medical Report.*
e) *In approaching the case with a predetermined and biased mind to remove the Petitioner thereby wholly disregarding exculpatory evidence showing that the Judge was sound and fit to serve. Further, the Tribunal failed to single out even one function of the office of Judge that*

the Petitioner was incapable of performing. Additionally, the Tribunal failed to consider the Court diary and proceeded to solely blame the Petitioner for the court backlog.

f) *In finding that the JSC had observed the procedural threshold for proportionality, rationality, reasonableness, and the rules of natural justice in spite of the illegalities and procedural lapses committed, disregarding Article 47, 50 and 168 of the Constitution, and provisions of the Fair Administrative Actions Act when transferring the Petitioner from Court to the JTI.*

g) *In making an erroneous conclusion that she was unable to continue working despite having satisfied itself that the Petitioner undertook considerable work while at the JTI.*

h) *When it disregarded the consensus reached by all the doctors who examined the Petitioner and concluded that her mental state was "normal".*

i) *Despite finding that the Petitioner was a person with a disability, the Tribunal erred in finding that the Petitioner was adequately accommodated, when there was no such accommodation.*

j) *When it accepted claims of absenteeism, wholly disregarded exculpatory evidence that the Petitioner sat in Court more days in the relevant period than any other Judge in the station. Further, the Tribunal ignored exculpatory evidence that the Petitioner handled the highest number of cases and was the second best-performing Judge in the Station.*

k) *In finding the Petitioner lacked mental capacity to serve yet did not consider the contents of her Rulings and Judgments or even the record of her proceedings, and did not consider the fact that there were no complaints against the contents of her Rulings and Judgments for the entire period of her tenure.*

l) *In reaching the conclusion that the "existing laws do not adequately provide for a proportionate mechanism of handling a situation in which a Judge is not at fault" and further that the JSC has yet to formulate the*

appropriate rules of procedure governing complaints, initiation of investigations suo moto, consideration of medical evidence, conducting of investigations or preliminary removal proceedings, thus ought to have resolved this matter in the Petitioner's favour.

[15] The Petitioner prays for the following orders:

a) *The Appeal herein be allowed.*
b) *The Report and Recommendation of the Honourable Tribunal herein be set aside in its entirety, and the Petition for removal thereto be dismissed.*
c) *Any other or further orders or reliefs that this Honourable may deem fit to grant.*
d) *The costs of the Appeal.*

[16] The Petitioner relies on her written submission dated 4th August 2022. She challenges the jurisdiction of the Tribunal and urges that the jurisdiction of the Tribunal is confined to the matters contained in the petition submitted to the President by the JSC and no more. She buttresses this assertion with the decisions *in* ***Justice Amraphael Mbogoli Msagha v Chief Justice of the Republic of Kenya & 7 Others*** **[2006] eKLR**, ***Republic vs Chief Justice of Kenya & 6 Others exparte Moijo Mataiya Ole Keiwua*** **[2010]** eKLR and ***Nancy Makokha Baraza v Judicial Service Commission & 9 Others*** **[2012] eKLR.** She contends that the Tribunal went outside its mandate when it made conclusions and findings on mental illness and treatment, psychosocial support, and the Petitioner's mental illness and its impact on the right to access to justice. She urges that none of these issues are contemplated under Article 168 (1) (a) of the Constitution as grounds for removal.

[17] It is the Petitioner's case that the applicable standard of proof is that of '*beyond reasonable doubt*' for the allegation of mental incapacity the intermittent standard being '*below beyond reasonable doubt but above a*

balance of probability' for allegations of inability to perform the functions of the office of a Judge. The Petitioner submits that the burden of proof in this matter was not discharged.

[18] On mental incapacity, she submits that the required standard of proof was not met. She contends that it was not established that she suffered mental incapacity. She submits that the Tribunal erroneously concluded that mental illness amounted to proof of mental incapacity. She contends that the test of 'severity of illness' was a wrong test for determining mental capacity. The Petitioner submits that the Tribunal erred in law and fact by finding that the Assisting Counsel had proved the element of mental incapacity beyond reasonable doubt.

[19] The Petitioner further submits that the allegation that she was unable to perform the functions of an office of a Judge was not established. She contends that the Tribunal did not attempt to set out the functions of the office of a Judge, and that the Tribunal did not single out any function that she did not or could not perform. She submits that the finding that she was unable to perform the functions of her office is inconsistent with the evidence adduced.

[20] The Petitioner submits that the Tribunal declined to apply the principles of fair labour practices enumerated in Statutes and numerous case law. She contends that the respondent erred in failing to apply the Judiciary Human Resources Policies and Procedure Manual on Procedures and Processes of Evaluating and Assessment of Performance of Judges because of a mistaken view that this manual did not apply to Judges. In addition, she contends that the Tribunal refused to apply the correct principles of law in holding that she did not require performance evaluation and appraisal before termination of employment. She buttresses this assertion with the decision of Lady Justice Ndolo in ***Simon Gitau Gichuru V Package Insurance Brokers Ltd. [2017] eKLR*** and the decision in ***National Bank of Kenya v Samuel Nguru Mutonya*** **[2019] eKLR.** She also contends that if an assessment had

been undertaken indicating poor performance, removal from office would not be the first option without giving the Petitioner a chance to improve. She reinforces this contention with the decisions in ***Gold Fields Mining South Africa (PTY) Ltd. Vs CCMA***, ***Jane Wairimu Machira v Mugo Waweru and Associates*** **[2012] eKLR**, ***Jane Samba Mukala v Ol Tukai Lodge Limited*** **[2013] eKLR** and ***Maina Mwangi v Thika Coffee Mills Limited*** **[2014] eKLR.** The Petitioner also submits that the decision to remove her from office was made before any investigations to her performance was made.

