



**REPUBLIC OF KENYA**

**THE SUPREME COURT OF KENYA**

**HON. JUSTICE SAID JUMA CHITEMBWE v. THE TRIBUNAL APPOINTED TO  
INVESTIGATE INTO THE CONDUCT OF THE HON. JUSTICE SAID JUMA  
CHITEMBWE, JUDGE OF THE HIGH COURT**

*(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**SC PETITION NO. E001 OF 2023**

**DATE OF JUDGMENT: 28<sup>TH</sup> DECEMBER 2023**

**MEDIA SUMMARY**

---

*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.*

**Orders: The Court dismisses this Petition.**

**The Court stresses that**, in their everyday lives, public or private, judges are expected to exhibit the highest standards of impartiality, fairness, and ethical behavior. They must remain unbiased and refrain from any actions or expressions that may compromise their objectivity; display a demeanor that commands respect and instills public confidence in the office of a judge. Maintaining independence from external influences is crucial to ensuring the credibility of the judiciary, and judges are obligated to resist any attempts at undue influence or interference, hence the adage “the robe magnifies the conduct”. The Oath of Office of a judge and the Code of Conduct formulated pursuant to the provisions of Article 168(1)(b) of the Constitution enjoin judges to preserve the integrity of the judiciary and to avoid even the appearance of impropriety.

### **Background**

In the month of November 2021, the attention of the Judicial Service Commission (the JSC) was drawn to several video recordings, social media posts, and audio cell phone recordings attributed to Hon. Mike Mbuvi Sonko, the former Governor of Nairobi City County, in which the conduct of the petitioner was brought into question, because in the recordings he was exposed discussing with persons, including, Hon. Sonko, the sale of property number **Kwale/Galu/Kinondo/779** (parcel no. 779) which had been the subject of a succession cause, **H.C Succ. Cause Malindi**

**No. 97 of 2015, In the Matter of the Estate of Peter Werner (Deceased)** over which the petitioner had presided as a Judge. Among the things discussed at those meetings was the possible withdrawal of an appeal, **Malindi Civil Appeal No. 32 of 2018, Pacific Frontiers Seas Limited v. Jane Mutulu Kyengo & Another**, that had been lodged against his decision in the said succession cause.

In other video and audio recordings, the petitioner is presented discussing yet another matter with Hon. Sonko, **Mike Sonko Mbuvi Gideon Kioko & another v. Clerk, Nairobi City County Assembly & 9 others**, Constitutional Petition No. E425 of 2020 (consolidated with Petition No. E014 of 2021) [2021] eKLR and **Okiya Omtatah Okoiti & 9 others v. Anne Kananu Mwenda (1st Respondent/Cross-Petitioner) & 6 others; Mike Mbuvi Sonko Kioko Gideon & 9 others (Interested Parties)** (the consolidated petitions) in which Hon. Sonko was the petitioner. The consolidated petitions were determined against Hon. Sonko by a three-judge bench presided over by the petitioner in a judgment rendered on 24<sup>th</sup> June 2021. The effect of that decision was the confirmation of the impeachment of Hon. Sonko. The discussion in the recordings revolved around possible grounds for challenging the judgment in the Court of Appeal.

Thereafter, on 18<sup>th</sup> November 2021, the petitioner appeared on a live television interview with Kenya Television Network (KTN) News, hosted by Ms. Sophia Wanuna, in which he made various concessions and admissions. For example, he disclosed that both Mr. Amana Saidi Jirani and Hon. Sonko, were his relatives and/or were personally known to him. Mr. Jirani had been alleged in the video clips to be holding parcel no. 779 as the petitioner's proxy.

Based on these episodes, JSC received four complaints which were later withdrawn under unclear circumstances. Following the withdrawal or termination of these petitions, and given the public interest generated by the social media posts, JSC resolved on 22<sup>nd</sup> November 2021 to initiate, on its own motion, proceedings for the removal of the petitioner under the provisions of Article 168(2) of the Constitution. To that end, the JSC constituted a Committee from its membership to investigate the allegations against the petitioner and report its findings to the full JSC as soon as possible.