[21] It is the Petitioner's case that she was subjected to unfair administrative actions or process before the JSC. She urges that the Tribunal erred in holding that the JSC afforded her the procedural threshold as to proportionality, rationality, reasonableness and the right to be heard before making a decision that was adverse to her.

ii) The Respondents' case and submissions

[22] The respondent relies on its grounds of objection dated 17th June 2022 and written submissions dated 14th September 2022.

[23] On the mandate of the respondent under Article 168 of the Constitution, the respondent commences its case by outlining the mandate of the JSC. It submits that the JSC is the body tasked with initiating proceedings for the removal of a Judge either acting on its own motion or on the petition of any person to the JSC pursuant to Article 168(2) of the Constitution. It urges that Article 168(4) of the Constitution requires the JSC to consider the petition, and if satisfied that the petition discloses a ground for removal of a Judge, sends the Petition to the President. It is urged that this brings the mandate of the JSC to a close. To reinforce this assertion, the respondent cites the case of ***Joseph Mbalu Mutava vs the Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya***

(2019) eKLR (Mutava case), where this Court held that the JSC became *functus offic*io upon presenting the Petition to the President.

[24] It is the respondent's further case that upon receipt of the Petition, the President is required to suspend the Judge and appoint a Tribunal in line with the provisions of Article 168(5) of the Constitution. The Tribunal in conducting its proceedings, inquires into the matter expeditiously and reports on the facts, and makes binding recommendations to the President. It is therefore submitted that the mandate of the respondent as appointed under Article 168(5) of the Constitution is to inquire into the matter presented through the Petition that was submitted to the President by the JSC, report on the facts, and to make binding recommendations to the President.

[25] It is also urged that the JSC conducted its own investigations and hearings following complaints on the conduct and performance of the Petitioner. In addition, on evaluation of the evidence on record, the Petitioner was accorded the procedural safeguards of proportionality, rationality, reasonableness and the right to be heard in line with the threshold set out in ***Associated Pictures Houses Ltd Vs. Wednesbury Corporation* (1947) 2 All ER 680**. On being satisfied that there was sufficient ground, the JSC petitioned the President seeking the Petitioner's removal from office. As such, the respondent contends that JSC's actions were within the law.

[26] The respondent submits that it does not sit to inquire into the proceedings, if any, conducted by the JSC, but conducts its own independent proceedings. In addition, that it does not sit on appeal or review the proceedings before the JSC.

[27] On whether the respondent acted within its mandate, it is the Respondent's case that to discharge its mandate, it had to determine whether the Petitioner had schizophrenia, and if so, whether it had led to mental incapacity, and if the mental incapacity led to her inability to discharge her

duties as a Judge. The respondent further submits that it was guided by the gazetted Rules of Procedure in conducting its proceedings.

[28] The respondent further urges that its proceedings were independent of the JSC proceedings. It submits that the parties were allowed to present their respective cases, call and cross-examine witnesses, evaluate the tabled evidence, and make submissions. The Tribunal further asserts that it considered relevant facts, evidence, and the law in arriving at its findings and recommendations - and not extraneous factors - but within the context of the matter before it and based on the applicable law. The Tribunal contends that the Petitioner failed to demonstrate that the respondent was biased or had a predetermined mind to remove her.

[29] On whether the Petitioner was accorded a fair hearing, the respondent submits that on 18th October 2021, it held a case conference to determine the manner in which the proceedings would be conducted. The Petitioner and her counsel were in attendance. It is urged that the preliminaries such as reading out the allegations were conducted in the presence and full participation of the Petitioner and her counsel. It is also pointed out that the Petitioner did not oppose Kenya National Commission on Human Rights (KNCHR) participation in the proceedings as *amicus curiae* neither did she at any point complain that she was given insufficient opportunity to be heard, to cross-examine witnesses or call witnesses to support her case. It is argued that from the record, it is clear that the Petitioner was accorded a fair hearing and the findings of the Tribunal were based on the facts, evidence, and applicable law as well as Article 50 of the Constitution.

[30] On whether the respondent applied the required standard and burden of proof in proceedings of a tribunal established under Article 168(5) of the Constitution, the respondent contends that from the proceedings, there was no dispute that the Petitioner suffers from schizophrenia, which fact she admitted in her testimony. The Tribunal contends that it established that the applicable

standard of proof in establishing mental illness is beyond reasonable doubt, while that of inability to perform functions of Judge is below reasonable doubt but above a balance of probability. It argues that the standard of proof that the mental illness had affected the Petitioner's ability to perform her duties as Judge was satisfied on account of the evidence adduced.

[31] The respondent submits that in its findings it was cognizant of the applicable international and domestic laws that recognize the rights of people with disabilities. The respondent concludes by praying for this Court to dismiss the Petition with costs and uphold the respondent's Report to the President.

D. ISSUES FOR DETERMINATION

[32] From the pleadings, submissions by the parties, and records of appeal, the following issues have crystallized for determination by this Court:

i) *Whether the Tribunal acted within its jurisdiction to make the findings contained in its report;*
ii) Whether the Petitioner's mental incapacity was established; and
iii) Whether mental incapacity rendered the Petitioner unable to perform the functions of the office of a judge of the ELC.

E. ANALYSIS

i. Whether the Tribunal acted within its jurisdiction to make the findings contained in its report

[33] The Petitioner contends that the Tribunal went outside its mandate when it made conclusions and findings on mental illness and mental incapacity, treatment, psychosocial support, and the Petitioner's mental illness and its impact on the right to access justice. The respondent opposes these contentions and reiterates that it acted within its mandate.

[34] The process of removal of a Judge from office is provided for under Article 168 (2) to (7) of the Constitution and we summarize it as follows; It is initiated by the JSC on its own motion or upon a petition being filed by any person for consideration by the Commission. If satisfied that the petition discloses a ground for the removal of a Judge, the JSC shall send the petition to the President. The President thereafter suspends the Judge within fourteen days and also appoints a Tribunal to hear the Petition and make recommendations to the President for the removal or reinstatement of the Judge.

[35] The Constitution also provides under Article 168 (7) (a) & (b) that the Tribunal shall be: **'(a) 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.'**

[36] This Court, pursuant to Article 168 (8) of the Constitution has the jurisdiction to hear a Judge who is aggrieved by the decision of the Tribunal and appeals within ten days after the Tribunal makes its recommendation. We pause here to point out as we did in the *Mutava case* that our jurisdiction under Article 168(8) of the Constitution is "*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.*"

[37] The grounds for removal from office are outlined in Article 168 (1) and they are reproduced hereunder for clarity:

> **"168. Removal from office**
>
> **A judge of a superior court may be removed from office only on the grounds of—**
>
> **(a) inability to perform the functions of office arising from mental or physical incapacity;**

(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;

(c) bankruptcy;

(d) incompetence; or

(e) gross misconduct or misbehaviour."

[38] From the record, it is evident that pursuant to the Petition by JSC and in exercise of the powers conferred by Article 168(5) of the Constitution as read with Section 31 of the Judicial Service Act, 2011, His Excellency, former President Uhuru Kenyatta, vide Gazette Notice No. 8625 dated 20th July 2021 and published on 23rd August 2021, suspended the Petitioner from office with immediate effect and appointed a Tribunal to inquire into the matter. The pertinent parts of this gazette notice in this issue are reproduced hereunder:

> **"Whereas the petition is premised on the Constitutional provisions on removal from office of a Judge of a Superior Court, Under Article 168 (1) (a) of the Constitution and is pursuant to the findings of the Judicial Service Commission;**
>
> **.....Now THEREFORE and having considered the petition of the Judicial Service Commission together with its annexures, I note that:**
>
> **.....The Judicial Service Commission having considered various medical reports was satisfied that a ground for removal of the Honourable Justice Mary Gitumbi, on the reason of her inability to perform the functions of office arising from mental incapacity under Article 168 (1) (a) of the Constitution has been disclosed,**
>
> **.....(iii) The mandate of the tribunal shall be:**
>
> **To consider the Petition on removal of the Hon Lady Justice Mary Muthoni Gitumbi from office on the reason of her inability**

to perform the functions of office arising from mental incapacity under Article 168 (1) (a)…"

[39] On 10th September 2021, the Tribunal gazetted its Rules of Procedure in accordance with the Constitution and pursuant to Section 31(5) of the Judicial Service Act. It held a case conference on 18th October 2021. During the case conference, the list of allegations, summary of facts, and summary of the findings by the JSC and its resolution and recommendation for her removal were read out to the Petitioner and her Counsel. The Petitioner elected to have the proceedings in camera pursuant to Rule 9(1) of the Tribunal Rules.

[40] The Tribunal heard a total of 12 witnesses including the Petitioner. The Tribunal in its report dedicated Chapter Four to identifying and crystallizing key medical issues that emerged in the proceedings and were relevant in the determination of the subject matter.

[41] The Tribunal on page 87 of its report at paragraph 554 acknowledging the novelty of the proceedings before it stated:

> ***"554. The issue of inability to perform the functions of the office of a Judge arising out of mental incapacity has not been considered by any other Tribunal. Article 168 (1) (a) of the Constitution provides that a Judge may be removed from office for "inability to perform the function of office arising from mental or physical incapacity."***
>
> ***555. What is required to be established before this Tribunal is not the issue of breach of code of conduct applicable to Judges, bankruptcy, incompetence, gross misconduct or misbehaviour by the Judge <u>but alleged incapacity arising out of a mental condition. The instant Tribunal must first establish the existence of a mental illness and, secondly answer the question whether that</u>***

illness has resulted in mental incapacity, leading to inability on the part of the Judge to perform the expected functions of that office.

556. With specific reference to Justice Gitumbi, whereas there is an admission that she has a mental illness known as Schizophrenia, this Tribunal, however being inquisitorial, must inquire into the nature of the illness, its extent and severity as well as its impact on the performance of the Judge and whether it has resulted in her inability to perform the expected function of that office." (emphasis ours)"

[42] Again on page 91 paragraph 579, after interrogating the definition of mental incapacity under the Constitution, the Mental Health Act, (1989) of Kenya, the Mental Capacity Act, 2005, (UK), the Convention on the Rights of Persons with Disabilities (CRPD), Black's Law Dictionary 9th edition, the online Merriam-Webster dictionary and persuasive case law, the Tribunal reported:

"579. The Tribunal in the current instance is required to establish whether Justice Gitumbi lacks mental capacity which renders her unable to perform the functions of the Office of a Judge of the ELC as provided under Article 168 (1) (a) of the Constitution."

[43] The Tribunal, on page 233 paragraph 1344 stated:- "***In the context of these proceedings, the Tribunal holds that to determine the question of whether the mental illness resulted in mental incapacity, it must determine whether the mental illness is so severe as to affect the Judge's capacity to undertake the functions of office of Judge."***

[44] Indeed, a thorough reading of the Tribunal's Report reveals an in-depth inquiry as to whether the Petitioner was unable to perform her judicial functions due to mental incapacity. It is therefore evident, in doing so, that the Tribunal was exercising its mandate pursuant to Article 168 (1) (a) of the Constitution. All the conclusions and findings of the Tribunal were geared towards establishing whether she was unable to perform the functions of office due to mental incapacity. The Tribunal found that she suffered from a mental illness that led to mental incapacity and inability to undertake the functions of her office. As such, we are of the view that the Tribunal confined itself to the matters contained in the petition submitted to the President by the JSC and we are not persuaded by the Petitioner that the Tribunal considered issues extraneous to its jurisdiction.

ii. Whether mental incapacity was established

[45] We now turn to determine this novel issue before us; whether the Tribunal erred in arriving at a finding of mental incapacity. The Petitioner contends that it was not established that she suffered mental incapacity. It was her case that the required standard of proof was not met and the Tribunal erroneously concluded that mental illness amounted to proof of mental incapacity. The respondent on the other hand urged that the standard of proof that the mental illness had affected the Petitioner's ability to perform her duties as Judge was satisfied on account of the evidence adduced.