Based purely on the material on record, the Committee in unanimity found merit in the motion and declared that it disclosed gross misconduct and breach of the Code of Conduct for Judges to warrant a recommendation to the President to establish a Tribunal to investigate the petitioner's conduct. The Committee submitted its report to the full JSC, which similarly unanimously adopted it. A petition was submitted to the former President, Hon. Uhuru Kenyatta, to appoint a Tribunal pursuant to Article 168(4) and (5) of the Constitution. Following this petition, the former President, by operation of the law suspended the petitioner from office and at the same time appointed a Tribunal to inquire into the matter.

After hearing the evidence, the Tribunal was equally convinced that the allegations brought against the petitioner had been proved and concluded in unanimity that the petitioner's conduct was in breach of the Code of Conduct and Ethics and amounted to gross misconduct under Article 168(1) (b) and (e) of the Constitution. Accordingly, pursuant to Article 168(7)(b) of the Constitution, the Tribunal recommended to the President that the petitioner be removed from office of Judge of the High Court.

Aggrieved by the outcome of the Tribunal, the petitioner lodged a petition before the Supreme Court on 12 grounds which delineated the following issues for determination:

- i. *Whether the Tribunal had jurisdiction to review the proceedings before the JSC;*
- ii. *Whether the Tribunal failed to uphold the doctrine of Judicial independence and immunity;*
- iii. *Whether the electronic evidence admitted by the Tribunal was unlawfully or illegally procured in violation of the petitioner's constitutional rights under Articles 31 and 50(4) of the Constitution;*
- iv. *Whether the allegations against the petitioner were proved to the required standard; and*
- v. *Who should bear the costs.*

Upon considering the appeal, the Supreme Court unanimously dismissed the petition holding that:

**Issue 1:** The JSC ensured that the proceedings before it were conducted in consonance with the Constitution and the law, upholding the rules of natural justice and respecting the petitioner's constitutional rights. Accordingly, the Court found that there was no basis upon which to conclude that the JSC violated the petitioner's right to fair administrative action, nor did the Tribunal, for rejecting the invitation to interrogate the proceedings before the JSC, for which it had no powers.

**Issue 2:** In view of the admitted relationship, though distant, between the petitioner and Hon. Sonko and the former's failure to disclose the same to the Hon. Chief Justice, his colleague Judges on the bench in the consolidated petition, and the parties, the Court cannot find fault in the Tribunal's conclusion that the petitioner's conduct divested him of any claim to protection under the principles of judicial immunity. Judicial immunity will only be available for actions or omissions of a judge done or omitted to be done in good faith and in the lawful performance of a judicial function. The petitioner's conduct could not accord him protection under the principles of judicial immunity. They were in excess of his mandate as a Judge. Judges do not entertain parties whose cases are pending before or have been determined by them; they do not invite litigants into the privacy of their homes; and they do not discuss cases they have heard or are hearing or advise them on what steps to take to advance to the next level. A judge is an impartial arbiter-referee with no personal interest in the outcome of a case he or she tries. A judge cannot decide a case impartially if his or her mind is mired in benefiting from the subject matter of the case. Besides, a judge cannot entertain a case in which a party is a relative or a close acquaintance.

**Issue 3:** Though the video and audio recordings were covertly recorded, they were recorded by participants in the conversations. Accordingly, the Court found that the audio and video recordings produced did not contravene the petitioner's right to privacy under Article 31 and their admission into evidence did not render the inquiry before the Tribunal detrimental to the administration of justice in contravention of Article 50(4) of the Constitution. On the allegation of entrapment, the Court found that the recordings were procured by the petitioner's relatives and acquaintances, and even in the absence of the recordings, there was independent and direct evidence of persons who were present and participated fully in the recorded conversation. Those present testified as to who they were and what their engagements were in different sectors of the economy. None of them was a government agent or an enforcement officer and therefore the allegation lacked basis.

**Issue 4:** The evidence presented established that the petitioner’s conduct was in breach of the Code of Conduct and Ethics and also amounted to gross misconduct or misbehaviour contrary to Article 168(1) (b) and (e) of the Constitution.

**Issue 5:** No orders as to costs have been made.