[46] It is prudent for us to venture into the legislative scheme governing mental incapacity. The Mental Health Act, Cap 248 Laws of Kenya does not define mental incapacity. It however defines a person with mental illness in section 2 as '**a person diagnosed by a qualified mental health practitioner to be suffering from mental illness.**' This Act is however silent on the resultant effect of mental capacity of persons with mental illness. We shall therefore seek a comparative perspective on the issue.

[47] The United Kingdom enacted the Mental Capacity Act in 2005 (UK Act). This Act, in section 1 provides that the following principles are applicable when applying the statute:

a) **"A person must be assumed to have capacity unless it is established that he lacks capacity;**
b) **A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;**
c) **A person is not to be treated as unable to make a decision merely because he makes an unwise decision;**
d) **An act done, or decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests;**
e) **Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."**

[48] The UK Act further provides in sections 2 (1) and (2) as follows:

"(1) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary."

[49] The case of ***Heart of England NHS Foundation Trust vs JB*** **[2014] EWCOP 342** expounded on the UK Act. The case concerned a 62-year-old woman (JB) diagnosed with paranoid schizophrenia during her 20's. In 2013 JB developed ulcers on her feet and eventually her right foot became gangrenous. The medical advice was for an amputation which JB opposed but

doctors attending her were in conflict as to whether she lacked capacity to make medical decisions. The NHS Trust applied to the Court of Protection for a declaration that JB lacked capacity to consent to medical treatment and that it would be in her best interest to have a through-knee amputation and for her to be sedated if she resisted. ***Peter Jackson, J*** held:

> ***"[3] There are some who, as a result of an impairment or disturbance in the functioning of the mind or brain, lack the mental capacity to decide these things for themselves. For their sake, there is a system of legal protection, now codified in the Mental Capacity Act 2005. This empowers the Court of Protection to authorise actions that would be in the best interests of the incapacitated person.***
>
> ***[4] The Act contains a number of important general principles regarding capacity:.....***
>
> ***[5] These principles reflect the self-evident seriousness of interfering with another person's freedom of action. Accordingly, interim measures aside, the power to intervene only arises after it is has been proved that the person concerned lacks capacity. We have no business to be interfering in any other circumstances. This is of particular importance to people with disadvantages or disabilities. The removal of such ability as they have to control their own lives may feel an even greater affront to them than to others who are more fortunate.***
>
> ***[6] Furthermore, the Act provides (s.1(6)) that even where a person lacks capacity, any interference with their rights and freedom of action must be the least restrictive possible: this acknowledges that people who lack capacity still have rights and that their freedom of action is as important to them as it is to anyone else." (emphasis ours)***

[50] The Judge concluded by finding that JB undoubtedly had a disturbance in the functioning of her mind in the form of paranoid schizophrenia (as to which she lacked insight), but that it had not been established that she thereby lacked the capacity to make a decision about surgery for herself. On the contrary, the evidence established that she had capacity to decide whether to undergo an amputation of whatever kind.

[51] Long before the enactment of the Mental Capacity Act in 2005, the UK Law Commission's tabled a report on Mental incapacity: Item 9 of the Fourth Programme of Law Reform: Mentally Incapacitated Adults (Law Comm 231) (https://www.lawcom.gov.uk/app/uploads/2015/04/lc231.pdf).

[52] The Commission was investigating the then UK law (Mental Health Act 1983) relating to mental incapacity after a number of outside bodies drew attention to problems and deficiencies in the existing law to the Commission's attention. On page 32 the Commission noted as follows on 'capacity':

> ***"(1) Capacity and Lack of Capacity***
>
> ***Presumption of capacity and standard of proof***
>
> ***It is presumed at common law that an adult has full legal capacity unless it is shown that he or she does not. If a question of capacity comes before a court the burden of proof will be on the person seeking to establish incapacity, and the matter will be decided according to the usual civil standard, the balance of probabilities. We proposed in Consultation Paper No 128l that the usual civil standard should continue to apply and the vast majority of our respondents agreed with this proposal. A number, however, argued that it would be helpful if the new statutory provisions were expressly to include***

and restate both the presumption of capacity and the relevant standard of proof.

3.2

We recommend that there should be a presumption against lack of capacity and that any question whether a person lacks capacity should be decided on the balance of probabilities. (Draft Bill, clause 2(6).)"

[53] At page 34:

"A diagnostic threshold

In the consultation papers we suggested that a person (other than someone unable to communicate) should not be found to lack capacity unless he or she is first found to be suffering from "mental disorder" as defined in the Mental Health Act 1983.

On page 36:

3.12 We take the view that (except in cases where the person is unable to communicate) a new test of capacity should require that a person's inability to arrive at a decision should be linked to the existence of a "mental disability". The adoption of the phrase "mental disability" will distinguish this requirement from the language-of the Mental Health Act 1983 and will stress the importance of a mental condition which has a disabling effect on the person's capacity. We recommend that the expression "mental disability" in the new legislation should mean any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or

disturbance of mental functioning. (Draft Bill, clause 2(2).) ...

The definition of incapacity

The functional approach means that the new definition of incapacity should emphasise its decision-specific nature. A diagnostic threshold of "mental disability" should be included, except in cases of inability to communicate.

We recommend that legislation should provide that a person is without capacity if at the material time he or she is:

(1) unable by reason of mental disability to make a decision on the matter in question, or

(2) unable to communicate a decision on that matter because he or she is unconscious or for any other reason. (Draft Bill, clause 2(1).)"

[54] In the English case ***Re MB (Medical Treatment) [1997]*** **EWCA Civ 3093,** the Supreme Court of Judicature in the Court of Appeal (Civil Division) made some observations on the capacity to decide. Though dealing with the issue of capacity to consent to or refuse treatment, its findings are persuasive. It was observed at paragraph 18:

"Capacity to decide.

18.....Lord Donaldson MR reviewed the relevant authorities and said at page 112:-

"Capacity to decide

The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that

capacity, but it is a presumption which can be rebutted. This is not a question of the degree of intelligence or education of the adult concerned.

<u>However, a small minority of the population lack the necessary mental capacity due to mental illness</u> or retarded development (see for example, Re F (Mental Patient) (Sterilisation) [1990] AC 1). This is a permanent or at least a long -term state. Others who would normally have that capacity may be deprived of it or have it reduced by reason of temporary factors, such as unconsciousness or confusion or other effects of shock, severe fatigue, pain or drugs being used in their treatment.

Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity to decide at the time when the decision was made. It may not be the simple case of the patient having no capacity because, for example, at that time he had hallucinations. It may be the more difficult case of a temporarily reduced capacity at the time when his decision was made. What matters is that the doctors should consider whether at that time he had a capacity which was commensurate with the gravity of the decision which he purported to make. <u>The more serious the decision, the greater the capacity required.</u> If the patient had the requisite capacity, they are bound by his decision. If not, they are free to treat him in what they believe to be his best interests."

Thorpe J, in Re C (Refusal of Medical Treatment) [1994] 1 FLR 31, formulated the test to be applied where the issue arose as to capacity to refuse treatment. In that case a man of 68 suffering from chronic paranoid

schizophrenia refused to have an amputation of his leg). Thorpe J said at page 36:-

"I consider helpful Dr E's analysis of the decision making process into three stages: first, comprehending and retaining treatment information, secondly, believing it and, thirdly, weighing it in the balance to arrive at choice. The Law Commission has proposed a similar approach in para 2.20 of its consultation paper 129 'Mentally Handicapped Adults and Decision-Making'."

In 1995 the Law Commission recommended in Law Com. No.231 on Mental Incapacity in paragraphs 3.2-3.23 that a person is without capacity at the material time if he is unable by reason of mental disability to make a decision for himself on the matter in question either because -

(a) he is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision; or

(b) he is unable to make a decision based on that information.

'Mental disability' was defined as a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning." (emphasis ours)

[55] According to Halsbury's Laws of England at page 75 and in reference to the Mental Capacity Act of the United Kingdom, '*a wide range of conditions can result in loss of capacity to make decisions e.g. psychiatric illness, learning disability, dementia, brain damage, toxic confusional state*.' On reliance on expert evidence, Halsbury's Laws of England provides that '*expert*

evidence does not relieve the court from the obligation of forming its own judgment.

[56] In a commentary on mental capacity, Paula Case (Case P. Dangerous Liaisons? Psychiatry and Law in the Court of Protection – Expert Discourses of 'Insight' (and 'Compliance'). Med Law Rev (2016) 24(3):360–78. 10.1093/medlaw/fww027) observes:

> ***"The domain of mental capacity assessment defies categorisation—it is '… not straightforwardly medical, legal, biological or psychological'. In cases where P's mental capacity is disputed, the Mental Capacity Act 2005 (MCA) applies a test that fuses clinical and legal competences. The statutory test for incapacity requires those alleging incapacity to demonstrate that P is 'unable to make a decision' because of an 'impairment or disturbance in the functioning of the mind or brain'. In cases that come before the Court of Protection (CoP), the evidence of an expert witness (usually a psychiatrist) that P is suffering from an 'impairment' is generally accepted, but the courts claim to be the ultimate arbiter of whether P is in fact 'unable to make a decision'."***

[57] UK law is therefore very clear that under the common law, every person is presumed to have mental capacity until the contrary is proved. Adults are presumed to have decision-making capacity, but this presumption can be rebutted for particular decisions if the person has some impairment or disturbance of mental functioning that renders him or her either: unable to comprehend and retain the information that is material to the decision, or; unable to use and weigh the information as part of the process of making the decision. In addition, the courts in ***A Local Authority v A*** **[2010] EWCOP 1549, [66];** ***CC v STCC*** **[2012] EWCOP 2136, [62] and** ***London***

***Borough of Islington v QR* [2014] EWCOP 26, [84]** have held that the ultimate decision on mental capacity is one for the Judge to make.

[58] In Australia, the State of South Australia enacted the Guardianship and Administration Act 1993. This Act provides for the guardianship of persons unable to look after their own health, safety or welfare or to manage their own affairs and for the management of the estates of such persons; and for other purposes. In section 3, it defines mental incapacity as:

> **"The inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of—**
>
> **(a)any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or**
> **(b)any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever;"**

[59] Still in Australia, in the State of New South Wales, the Law Society of New South Wales in a 2016 publication, "***When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors***" observes on page 5:

> ***"3. WHAT IS "MENTAL CAPACITY"?***
> ***There is no single legal definition of mental capacity in New South Wales. Rather, the legal definition of mental capacity depends in each case on the type of decision which is being made or the type of transaction involved. This means there are a variety of legal tests of mental capacity. Some are contained in legislation such as the Guardianship Act 1987 (NSW) and others have been developed in common law, such as the test for testamentary capacity. The different legal tests for mental capacity mean that a client may have the mental***

capacity to make some decisions, such as deciding whether to make small purchases like groceries, but may lack the mental capacity to make other decisions such as deciding whether to enter into more complicated financial arrangements."

[60] Back to the instant case, the record reveals that the Tribunal established that the Petitioner admitted to being diagnosed with Schizophrenia in the year 2008, which diagnosis was also confirmed by both Dr. Mutisya and Dr. Owiti in their evidence before the Tribunal.

[61] On the medical issue of schizophrenia, the Tribunal entirely relied on the evidence as presented by Consultant Psychiatrists; Dr. Catherine Mutisya, Dr. Edith Kamaru Kwobah, and Dr. Frederick Owiti. Dr. Mutisya gave evidence as a Tribunal witness having participated in the 1st and 2nd Medical Board proceedings. Dr. Owiti gave evidence in the proceedings as the Petitioner's witness. Upon request by the Tribunal, Dr. Kwobah was nominated as an expert witness by the Kenya Psychiatric Association.

[62] The Tribunal in chapter 7 of its report noted that it was not contested that the Petitioner had schizophrenia. It undertook an analysis of medical evidence to establish the question whether the Petitioner's illness led to mental incapacity. The evidence by the psychiatrists was as hereunder.

[63] Dr. Owiti assessed the Judge for a total of three and a half hours on 19th and November 2021 by which dates the proceedings in the Tribunal had commenced. His assessment was that the Petitioner was not mentally impaired and she is smart, sharp, and bright. He testified that in his view, this illness had not derailed any part of the Petitioner's cognition. Dr. Owiti also testified that schizophrenia only affects performance in its chronic state because a patient experiences difficulty in thinking and reasoning. It was Dr. Owiti's testimony

that during periods of relapse, the Judge experienced lack of sleep and confusion and that confusion can present itself in the form of 'not talking to people or being too aggressive.' He explained that relapses may be attributed to many factors including low medication, too much medication, non-compliance in taking medication and environmental factors. He also explained that if the work environment is too stressful, it can trigger illness. He testified that the Petitioner was on Clozapine, a drug that causes lethargy, tiredness, dizziness and weight gain. He also stated that Olanzapine, another antipsychotic drug that that the Petitioner was taking causes sedative effects.

[64] It was Dr. Mutisya's further testimony that with every relapse, the function of the brain may not go back to normal and this manifests through impairment in social and occupational life. He stated that in cases of relapse, the Petitioner cannot perceive what is happening around her. He also testified that the Board in reaching a conclusion that the Petitioner had severe schizophrenia, also considered an indication in the report by her doctor (Dr. Owiti) that when she misses her medication, she inevitably relapses and has to be admitted into hospital. This conclusion was affirmed by Dr. Owiti. Futher, Dr. Mutisya testified that the Petitioner was on four different antipsychotic drugs which included Clozapine a third line drug reserved for schizophrenia.

[65] The Tribunal also took note of Dr. Kwobah's testimony. Dr. Kwobah testified that an assessment of fitness to work cannot be done in a one day sitting but has to be carried out over a period of time because the symptoms of schizophrenia are not necessarily manifested every day of the person's life. Dr. Kwobah further testified that schizophrenia is a complex mental illness that is chronic and recurring and that it is characterized by abnormal beliefs and hallucinations. With specific reference to the side effects of clozapine, Dr. Kwobah testified at page 193 of the report, that ***"there are some that are standard, things like sedation, you feel a bit drowsy. There are people who develop tremors. There are people who have a very***

heavy tongue with saliva that continues drooling. There are people that can have weight gain."

[66] Dr. Pius Kigamwa, on his part, observed that the Petitioner's relapses occurred when she did not take her medication leading to involuntary hospital admissions. Dr Owiti testified that involuntary admission is an indicator for review and that when this happens, ordinarily a patient has no insight and a patient is labelled dangerous to him/herself and to other people.

[67] The Tribunal then considered the burden and standard of proof. It adopted the holding in the ***Mutava case***, that the Assisting Counsel bears the legal burden of proof, and where the Assisting Counsel has provided sufficient evidence, the Judge may be required in law to discharge the evidential burden on matters which are peculiarly within the Judge's knowledge. The Tribunal also pointed out that the subject matter before it was distinct from that considered by other Tribunals before it because the matter related to inability to perform the functions of a Judge arising from mental incapacity and not misconduct. Thus, having considered the applicable law and precedent, it concluded that the standard of proof is 'beyond reasonable doubt' in establishing the alleged mental illness and with regard to the inability to perform the expected functions of the office of Judge of a superior court, the applicable standard is 'below reasonable doubt but above a balance of probability.'

[68] On account of the medical evidence adduced at the hearing, the Tribunal established that the Petitioner had severe schizophrenia and within a span of five (5) years, her mental illness had deteriorated. Thus, the Tribunal concluded that the question of whether the Judge had schizophrenia was proved to the required standard of beyond reasonable doubt.

[69] The Tribunal also took note of the evidence adduced before it and paid particular attention to the medical evidence on the diagnosis of schizophrenia, the progression of the illness, the course of treatment, the history of the Petitioner's compliance with medication, coupled with the report from her treating doctor that she invariably relapses when she does not adhere to her medical regime. The Tribunal also considered the fact that over time, in order to control the symptoms of the illness, the antipsychotic medications prescribed had increased from one drug to four, out of which, one was Clozapine, a third line drug normally reserved for treatment of schizophrenia resistant to other antipsychotic medications.

[70] The Tribunal considered the medical evidence on the use of Benzhexol to manage negative side effects including drowsiness, dizziness, lethargy, tiredness, and weight gain which have an impact on one's concentration and alertness. The Tribunal further noted the increased incidences of relapse and increased instances and duration of hospitalization from the time of her appointment as Judge of the ELC. The Tribunal found that the Petitioner's episodes and hospitalizations were occasioned by her failure to adhere to medication prescribed by her personal doctor and the increased episodes led to deterioration of the illness and made it severe. The Tribunal therefore concluded that the Petitioner had severe schizophrenia which affected her mental capacity to undertake the functions of office of Judge of ELC. The question that then arises before us is whether the Tribunal erred in coming to this conclusion.

[71] On the basis of the medical evidence on record, we find that it is not in contest that the Petitioner suffers from a mental illness, having testified herself that she was diagnosed with schizophrenia in the year 2008. On the basis of the medical evidence adduced, it is evident that the severity of the illness is that it is chronic and deteriorates with every relapse. The Tribunal established beyond reasonable doubt, that the Petitioner had a mental illness, schizophrenia.

[72] The Petitioner also acknowledged that on most occasions she was involuntarily admitted to the hospital. In no instance did the Tribunal equate mental illness to mental incapacity. We also note that one of the effects of the illness although not manifested every day is that the patient experiences difficulty in thinking and reasoning. It is our considered analysis that based on the nature of the disease, symptoms, result of relapses, and mental impairment caused by the disease and upon our evaluation of the evidence before the Tribunal, the Tribunal's finding that the Petitioner's mental illness caused mental incapacity was arrived at correctly.

[73] This Court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual, employment environment, and society at large, from the adverse effects of mental illnesses and disorders. Therefore, in determining cases of mental incapacity, and bearing in mind that conclusions cannot be transposed from one case to another, we establish the following guidelines for courts to follow in matters which involve an assessment of mental incapacity:

1. *Mental incapacity includes but is not limited to a person's inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.*
2. *Mental incapacity can result from mental illness but it does not necessarily follow that mental illness equals mental incapacity.*
3. *Mental incapacity must be diagnosed by a qualified professional.*
4. *A court is bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee is, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.*

5. *If an employee's mental illness is adversely affecting their ability to perform their duties, in some instances, the employer, following due process, may terminate the employee's contract of employment or recommend the employee's removal from office.*
6. *A court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee's mental illness affects their work duties.*
7. *Where a person is deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible.*

iii. Whether mental incapacity rendered the Petitioner unable to perform the functions of the office of a judge of the ELC.

[74] It was the Petitioner's case that her inability to perform the functions of an office of a Judge was not established.

[75] This necessitates us to consider the functions of a Judge of the ELC. Section 7 of the Environment and Land Court Act (ELC Act) stipulates that a person shall be qualified for appointment as Judge of the Court, if the person possesses the qualifications specified under Article 166(2) of the Constitution; and has at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land. Section 8 of the ELC Act provides that a Judge shall hold office until he resigns, retires, or is removed from office in accordance with the Constitution or is transferred from the Court to the High Court or other court with the status of the High Court.

[76] Section 13 of the ELC Act stipulates that the Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land.

[77] Section 13 (2) of the ELC Act provides that the ELC Court in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, shall have power to hear and determine disputes relating to; environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources; compulsory acquisition of land; land administration and management; public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

[78] The Tribunal considered several aspects in determining whether the mental incapacity of the Judge led to the inability to discharge her duties as Judge of ELC. Firstly, they contemplated whether the Petitioner's performance required appraisal before a decision was made by the JSC to petition for the appointment of the Tribunal. On this aspect, the Tribunal considered the evidence of Dr. Kimalu, Director of DPOP, who disclosed that the Petitioner was not meeting her set monthly targets or prescribed minimum thereof.

[79] The Tribunal also considered the evidence retired Chief Justice David Maraga, Justice Okong'o, the then Presiding Judge, ELC, Justice M'Inoti (the then Director JTI), the Chief Registrar of the Judiciary (CRJ), Dr. Fredrick Owiti (Petitioner's witness) and Dr. Catherine Mutisya, the Acting Director General for Health that revealed that the Judge would be away from work occasionally affecting her performance.

[80] The Tribunal also noted that the Petitioner conceded that she was aware of the required minimum set for her performance and did not require an external appraiser to inform her that she was not performing. Due to this fact, the Tribunal found that the Petitioner was aware of her performance shortcomings and at the time she was stationed at the ELC Milimani, she had the opportunity to improve but was unable to do so due to her mental illness. The Tribunal also found that by the time of her transfer to JTI, it was evident

that her performance was below the expected standard and there was need for intervention.

[81] Our consideration is that the ELC hears and determines complex legal issues in relation to a finite resource often with numerous parties and lengthy hearings due to the voluminous documents to be scrutinised and parties to be heard. The performance reports submitted by DIPOP demonstrated that the Petitioner had considerably handled several matters but had numerous judgments and rulings that were pending delivery.

[82] The record also shows that the Petitioner's performance as a Judge in the period under review was affected by absenteeism caused by her mental illness. Her absence was not only when she was hospitalised but also when she fell ill and not admitted to hospital. Her absence from duty became acute in the Financial Years 2015/2016 and 2016/2017. According to the Presiding Judge of ELC, her absence from duty resulted in cases in her docket being re-allocated to other Judges when applications were filed under Certificates of Urgency. The cases due for hearing were adjourned to other dates when the Judge resumed duty after recovering from illness. This negatively impacted the performance of the ELC due to the burden of caseload assumed by other Judges in the absence of the Petitioner.

[83] We also note that the Presiding Judge testified that he received numerous complaints from advocates and litigants against the Petitioner in relation to her conduct in court and on delays in rendering judgments and rulings. The retired Chief Justice also testified that he had received similar numerous complaints from advocates and the public about the Petitioner. In addition, the Chief Justice testified that some advocates complained of instances when the Petitioner was not concentrating on the case before her and at times would ask questions totally unrelated to the case at hand. Due to no fault of her own, it is clear to us that the Petitioner was not performing at her optimum mental level.

[84] We are, in addition, conscious of the side effects of the use of the drugs; Clozapine, Haloperidol and Risperidone some of which include drowsiness, lethargy and tiredness. These can impact on the concentration and alertness of the Petitioner. We also note from the record that the Petitioner's doctor had prescribed Benzhexol to counter some of the side effects and thus by parity of reason, the Petitioner was experiencing some side effects.

[85] We affirm the requisite standard of proof as that applied by the Tribunal, *'below beyond reasonable doubt but higher than a balance of probabilities*', in addressing the issue at hand. The Tribunal, on the basis of the evidence by the Petitioner's immediate supervisors and scope of work in the office of a judge of the ELC as well as having identified the mental illness schizophrenia as the cause of her mental incapacity, concluded that the Petitioner unable to perform the functions of the office of a judge of the ELC. We find no reason to interfere with this finding, save to add that while considering this illness and its attendant consequences on mental capacity, the Tribunal was well within its rights to consider its treatment and psychosocial support both integrally linked to the ability of the Petitioner to perform her functions of office.

[86] We find it necessary at this stage, based on persuasive comparative jurisdiction outlined in earlier part of this Judgment, to establish a two-stage test that will guide courts when they are faced with the issue of establishing whether mental incapacity affects the performance of a person in their work duties. Firstly, there must be proof that a person has an illness or injury that affects the manner in which the brain or mind works. Secondly, that the illness or injury affects the person to the extent that they are unable to perform their duties to the requisite standard.

[87] We find it necessary to make some observations regarding procedural fairness of the Tribunal proceedings. This is because the Petitioner in her grounds of appeal contends that the Tribunal failed to consider the protections afforded to the Petitioner by Articles 47 and 50 of the Constitution and the Fair

Administrative Action Act, 2015. On the other hand, the respondent submitted that the proceedings complied with the rules of natural justice. This calls upon us to review the report of the Tribunal and its Hansard report in determining whether there was procedural fairness by the Tribunal. Before doing so, we also note that it is the Petitioner's case that she was subjected to unfair administrative actions or process before the JSC. However, as we observed in the *Mutava case*, our jurisdiction extends only to enquiry of the proceedings of the Tribunal and not the JSC. We shall therefore turn to consider the process by the Tribunal prior to arriving at its recommendation.

[88] Section 13 of the second schedule of the Judicial Service Act (JSA), 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. Part IV of the said schedule provides for the hearings and evidence before the Tribunal. It provides in section 8 that the notice and list of allegations shall be served upon a judge who is the subject of the Tribunal proceedings at least fourteen (14) days before the date of hearing. Section 9 (1) provides that the hearing shall be held in private save that the Judge may choose to have the hearing in public. Section 10 provides that the Judge shall have the right to be present at the hearing and is also entitled to legal representation by counsel. Section 12 provided that the Tribunal may summon witnesses and the Judge has the right to cross-examine the witnesses. Likewise, the Judge has the right to call evidence and the Tribunal's Assisting Counsel has the right to cross-examine any witnesses called by the Judge.

[89] In light of these provisions and upon consideration of the Report of the Tribunal, we find that the Tribunal was compliant with the provisions of the second schedule on how a hearing by the Tribunal is conducted. We also point out that the Petitioner did not also specifically fault how the Tribunal failed to comply with the rules of natural justice during the hearing. We find no basis to fault the Tribunal for failing to adhere to procedural fairness.

[90] Consequently, the Petition of Appeal fails. Before we give our Orders, we take Judicial Notice that mental health issues are becoming quite prevalent in the Country. In this regard, it would be prudent for the Legislature to amend the Mental Health Act (Cap 248) guided by best practices and provide for *inter alia* a clear definition of mental capacity, the test for mental capacity, insight, pension for Judges and other state officers who may be removed from office due to mental incapacity, and so forth. In this regard, the Legislature would also need to align the provisions of the Pension Act (Cap 289) with any new amendments. Parliament should also consider aligning the Employment Act with mental health considerations and accommodations such as the provision of clauses that place an onus on employers to ensure that they create a safe working environment and that mental health issues are not caused or exacerbated by work-related stress; clauses that provide that employers have a legal duty to reasonably accommodate employees with mental illness providing the same can be done without undue hardship to the employer; what is 'reasonable' will depend on the facts of each case; to give but a few examples.

[91] We also note that despite the Petitioner's ailment, she exuded great determination in the functions of her office as a Judge whenever she was able to do so. We point out that the Petitioner's mental illness that led to mental incapacity in the performance of her functions is not her fault or her own doing.

[92] We are also guided by the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care Adopted by General Assembly resolution 46/119 of 17 Dec. 1991. It provides in principle 1 (7) as follows:

> **7. Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition, to ensure the protection of his or her interest.**

[93] In light of the foregoing, although we have established that the Petitioner is unable to perform the functions of the office of a Judge which require immense alertness, endless concentration, presence, a good frame of mind to observe the demeanour of witnesses, back-breaking research, writing/typing skills, this is not to mean that she cannot undertake other duties pertaining to the legal profession. She can.

[94] This Petition of Appeal fails because the Tribunal duly established the ground for the removal of the Petitioner due to inability to perform functions of the office arising from mental incapacity.

F. ORDERS

[95] Accordingly, we make the following orders;

a) *The Petition of Appeal dated 19th May 2022 is hereby dismissed.*
b) *The Tribunal's finding that the Petitioner was unable to perform the functions of her office due to mental incapacity is affirmed.*
c) *The Tribunal's recommendation to the President for the Petitioner's removal from office under Article 168(1)(a) of the Constitution is affirmed.*
d) *No orders as to costs.*
e) *We hereby direct that the sum of Kshs. 6000/- deposited as security for costs in the appeal be refunded to the Petitioner.*

DATED and **DELIVERED** at **NAIROBI** this **12th** day of **September 2023.**

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M.K IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA