REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NO. E001 OF 2023

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

— BETWEEN—

HON. JUSTICE SAID JUMA CHITEMBWE.....PETITIONER

-AND-

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

(*Being an Appeal against the Report and Recommendation of the Honourable Tribunal Appointed under Article 168(5)(b) of the Constitution of Kenya to Inquire into the conduct of Hon. Mr. Justice Said Juma Chitembwe dated 7th February 2023)*

Representation:

Patrick Ochwa & Peter Wena for the appellant
(*P.W. Wena & Co. Advocates*)

Mr. Oscar Eredi for the respondent
(Attorney General's Chambers)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Judges are entrusted with a significant responsibility to uphold the principles of justice and maintain the integrity of the judicial and legal system. 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. They must 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. Transparency, diligence, and a commitment to upholding the rule of law are paramount in guiding judges in the proper conduct of their duties and fostering public trust in the legal system they represent.

[2] Although Judges have guaranteed tenure until mandatory or early retirement age, they can be removed only for reasons and through the process outlined in the Constitution and the law. These principles are espoused not only in the oath of office of a judge but also in some of the international and regional human rights instruments which in turn are replicated in the Constitution and relevant statutes. Those international and regional instruments include the International Covenant on Civil and Political Rights (1966), the United Nations Basic Principles on the Independence of the Judiciary, 1985 Commonwealth Principles (Latimer House), 1988, African Charter on People and Human Rights, 1981.

[3] A judge can be removed from office only on specific grounds, namely the inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour. Where any or some of these grounds are alleged, the concerned

Judge is entitled to due process before an independent tribunal is appointed to inquire into the alleged grounds. Similarly, should the tribunal recommend removal, the Judge has the right to challenge the decision of the Tribunal through an appeal process to this Court.

[4] The petition before us has been lodged pursuant to Article 168(8) of the Constitution by the Hon. Mr. Justice Said Juma Chitembwe, (the petitioner), a Judge of the High Court, who is challenging the decision of the Tribunal that has recommended to the President his removal from office for gross misconduct.

B. BACKGROUND

[5] The petitioner was appointed to the High Court as a Judge on 2nd April 2009 and has an aggregate experience of 32 years in the legal profession, having been admitted to the Bar in 1991. He has served the nation in different court stations around the country.

[6] When the events giving rise to these proceedings came up, the petitioner was serving at the High Court Civil Division in Nairobi. 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 (Hon. 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 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.

[7] 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)*** Nairobi High Court Constitutional Petition No. E005 of 2021 (consolidated with Petition No. E433 of 2020, E007 of 2020, E009 of 2020, E011 of 2021, E012 of 2021, E013 of 2021, E015 of 2021, E019 of 2021 and E021 of 2021) (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 24th June 2021. The discussion in the recordings revolved around possible grounds of appeal against this judgment.

[8] Thereafter, on 18th November 2021, the petitioner appeared on a live television interview with Kenya Television Network (KTN) News, hosted by Ms. Sophia Wanuna, in which the petitioner made various concessions and admissions. For example, he disclosed that both Mr. Amana Saidi Jirani (Mr. Jirani) and Hon. Sonko, were his relatives 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.

[9] Based on these episodes, JSC received the following complaints against the petitioner:

a) Petition No. 69 of 2021 by Imgard Biege and David Leboo Olekilusu
b) Petition No. 80 of 2021 by Stephen Owoko and John Wangai
c) Petition No. 91 of 2021 by Peter Agoro and Jacob Omondi
d) Petition No. 92 of 2021 by Francis Wambua.

All these petitions were subsequently withdrawn or terminated by those who had brought them under unclear circumstances.

[10] Following the withdrawal or termination of these petitions, and given the public interest generated by the social media posts, JSC resolved on 22nd 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.

C. LITIGATION HISTORY

i. Proceedings before the Judicial Service Commission

[11] Pursuant to its resolution of 22nd November 2021, and in terms of Section 19(4) of the Judicial Service Act (the JS Act), JSC appointed a panel of five of its Commissioners to constitute a Committee to consider the allegations against the petitioner and report its findings to the full JSC as soon as possible.

[12] The Committee identified, interviewed, and recorded statements from 18 persons of interest according to the provisions of Article 252(1)(a) and 3(b) of the Constitution and Section 42 Part VIII of the JS Act to ascertain the veracity of the allegations made against the petitioner. Hon. Sonko and 13 others recorded statements.

[13] By a letter dated 23rd November 2021, JSC communicated to the petitioner its decision to commence removal proceedings against him on its own motion under Article 168(1) and (2) of the Constitution. The letter outlined the grounds upon which it was seeking the removal of the petitioner together with relevant supporting material. The grounds cited included impropriety, gross misconduct, and misbehaviour. The provisions of Articles 10, 73, 74, 75(1), 168(1), and 232 of the Constitution and the Judicial Service (Code of Conduct and Ethics) Regulations 2020 (Code of Conduct) were similarly relied upon.

[14] After the dispatch of the letter of 23rd November 2021, JSC by another letter dated 8th December 2021, forwarded to the petitioner a flash disk containing all the video recordings, social media posts, and cell phone recordings. The petitioner was required to respond to the allegations within fourteen (14) days from the date of service. However, at the request of the petitioner's counsel, P. W. Wena & Co.

Advocates, JSC granted the petitioner an extension of a further thirty (30) days from 25th November 2021 within which to respond. As a result, the hearing already scheduled had to be adjourned to a later date.

[15] Upon further evaluation of the statements together with the evidence so far collected, the Committee identified further grounds against the petitioner, which were served upon him on 16th March 2022 by a letter dated 14th March 2022. The petitioner was requested to respond to these further allegations within seven (7) days from the date of service.

[16] No response to the two letters dated 23rd November 2021 and 14th March 2022 was received. Instead, the petitioner through his counsel, filed a Notice of Preliminary Objection dated 20th December 2021 contesting the hearing of the motion on the grounds that the video clips and audio recordings that formed part of the evidence were inadmissible and amounted to illegally obtained evidence contrary to Article 31(d) of the Constitution. In the Committee's view, however, the Preliminary Objection did not raise pure points of law as held in the case of ***Mukisa Biscuits Manufacturing Company Ltd*** (1969 EA at p. 696), and in any event, the issue as to whether the video clips and audio recordings were illegally obtained could only be canvassed during the hearing of the own motion proceedings. In any event, the petitioner had not filed any response to the motion proceedings, and therefore the Preliminary Objection lacked merit and was dismissed, and the motion was declared as undefended in the absence of any response.

[17] 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 suspended the petitioner from office by a Gazette Notice No. 5540 dated 17th May 2022 and at the same time appointed a Tribunal to inquire into the matter.

ii. Proceedings before the Tribunal

[18] The terms of reference of the seven-member Tribunal were:

> *"To consider the Petition for the removal of the Hon. Justice Said Juma Chitembwe from office that was submitted by the Judicial Service Commission and to inquire into the allegations therein."*

[19] In the discharge of its functions, the Tribunal was to:

> *"(a) Prepare and submit a report and its recommendations thereon expeditiously; and*
>
> *(b) Exercise all the powers conferred upon it by law for the proper execution of its mandate".*

[20] Vide a Gazette Notice No. 6608 dated 8th June 2022, the Tribunal published its Rules of Procedure under Section 31(5) of the JS Act and by rule 8(2) of those rules, a List of Allegations and Summary of Evidence in support was prepared and served on the petitioner on 28th June 2022. This was followed on 25th July 2022, by a case conference which was attended by the petitioner and his Counsel, Mr. Patrick Ochwa and Mr. Peter Wena. The List of Allegations and Summary of Evidence in support of the allegations were read out to the petitioner, who was informed of his rights. He elected to have a hearing in camera under rule 9(1) aforesaid. Thereafter, the hearing commenced on 19th September 2022 and was concluded on 25th January 2023. Counsel assisting the Tribunal called a total of 25 witnesses. On his part, the petitioner gave oral testimony but did not call any witnesses.

[21] Based on the evidence and submissions by the petitioner and the Assisting Counsel, the Tribunal condensed for determination the following issues:

a. *Whether in light of Article 165 of the Constitution, the Tribunal had jurisdiction to hear and determine the allegations against the petitioner.*

b. *If the answer to the foregoing issue is in the affirmative, whether the Tribunal has the jurisdiction to hear and determine the locus and jurisdiction of the JSC under Article 168(2) and (4), or allegations of breach of the constitutional rights of the Judge by the JSC.*

c. *Whether the petitioner was protected by the principles of judicial independence and absolute immunity.*

d. *On the admissibility of the evidence adduced before the Tribunal, four sub-issues were identified thus;*

   (i) Whether the evidence adduced in support of the allegations was precluded from admissibility by the rules of natural justice and relevance.

   (ii) Whether the video and audio recordings produced were in contravention of the provisions of Article 31 as read with Article 50(4) of the Constitution and therefore inadmissible.

   (iii) Whether the video and audio recordings are inadmissible for having been obtained in furtherance of a scheme to entrap the Judge.

   (iv) Whether the video and audio recordings were edited or modified to suit Hon. Sonko's alleged revenge narrative and were therefore inadmissible

e. *Whether the allegations against the petitioner had been proved to the required standard.*

[22] On *whether in light of Article 165 of the Constitution, the Tribunal had jurisdiction to hear and determine the allegations against the Judge,* the Tribunal

held that nothing, either in the Constitution or in law, prohibits the Tribunal from interpreting the provisions of the Constitution which came within the purview of its task of inquiring into whether the grounds for the removal of a Judge have been established. Ultimately, the Tribunal held that it had jurisdiction to hear and determine the allegations against the petitioner regarding purported contraventions of the Constitution.

[23] On *whether the Tribunal had the jurisdiction to hear and determine the locus and jurisdiction of the JSC under Article 168(2) and (4), or allegations of breach of constitutional rights of the Judge by the JSC,* the Tribunal was of the view that it cannot arrogate to itself the jurisdiction either to entertain or to determine any alleged acts or omissions of and or proceedings before the JSC prior to its constitution; that the alleged acts or omissions of JSC as claimed by the petitioner as constituting breaches of the Constitution are matters which should have been placed before and dealt with by the High Court under Article 165 of the Constitution.

[24] In the Tribunal's view, JSC's consideration of its own motion against the petitioner was a separate constitutional process that was concluded upon submission of its recommendation to the President; that the consideration of the petition by the President leading to the appointment of the Tribunal was also a separate constitutional process which was also concluded, and the Tribunal's conduct of the matter is a third separate constitutional process under Article 168 of the Constitution. Therefore, assuming jurisdiction to consider infractions of JSC, if any would amount to sitting on appeal or reviewing a decision of JSC on a concluded constitutional process.

[25] On the c*laim of judicial independence and absolute immunity,* the Tribunal noted that, while Article 160(5) of the Constitution and Section 6 of the Judicature Act protect judges and judicial officers from liability in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of

a judicial function, judicial immunity is not absolute. Accordingly, the Tribunal found that the conduct of the petitioner which it was inquiring into did not relate to the discharge of his judicial functions. Its mandate was to investigate the petitioner's conduct which was alleged to be in breach of the Code of Conduct and Ethics and whether the conduct amounted to gross misconduct or misbehaviour. That task required the Tribunal to consider whether the discussions surrounding the sale of the property subject of the petitioner's decision in the succession cause, the advice on points to take on appeal in a matter the petitioner had presided over and his intervention on the consent to compromise the appeal before the Court of Appeal at Malindi challenging his decision in the succession cause as well as the admissions that he was related to Hon. Sonko, amounted to gross misconduct or misbehaviour. The Tribunal found in the circumstances and on the facts of this matter that the concept of judicial immunity did not apply.

[26] On *whether the evidence adduced in support of the allegations was precluded from admissibility by the rules of natural justice and relevance,* the Tribunal explained that it took all necessary steps to furnish the petitioner with all documents and exhibits within a reasonable time. In addition, the petitioner was accorded ample opportunity to challenge the evidence against him, not to mention that the Tribunal entertained all the objections raised by the petitioner and gave its determination on each of them. For these reasons, the Tribunal was of the view that the evidence produced complied with the rules of natural justice, the Tribunal being guided by the provisions of rules 11 and 17(4) and (5) of its Rules as well as the principles set out in Section 5 of the Evidence Act. The Tribunal was therefore duly satisfied that the evidence presented before it was relevant.

[27] On *whether the video and audio recordings produced were in contravention of the provisions of Article 31 as read with Article 50(4) of the Constitution and therefore inadmissible,* the Tribunal expressed the view that Article 50(4) establishes a dual threshold for such evidence to be excluded. First, the evidence must have been obtained in a manner that violates a right or fundamental freedom.

Second, the admission of the evidence would render the trial unfair or detrimental to the administration of justice. Concerning Article 31, the Tribunal noted that the petitioner discussed cases pending determination and land transactions of a property, the subject matter of litigation with third parties. Further, he willingly discussed these matters on a live television interview, a public forum. As such, the Tribunal was of the view that in the circumstances the matters became public in nature, the petitioner having, by his own conduct removed them from the private realm. He could not also be heard to complain that there was a violation of his right to privacy in the recording of the meetings at his residence.

[28] Even though the Tribunal found that the audio and video recordings were covertly taped, it however underscored the fact that the recordings were not done illegally. Guided by the cases cited with regard to electronic recording, the Tribunal outlined the following four fundamental principles to be considered for the covert recordings to qualify for admission in evidence:

a. *The recording must have been done by a participant in the conversation and not by a third party;*
b. *The recording was of a conversation between parties who were privy to the truth of the matter they were discussing and were freely talking about it;*
c. *The court or tribunal has direct evidence of the participant who made the recording and;*
d. *The recording is of great probative value.*

[29] Applying these principles to the evidence, the Tribunal was satisfied that the above conditions were met as the video and audio recordings were by participants in the conversations or their agents; that the video and audio recordings were of immense probative value in the determination of the matter before it; and that the recordings were not obtained in a manner that contravenes the provisions of Articles 31 and 50(4) of the Constitution and was therefore admissible.

[30] On *whether the video and audio recordings were inadmissible for having been obtained in furtherance of a scheme to entrap the Judge,* the Tribunal noted that other than making the bare assertion that the visits to his residence and the recordings were a scheme to entrap him, the petitioner did not demonstrate how the alleged actions of Hon. Sonko, Mr. Francis Wambua Kivuva (Mr. Kivuva), Mr. Jirani, Mr. Jimmy Ibrahim Askar (Mr. Askar) and others amounted to entrapment. The Tribunal further noted that the persons who obtained the recordings were private citizens who were participants in the meeting and not law enforcement officers. There was therefore nothing before the Tribunal that fell within the legal definition of entrapment. Further, there was no evidence before the Tribunal that he objected to or questioned the presence of those who accompanied his guests. Accordingly, the Tribunal concluded that the petitioner's claim of entrapment had no basis.

[31] On *whether the video and audio recordings were edited or modified to suit Hon. Sonko's alleged revenge narrative and therefore inadmissible,* the Tribunal first noted that the recording devices were examined by PC Mutinda, a certified digital forensics examiner who prepared a Memorandum dated 4th October 2022 and two separate Certificates of Authenticity dated 29th September 2022 and 8th October 2022, respectively. Mr. Kivuva produced a Certificate of Authentication of Video dated 24th November 2022 and a Certificate of Authenticity of Video dated 3rd October 2022. The memorandum and certificates, in the Tribunal's assessment met the dictates of the law regarding certification of the reliability of electronic evidence.

[32] The Tribunal further noted that apart from the petitioner failing to particularize the allegation, he admitted that the recordings depicted him, Hon. Sonko, Mr. Askar, Mr. George Omollo Ngasi and Mr. Peter Ngati Mutisya and thereby gave first-hand account of the events depicted in the recordings. The Tribunal watched and listened to the video and audio recordings and noted that they were clear and continuous and the participants' contribution to the matters

that were being discussed could be heard. Because of the foregoing, the Tribunal rejected the petitioner's assertion that the video and audio recordings were edited or modified to suit Hon. Sonko's alleged 'revenge' narrative.

[33] On w*hether the allegations against the Judge were proved to the required standard,* the Tribunal considered each allegation and drew its conclusions on each as follows, beginning with allegations one and six, which were premised on similar statements of misconduct.

Allegation One: Lack of impartiality contrary to Articles 10 and 168(1) of the Constitution, and Regulations 11(3)(b), 16, 20, 21 and 30 of the Code of Conduct and Ethics; and

Allegation Six: Non-Disclosure of conflict-of-interest contrary to Articles 75 and 168(1) of the Constitution, and Regulations 19, 20 and 21(1)(c), 21(1)(d), 21(1)(e) and 21(1)(h) of the Code of Conduct and Ethics

[34] The alleged misconduct under these two combined heads was that the petitioner while serving as a Judge of the High Court of Kenya, failed to disclose to the Hon. Chief Justice, his colleague Judges, and parties or failed to disqualify himself from proceedings in the consolidated petitions, circumstances having arisen in which his impartiality might have been reasonably questioned. In particular, the petitioner failed to disclose that he knew Hon. Sonko, as he had ongoing dealings with him over parcel no. 779 aforesaid.

[35] The Tribunal upon analysis of the evidence found that the petitioner had a relationship with Hon. Sonko through marriage, his late step cousin having married Hon. Sonko's aunt. Further, by his own admission and based on the evidence of Hon. Sonko and corroborated by the evidence of Mr. Weldon Siongok, the petitioner held two meetings with Hon. Sonko on 16th March 2021 and 22nd May 2021 during the pendency of the consolidated petitions. In addition, on those dates, it was demonstrated that there was communication between the petitioner,

Mr. Jirani, and Mr. Askar who in turn communicated with Hon. Sonko. All these parties were demonstrated in the video, audio recordings, and oral testimony to have had interactions over the transaction involving land parcel no. 779. The Tribunal was also convinced that the petitioner had an interest in parcel no. 779 in which Mr. Jirani was acting as his proxy, and that he keenly followed and directed the intended sale of the parcel to Mr. Askar in a transaction involving Hon. Sonko.

[36] In view of the foregoing, the Tribunal concluded that the facts presented circumstances to compel a reasonable person in the petitioner's shoes to disclose the same to the Hon. Chief Justice, the petitioner's colleague Judges on the Bench, and parties in the consolidated petitions, and to proceed to recuse himself from sitting on the petitions. The Tribunal therefore found that the petitioner was in breach of Articles 10, 50(1), 75, 232 of the Constitution, and Regulations 9, 19, 20 and 21 of the Code of Conduct and Ethics. The Tribunal, having considered the totality of the evidence in respect of Allegations One and Six, found that the two related allegations had been established to the required standard.

Allegation Two: Lack of integrity contrary to Articles 10, 73(2)(b), 75(c), and 168(1) of the Constitution, section 13 of the Leadership and Integrity Act, and Regulations 11(3)(a), 11(3)(b), 17(3), 20, 21 and 30 of the Code of Conduct and Ethics

[37] The allegation against the petitioner under this head was that while serving as a Judge of the High Court of Kenya, the petitioner failed to exercise his judicial functions as a Judge independently by engaging with persons who were litigants in matters that were before him. The particulars of the allegations were to the effect that the petitioner offered legal advice to Hon. Sonko on the viability of an appeal and the proposed grounds upon which the appeal against his own judgment in a three-judge bench consolidated petitions could be challenged.

[38] The Tribunal found that there was no dispute that two meetings took place on 9th and 10th July 2021 in the petitioner's residence in Mountain View Estate

involving the petitioner, third parties, and Hon. Sonko, who was a principal party in the petition concerning his impeachment. The Tribunal further found on the admission of the petitioner and based on the evidence of Hon. Sonko and Mr. Jirani, that there was a discussion about the possible grounds of appeal against the aforesaid High Court judgment. The two meetings also discussed with litigants a transaction involving land Parcel nos. 779 and 1222 that had been the subject of litigation before the petitioner in ***Malindi Succession Cause No. 97 of 2015.***

[39] The Tribunal found that contrary to the assertion by the petitioner that he did not advise Hon. Sonko on the grounds of appeal, it was *contra bonos mores* for a judge to engage in a conversation with a litigant about possible grounds of appeal. And it mattered not that the advice on possible grounds of appeal was given after the High Court had delivered its judgment on 24th June 2021, given seven (7) days stay order, and that by the time the matter was mentioned after the seven (7) days, Hon. Sonko had already obtained permanent orders of stay from the Court of Appeal.

[40] In the circumstances, the totality of the evidence before the Tribunal indicated that the petitioner conducted himself in a manner that demonstrated a singular lack of integrity by engaging with parties who were litigants before him. The Tribunal held that this was contrary to Articles 10, 73(2)(b), 75(c) of the Constitution as well as Regulations 11(3)(a) and (b), 17(3), 20, 21 and 30 of the Code of Conduct and Ethics, based on which the Tribunal was persuaded that Allegation Two was established to the required standard.

Allegation Three – Lack of accountability, involvement in corrupt practices, and impropriety contrary to Articles 10, 75 and 168(1) of the Constitution, and Regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Code of Conduct and Ethics

[41] According to this allegation the petitioner, while presiding over ***Malindi Succession Cause No. 97 of 2015***, conducted himself in a manner inconsistent

with the dignity of his judicial office by acquiring a beneficial or proprietary interest in a property that formed the subject matter of the cause, an action that did not exhibit, uphold and promote the high standards of judicial conduct required to maintain public confidence in the Judiciary. It was alleged that the petitioner having heard and determined the cause actively involved himself in the transfer of parcel no. 779, which was the main subject matter in the succession cause to Mr. Jirani to hold on his behalf.

[42] In view of the arguments placed by both sides before it, the Tribunal considered in this allegation the question for determination as being whether the petitioner had a proprietary interest in parcel no. 779 which was allegedly held on his behalf by Mr. Jirani and whether, in acquiring or holding the interest, if at all, the same amounted to lack of accountability, involvement in corrupt practices, and impropriety. On the first part of this allegation, the Tribunal made reference to its finding under Allegations One and Six; that as a matter-of-fact Mr. Jirani was indeed a proxy for the petitioner and that he was holding Land parcel no. 779 on his behalf.

[43] The Tribunal found that the petitioner having heard and determined ***Malindi Succession Cause No. 97 of 2015***, in which the subject matter was parcel no. 779, it was improper for him to acquire an interest in it through Mr. Jirani. It was equally inappropriate for him to host several meetings at his residence on 16th March 2021, 22nd May 2021, 9th and 10th July 2021 to discuss the withdrawal of the appeal against his own decision in the succession cause, the completion of the sale transaction and transfer of parcel no. 779 to Mr. Askar and the distribution of the proceeds of the sale. While the petitioner stated that he gave advice as a mediator, the Tribunal found that the same was still inconsistent with the petitioner's role as a judge who had heard the cause.

[44] On the second limb, the Tribunal declined the invitation to determine whether it was legal for the petitioner to direct the Kwale County Police

Commandant in his judgment on 16th May 2018 to ensure that possession of parcel no. 779 was reconveyed to Jane Mutual Kyengo. The Tribunal was of the view that such a course was not available to it as it would amount to a review of or sitting on appeal over the decision of the petitioner, which would be in excess of its jurisdiction under Article 168 of the Constitution.

[45] Save for this one solitary aspect in so far as Allegation Three was concerned, the Tribunal found the rest of the aspects proved, namely: that the petitioner had a proprietary interest in parcel no. 779 which was held on his behalf by Mr. Jirani; that he subsequently held meetings with parties at his residence to discuss the sale of parcel no. 779; that he advised the parties in the ***Malindi Civil Appeal No. 32 of 2018***; and that he undertook to compromise the Court of Appeal Judges to facilitate quick resolution of the appeal. The Tribunal concluded that all these amounted to lack of accountability, involvement in corrupt practices, and impropriety contrary to Articles 10, 73, and 75 of the Constitution, and Regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Code of Conduct and Ethics.

Allegation Four- Subversion of justice through commenting and advising a litigant on matters pending in court contrary to Article 75(c) of the Constitution, section 13 of the Leadership and Integrity Act and Regulation 18 of the Code of Conduct of Judges; and

Allegation Five- Lack of professionalism and conduct unbecoming of a judge in contravention of Articles 73 and 168(1)(e) of the Constitution of Kenya, 2010 and Regulations 15, 16(a), (b) and (c) and 17(3) of the Code of Conduct for Judges.

[46] Because Allegations Four and Five raised related questions, the Tribunal decided to determine them together. In Allegation Four it was alleged that the petitioner while serving as a Judge of the High Court, conducted himself in a way and manner inconsistent with the dignity of the judicial office and went against the judicial principle of *sub judice* by discussing the withdrawal of ***Malindi Civil***

Appeal No. 32 of 2018 pending before the Court of Appeal and emanating from his own decision. He also discussed at meetings at his residence in Mountain View Estate and through telephone calls on 16th March 2021 with Ms. Kyengo, Hon. Sonko, Mr. Askar, and Mr. Jirani among others, how to facilitate the completion of the sale of parcel no. 779 for his personal benefit.

[47] Allegation Five on the other hand stated that the petitioner held a meeting with Hon. Sonko during which he offered legal advice on the viability of an appeal and the proposed grounds of appeal against the judgment in the consolidated petitions over which he presided in a three-judge bench. It turned out that Hon. Sonko and the petitioner were known to each other as distant relatives. It was alleged that, because of this fact, the petitioner ought but failed to disclose the same to the Hon. Chief Justice and the other two Judges on the Bench as well as the parties, an omission that derogates from the Judge's duty to safeguard the right of equality before the law and the right of equal protection, and benefit of the law without bias or prejudice.

[48] Based on the evidence before it, the Tribunal found that it was inappropriate for the petitioner to be engaged in discussions with parties of matters he had dealt with, was dealing with or was pending before any court, and therefore the petitioner was engaged in the subversion of justice through commenting and advising a litigant on matters pending in court contrary to Article 75(c) of the Constitution, and Regulation 18 of the Code of Conduct and Ethics. His conduct showed a lack of professionalism and conduct unbecoming of a judge which is in contravention of Articles 73 of the Constitution as well as Regulations 15, 16(a), (b) and (c) and 17(3) of the Code of Conduct and Ethics.

[49] With regard to the third aspect of the particulars of Allegation Five that the petitioner ought to have disclosed to the Hon. Chief Justice and his colleague judges and the parties that he had offered advice on the withdrawal of ***Malindi Civil Appeal No. 32 of 2018*** and the viability of the appeal from the judgment

in the consolidated petitions, the Tribunal reiterated its determination that the conduct in question amounted to subversion of justice and unbecoming of a judge.

[50] The Tribunal having reached the determination that Allegations One, Two, Three, Four, Five, and Six had been proved, it unanimously concluded in its final decision that the petitioner's conduct was in breach of the Code of Conduct and Ethics and amounted to gross misconduct in terms of 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.

iii. Proceedings before the Supreme Court

[51] Aggrieved by the outcome of the Tribunal, the petitioner lodged the instant petition under Article 168(8) of the Constitution on 12 grounds seeking:

a) *A declaration that the Judicial Service Commission lacked the locus standi to initiate removal proceedings against the petitioner on its own motion when the petition by the Judicial Service Commission was effectively relying on other Petitions by third parties.*

b) *A declaration that the Judicial Service Commission acted in violation of the requirements of Articles 47 and 50 of the Constitution and the petitioner's right to fair administrative action was violated thereby rendering the petition by the Judicial Service Commission null and void.*

c) *A declaration that the allegations made against the petitioner were not proved to the required standard and the same are dismissed.*

d) *A declaration that the petitioner's action did not amount to gross misconduct and/or misbehaviour and were not in breach of the Constitution and the Code of Conduct and Ethics warranting his removal from office.*

e) A declaration that the findings and recommendation of the Judicial Service Commission to his Excellency the President of the Republic of Kenya that the petitioner be removed from office be quashed with an order directing that the petitioner resumes his duties as a Judge of High Court of Kenya.

f) The Costs of the Petition be borne by the respondent.

D. PARTIES' SUBMISSIONS

i. The Petitioner

[52] To advance the broad grounds, the petitioner clustered and argued his petition under the following heads:

[53] As to the Tribunal's finding that *it lacked jurisdiction to hear and determine allegations of breach of the petitioner's constitutional rights by the JSC,* the petitioner relied on the guiding principles set out by this Court in ***Gladys Boss Shollei v. Judicial Service Commission;*** [2022] eKLR and submitted that once he alleged breach by the JSC of his constitutional rights, the Tribunal, being a *quasi-judicial* body, was duty bound to make an inquiry and a determination of the issue.

[54] About the *doctrine of Judicial independence,* the petitioner submitted that the totality of the examination of the witnesses in relation to the Malindi Succession cause by both the Tribunal members and the lead counsel amounted to the interrogation of the merits of the decision of a judge, the petitioner, which amounted to an overreach by the Tribunal playing the role of an appellate court. It was this misdirection that influenced the erroneous final decision of the Tribunal, ignoring the fact that the petitioner had immunity from liability for anything allegedly done or omitted to be done by him in good faith in the lawful performance of his judicial function. On judicial immunity the Petitioner cited the Court of Appeal decision in ***Bellevue Development Company Ltd v.***

Francis Gikonyo & 7 Others; Civil Appeal No. 239 of 2017; [2018] eKLR and the Supreme Court decision in ***Bellevue Development Company Ltd v. Francis Gikonyo & 3 Others;*** SC Petition No. 42 of 2018; [2020] eKLR.

[55] Regarding *his relationship with Hon. Sonko and whether he was biased against him so as to require the petitioner to disclose his relationship to the Hon. Chief Justice, the other two judges, and parties in the consolidated petitions,* the petitioner posited that the evidence of his relationship with Hon. Sonko revealed that they were not so close as to warrant him to recuse himself or to disclose the same to the Hon. Chief Justice, other members of the bench and parties. He insisted that the relationship was remote as it was his step-cousin who had married Hon. Sonko's aunt. That marriage ended in a divorce. Secondly, Hon. Sonko did not raise the issue of bias during the hearing of the consolidated petitions; and in any event, he was vindicated by the fact that their judgment in the High Court was upheld by both the Court of Appeal and the Supreme Court. This was an indication that the petitioner was not biased against Hon. Sonko.

[56] On *whether the petitioner had any dealings with Hon. Sonko with regard to the sale of parcel no. 779 during the pendency of the consolidated petitions,* the petitioner contended that the allegations that he met Hon. Mike Sonko on 16th March 2021 at his residence in Mountain View and on 22nd May 2021 in Kwale were not supported by evidence since the records obtained from Safaricom did not place the mobile phones of the petitioner and Hon. Sonko at the Kangemi tower near the petitioner's residence on that day; and that the linking of mobile phones of Hon. Sonko and Mr. Jirani by a Safaricom Tower in Kwale on 22nd May 2021 could not conclusively constitute proof that a meeting took place with the petitioner on the same date.

[57] Turning to the *finding that the petitioner had acquired an interest in parcel no. 779 through his alleged proxy, Mr. Jirani during the pendency of Malindi Succession Cause No. 97 of 2015,* the petitioner denied that he paid Ms. Kyengo

the sum of Kenya Shillings Eight Million (Kshs. 8,000,000) as no such evidence was tendered in proof. Two investigations officers attached to JSC, Inspector Lucy Wanjiku Wambugu and Inspector Boniface Musembi Kivelenge indeed confirmed that they did not find any proof of such payment into Ms. Kyengo's bank account or that of Mr. Jirani. Instead, the petitioner sought to persuade the Tribunal that given the relationship between Hon. Sonko and Mr. Jirani, it was safe to conclude that Mr. Jirani was in fact a proxy to Hon. Sonko, who had in his possession the original title deed, together with a duly executed transfer instrument in respect of parcel no. 779 and copies of Mr. Jirani's National Identity Card and KRA Pin Certificate.

[58] In respect of the Tribunal's *finding that the petitioner discussed the withdrawal of Malindi Civil Appeal No. 32 of 2018 to facilitate the completion of the sale of parcel no. 779*, the petitioner argued that his role in the meeting was purely as a mediator advising those present on how the matter could be resolved amicably. However, he maintained that he did not speak to any of the parties to the appeal. In his view, the request to meet and hold discussions on the sale of the land and the withdrawal of the appeal was just another pre-conceived scheme to set him up and use the meeting as a ground for his removal from office. The truth of the matter, though was that the question of withdrawal of the appeal was Hon. Sonko's suggestion, who even went ahead to communicate with the parties and their advocates.

[59] On whether *the petitioner advised Hon. Sonko on the possible grounds to challenge the decision in the consolidated petitions over Hon Sonko's impeachment,* the petitioner submitted that the evidence was insufficient to conclude that he indeed engaged in such discussion; that such a suggestion would not have arisen given the fact that the grounds of appeal had already been settled; furthermore that Hon. Sonko had advocates acting for him in the appeal and the discussion was a general discussion that did not amount to a piece of advice.

[60] The Tribunal's finding *that the recording of the video and audio did not violate the petitioner's right to privacy as enshrined in Article 31 as read with Article 50(4) of the Constitution and therefore admissible,* has also been challenged with the petitioner maintaining that the recordings could not be relied upon since there was a variance between the creation and modification date. He urged that the report showed that the videos were running backward for over one month. He also pointed out that the dates in the report are generated scientifically from the forensic lab and are not generated by human beings. He further questioned the integrity of the video and audio evidence considering it was not clear where they were stored from the time they were created in July, November, and December 2021; that the videos recorded using the watch are in short second clips, yet the ones produced before the Tribunal run for more than the given second in the report. The videos recorded using the spectacles run backward for periods over one month. The petitioner maintained that based on the evidence brought before the Tribunal and Mr. Peter Mbatha's testimony, there was a possibility that the videos were edited.

[61] To buttress his argument, the petitioner cited the decision in ***William Odhiambo Oduol v. I.E.B.C & 2 Others;*** Kisumu Election Petition No. 2 of 2012; [2013] eKLR**,** that to be admitted as evidence it must be demonstrated that the tapes are in their original form. He further noted that an examination of Galaxy Phone 9 by Mr. Mbatha revealed that the audio recording between Mr. Jirani and Mr. Wambua *alias* Peter did not exist. This, in the petitioner's view, rendered the audio inadmissible as the gadget that allegedly made the recording did not yield any results. To him therefore the videos and audio were manipulated by Hon. Sonko and his two personal assistants, Mr. Wambua and Mr. George Omollo Ngasi.

[62] For all the foregoing reasons the petitioner has urged the Court to make a finding that the video recordings did not comply with the requirement of Section

106B of the Evidence Act and at the same time, infringed on his fundamental rights under Articles 31 and 50(4) of the Constitution.

[63] Submitting on the issue of *entrapment,* the petitioner urged the Court to weigh the evidence adduced before the Tribunal against that of Mercy Nkatha who stated in her affidavit that she was offered money to swear an affidavit alleging that the petitioner was bribed with between Kshs. 30 to 40 million; that she was subsequently abducted and threatened at gunpoint by Hon. Sonko to record incriminating evidence against the petitioner; that the videos were edited to fit in Hon. Sonko's scheme and narrative; and that she was also asked to file a separate petition for the removal of the petitioner on Hon. Sonko's behalf. The totality of all the evidence presented before the Tribunal pointed to a revenge mission by Hon. Sonko, for which reasons he urged the Court to allow his appeal.

ii. The Respondent

[64] The respondent relied on its grounds of objection to the petition dated 20th March 2023 together with its written submissions dated 15th May 2023.

[65] On *whether the JSC accorded the petitioner the right to fair administrative action*, the respondent relied on the proceedings before the JSC to argue that the petitioner's right to fair administrative action was upheld; he was informed of the allegations against him and furnished with the petition, witness statements and evidence supporting the allegations; he was represented by an advocate of his choice; ample opportunity was extended to him to respond to the allegations; a preliminary objection he raised was considered and determined; a Committee of JSC was set up to investigate the petitioner's conduct; and the Committee made a report to JSC, the basis upon which JSC recommended to the President to set up a Tribunal.

[66] That apart, the respondent submitted that it is now settled in a long line of cases including ***Judicial Service Commission v. Mbalu Mutava & Anor;*** Civil Appeal No. 52 of 2014; [2015] eKLR, that proceedings before the JSC are not

a trial; that all that is required of the JSC is to follow and apply the rules of natural justice. Ultimately, when judged by the correct standards, the respondent argued, the proceedings before the JSC were lawful and the petitioner's right to fair administrative action was respected and upheld. In any case, the petitioner had the right to challenge the JSC proceedings in the High Court under Article 47 of the Constitution and the Fair Administrative Action Act but did not. Accordingly, having fully participated in the process before the JSC and the Tribunal, the respondent submitted that it was too late in the day for the petitioner to raise these questions.

[67] As to *the role of the Tribunal to evaluate and review the JSC proceedings as proposed by the petitioner,* the respondent affirmed that, like in ***Judicial Service Commission v. Mbalu Mutava & Another*** (supra), the role of JSC under Article 168 of the Constitution is confined to making a preliminary inquiry to satisfy itself that the petition for the removal of a judge has merit. No residual powers are granted to JSC to decide the fate of a judge. Once it determines that the threshold for removal from office has been met, it merely forwards its recommendation to the President who must then appoint a Tribunal to investigate fully the allegations of misconduct of a judge. The Tribunal could not, in those circumstances arrogate itself jurisdiction to either entertain or determine any errors in the proceedings before the JSC committed prior to the Tribunal's formation.

[68] Responding to the issue of *admissibility of the recordings*, the respondent reiterated that for the same to be excluded it had to be shown that either there was a violation of a right or fundamental freedom in the manner the evidence was obtained or that the admission of the evidence would otherwise be detrimental to the administration of justice in terms of Article 50 (4) of the Constitution. On the facts of this case, the respondent submitted that there was no proof that any of the petitioner's rights were violated in the recording of the conversations. In any event, they argued that there is nothing like a right not to have one's communications

recorded without consent especially where the communications are recorded by a person who is a participant in the discussion.

[69] The respondent dismissed the *allegations of entrapment,* arguing that they were without legal basis, and distinguished the case of ***Cyprian Nyakundi & another v. Director of Criminal Investigations & 2 others; Victoria Commercial Bank (Interested Party);*** High Court Constitutional Petition No. E284 of 2020; [2021] eKLR on which the petitioner relied, noting that police officers were not involved.

[70] Likewise the *allegation that the recordings were doctored or edited* had no merit as no evidence was presented to the Tribunal to prove this. Without particulars of how the recordings were edited, and in the absence of expert evidence to prove this, the assertion was for rejecting. Furthermore, the petitioner having admitted that the recordings depicted him, and the witnesses who testified as to the events contained in the recordings cannot now claim that they were interfered with. The Tribunal was the best judge in factual matters. It watched and listened to the video and audio recordings and noted that they were clear and continuous and the participants' contribution to the matters that were being discussed could be heard clearly.

[71] Guided by the rules of natural justice and the evidence, the Tribunal gave the petitioner ample opportunity to challenge the recordings. The recordings were relevant as they pointed to the facts in issue and were therefore admissible.

[72] On *lack of integrity on the part of the petitioner*, it has been submitted that the allegation was proved by the fact that the petitioner discussed the viability and merits of the appeal against the judgment in which the petitioner was the presiding judge in a bench of three judges of the High Court. Secondly, there was sufficient evidence to demonstrate that the petitioner held a meeting with Hon. Sonko and others on separate occasions. While the petitioner testified that at the time he met Hon. Sonko and discussed the appeal in the Court of Appeal, the notice of appeal

had already been filed and he was *functus officio*, the respondent argued that it was nonetheless inappropriate for a judge to entertain any conversation with a litigant concerning an appeal challenging the decision of the judge.

[73] The respondent relying on the Court of Appeal decision in ***Kalpana H. Rawal v. Judicial Service Commission & 2 Others;*** Civil Appeal No. 1 of 2016; [2016] eKLR submitted that *the petitioner lacked impartiality and was guilty of non-disclosure of conflict of interest*; that the test for impartiality is whether an informed person viewing the matter realistically and practically would conclude that there is a likelihood of bias. In the respondent's view, a reasonable person appraised of the fact that Hon. Sonko was a distant relative and a close acquaintance of the petitioner who was presiding in matters concerning his impeachment would likely conclude that the petitioner may lack impartiality. Likewise, a reasonable man with the knowledge of these facts would also have concluded there was a conflict of interest which the petitioner ought to have disclosed.

[74] Whereas the respondent appreciated that it is acceptable for a judge to be wrong in making a decision, for which the appellate system exists to correct, it was however of the view that, in the circumstances of the complaints against the petitioner, and the evidence, the petitioner had an interest, through a proxy in parcel no. 779, the subject matter of a cause he had determined. His involvement was purely to further his personal interests as opposed to serving the ends of justice. Therefore, the Tribunal correctly concluded that the allegations of *lack of accountability, participating in corrupt practices, and impropriety,* were proved.

[75] The respondent also pointed out that, by discussing the particulars of ***Malindi Civil Appeal No. 32 of 2018*** with Mr. Omwenga, Advocate, who was acting for prospective buyers in the matter; and by commenting on how the appeal would be withdrawn to pave way for the completion of the sale transaction of parcel no. 779, the petitioner was engaged in acts of *subversion of justice through*

commenting and advising a litigant on matters pending in court. In the respondent's view, the petitioner's conduct violated the provisions of Regulation 18 of the Code of Conduct and Ethics which prohibits comments on proceedings before the court and the Tribunal cannot be faulted for so finding.

[76] Citing ***Republic v. Ethics and Anti-Corruption Commission ex-parte Nairobi City County Assembly & 13 Others;*** Misc. Civ Appl. No. 383 of 2018; [2019] eKLR to support the proposition that state officers are the nerve center of the Republic and carry the highest level of responsibility in the management of state affairs, which in turn requires their conduct to be beyond reproach; and that the provisions of Chapter Six of the Constitution applied to all public officers, including judges. There was evidence, according to the Tribunal that the petitioner discussed the viability of the appeal against the decision of a bench on which he presided with the appellant, Hon. Sonko who also happened to be his relative and failed to disclose this relationship to the Hon. Chief Justice and his fellow judges or litigants. In view of this, the Tribunal committed no error in finding that the petitioner lacked *integrity and professionalism and was involved in a conduct unbecoming of a Judge*.

[77] Did *the Tribunal delve into the merits of the succession cause and how the Judge discharged his judicial functions*? The respondent has reiterated that the Tribunal's findings that the conduct of the Judge that the Tribunal was asked to inquire into did not relate to the discharge of his judicial functions but conduct that was alleged to be outside the functions of his duties and which was in breach of the Code of Conduct and Ethics and amounted to gross misconduct or misbehaviour. As such, the concept of judicial immunity did not apply.

[78] But *was there proof of gross misconduct or misbehaviour to warrant the removal of the petitioner*? The respondent submitted that from the videos and television interviews, it is clear that the petitioner was not circumspect at all in his associations and dealings; that he was audacious, brazen and intentional in his

conduct; that he had no qualms about subverting justice or using his office for unlawful gains. In conclusion, the respondent urged the Court to dismiss the petition and uphold the Tribunal's findings that the Judge's conduct was in breach of the Code of Conduct and Ethics and amounted to gross misconduct contrary to Article 168(1) (b) and (e) of the Constitution, and the recommendation to His Excellency the President that the petitioner be removed from the office of Judge of the High Court was justified.

E. ISSUES FOR DETERMINATION

[79] From our own consideration of the pleadings, the findings of the Tribunal, and the arguments by counsel representing the parties, we consider the following five issues as falling for our 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.*

F. ANALYSIS AND DETERMINATION

[80] We start by restating the broad principles to be borne in mind when dealing with the question of removal of a judge. Those principles were outlined by this Court in its maiden determination under Article 168(8) in the case of ***Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya,*** SC Petition 15 B of 2016; [2019] eKLR ***(Mutava Case)***, and further summarized in

the case of ***Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya***, SC Petition 4 of 2020; [2022] KESC 16 (KLR) ***(Muya Case)*** as follows:

i. **"Unlike its jurisdiction under article 163(4), the Supreme Court, as the first and only appellate court in such matters, has a more expansive jurisdiction since, it is required to re-evaluate and re-assess the evidence on record in order to establish whether the Tribunal misdirected itself leading to a wrong conclusion.**
ii. **Judges are presumed to be independent and to act without the control of anyone in deciding cases before them.**
iii. **Judges should always ensure that their conduct is beyond reproach in the eyes of a reasonable observer. They must always uphold the principle that justice must not only be done but be seen to be done.**
iv. **Once the President has received a petition from the Commission, he is constitutionally bound to appoint a Tribunal.**
v. **The standard of proof, whether in direct or circumstantial evidence, is one which is neither beyond reasonable doubt nor on a balance of probabilities."**

[81] Consequently, an appeal to the Supreme Court under Article 168(8), can be likened to a primary appeal, affording the Court broader authority to scrutinize and reassess the evidence presented. This process aims to validate the accuracy of the Tribunal's findings regarding the application of factual matters to the law, even as the court acknowledges the Tribunal's firsthand assessments of witnesses' credibility. The Court will exercise this authority to overturn factual conclusions with caution and will only do so if it is demonstrated that the Tribunal's

conclusions were not supported by evidence or if it is evident that the Tribunal failed to appreciate the weight or bearing of circumstances admitted or proved, or if the Tribunal was plainly wrong in its conclusion.

[82] We observe at the outset that the petitioner sought to persuade us to overturn the decision of the Tribunal on twelve (12) grounds, which were condensed into eight (8) in the written submissions but argued before us in two broad clusters. For our part, we think that, given the importance of the arguments in this petition, it is necessary and only appropriate to consider all the grounds as framed.

i. *Whether the Tribunal had jurisdiction to review the proceedings before the JSC*

[83] The petitioner has challenged the proceedings before the JSC on the basis that his constitutional right to fair administrative action under Article 47 of the Constitution was not observed and to that extent, the Tribunal was duty-bound to make an inquiry and a determination as to the integrity of the proceedings before the JSC. The respondent opposes these arguments and instead affirms that the proceedings before the JSC were lawfully conducted in strict compliance with the tenets of fair administrative action under Article 47 of the Constitution.

[84] According to Article 168(2) of the Constitution, there are only two routes to initiate the removal of a judge.

> "**The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission".**
> [our Emphasis].

[85] As a constitutional requirement, a petition to the JSC must be in writing, setting out the alleged facts constituting the grounds for the judge's removal. Upon receipt of the petition or upon considering the question of removal of a judge on its own motion, the JSC,

> **"(4) shall consider the petition and, if it is <u>satisfied that the petition discloses</u> a ground for removal under clause (1), send the petition to the President".** [our Emphasis]

[86] The standard to be attained before the petition is sent to the President is entirely subjective, depending on the material placed before the JSC. Whether the petition is filed by a person or where the JSC is in possession of some information, regardless of the source, pointing to a questionable conduct of a judge, it must consider the petition or the information and satisfy itself that the complaint discloses facts constituting grounds for the judge's removal. The JSC is expected to evaluate the facts and only *"if it is satisfied"* that a ground or grounds for removal has/have been disclosed will it recommend to the President to constitute a Tribunal. The JSC is not simply a conduit pipe by which complaints are channeled to the President. It must be convinced that the complaint discloses *prima facie* evidence against the judge and that the complaint is serious enough to warrant a representation to the President. This is the threshold described by the Court of Appeal in ***Judicial Service Commission v. Mbalu Mutava & another*** (supra) as:

> **"a preliminary inquiry to satisfy itself that the complaint is not frivolous, lacking in substance, unfounded or hypothetical. The inquiry is not intended to lead to a final decision but is only designed for receiving information for purposes of a recommendation on which a subsequent and final decision may be founded. As such, JSC does not conduct a formal hearing where witnesses are called and examined".**
> *(per Ouko, JA as he then was, concurring)*

[87] In considering whether a ground for removal has been disclosed, and being concerned only with *prima facie* evidence, the JSC is not required or expected to make definitive conclusions whether the allegations against the judge have been

proved. It is expected to act in good faith, to accord the judge an opportunity to understand the accusations and to be guided by the provision of Article 47 of the Constitution on the fair administrative action. It cannot be the JSC's mandate to conduct a full-fledged inquiry, with witnesses being cross-examined. That is a preserve of the Tribunal where the actual hearing takes place.

[88] In November 2021, JSC's attention was drawn to several video clips, social media posts, and cell phone recordings that were in the public domain. The recordings were attributed to Hon. Sonko and appeared to question the integrity of the petitioner. From the record, it is apparent that four complaints were filed against the petitioner with the JSC and later withdrawn. Due to the persistence of the allegations and because of the intense public interest elicited by recordings and social media postings, JSC resolved to initiate, on its own motion, proceedings for the removal of the petitioner from office. That course was perfectly permitted by the force of Article 168(2) of the Constitution, which we have set out in the previous paragraph. Satisfied that the material and evidence placed before it disclosed *prima facie* grounds for the removal of the petitioner, JSC unanimously resolved to petition the President to appoint a Tribunal pursuant to Article 168(4) and (5) of the Constitution. It is this process that the petitioner challenged, first before the Tribunal and now before this Court.

[89] Following the petition by JSC and in exercise of the powers conferred by Article 168(5)(b) of the Constitution as read with Section 31 of the JS Act, H.E Uhuru Kenyatta, the former President, suspended the petitioner from office and appointed a Tribunal to inquire into the allegations by Gazette Notice No. 5540 of 17th May 2022, which read in the pertinent parts as hereunder:

> **"WHEREAS the Judicial Service Commission has submitted to the President a Petition for the removal from office of the Hon. Justice Said Juma Chitembwe, Judge of the High Court of Kenya, under the provisions of Article 168 of the Constitution.**

……

Now Therefore, having received and considered the Petition of the Judicial Service Commission and in exercise of the powers conferred by Article 168 (5) (b) of the Constitution of Kenya, as read together with section 31 of the Judicial Service Act, 2011, I, Uhuru Kenyatta, President and Commander in Chief of the Kenya Defence Forces, do hereby direct as follows:

1. **The Hon. Justice Said Juma Chitembwe, Judge of the High Court of Kenya, be and is hereby suspended from office with immediate effect; and**
2. **A Tribunal to inquire into the matter be and is hereby appointed, constituted as follows …**
3. **The mandate of the Tribunal shall be to consider the Petition for the removal of the Hon. Justice Said Juma Chitembwe from office that was submitted by the Judicial Service Commission and to inquire into the allegations therein".** [our Emphasis].

[90] The Tribunal's jurisdiction is founded on Article 168(7)(b) of the Constitution, as read with Section 31 of the JS Act and the Second Schedule thereto. In appreciation of its mandate the Tribunal made the following observations:

"**818. Article 168(7)(b) of the Constitution, as read with section 31 of the Judicial Service Act, 2011 and the Second Schedule thereto, and in light of the said Gazette Notice, it is the Tribunal's view that it was thereby mandated to a clear, specific constitutional jurisdiction restricted to inquiring into the matter and reporting on the facts in connection with**

the allegations made by the JSC. As the Gazette Notice reads, the Tribunal came into being after the appointing authority having received and considered the Petition of the Judicial Service Commission. Consequently, the President appointed the Tribunal 'to inquire into the matter'. He mandated the Tribunal 'to consider the Petition' for the removal of the Judge the subject of the inquiry 'that was submitted by the Judicial Service Commission and to inquire into the allegations therein'.

819. That jurisdiction was pointed and specific. It did not and does not include an inquiry into the activities of or proceedings before the JSC. It was informed solely by the request made by the JSC."

[91] We are in agreement with the above pronouncement and conclusion, save to only add that, just like jurisdiction is everything for a court of law, it is equally critical for a tribunal or any administrative body exercising *quasi-judicial* authority. Similarly, like a court of law, a tribunal can only exercise jurisdiction donated by statute or the Constitution. Since the Tribunal in these proceedings was a direct creation of a petition presented to the President, it would be an act of overreach for it to interrogate events that took place before its appointment. It had no such powers and therefore we agree with the conclusion reached by the Tribunal in that regard.

[92] But since heavy weather was made of Article 47 of the Constitution, that the JSC did not accord the petitioner the right to an administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, it is important to understand the evolution of administrative justice in Kenya. In ***Judicial Service Commission v. Mbalu Mutava & Another*** (supra), the Court of Appeal traced this development thus:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

[93] The Fair Administrative Action Act was eventually enacted to illuminate and expand the values espoused in Article 47 aforesaid. It provides in Section 4(3) the broad parameters to which bodies undertaking administrative action must conform to as follows:

"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action."

[94] The proceedings before the JSC took the following form, from what is obvious to us on the face of the record:

a) JSC initiated removal proceedings on its own motion based on the allegations regarding the conduct of the petitioner.
b) Thereafter, JSC set up a committee of its members to consider its own motion alleged transgressions of the petitioner.
c) The petitioner was informed of the allegations against him and furnished with the petition, witness statements, and evidence supporting the proceedings.
d) The petitioner was represented by an advocate of his own choice.
e) The Committee conducted its investigations and recorded witness statements.
f) The petitioner was given ample time to prepare his defence and to respond to the allegations in the petition.
g) The petitioner's response to the petition being a preliminary objection was considered and determined.
h) The Committee reported its findings to JSC who in turn submitted a petition to the President.

[95] To our mind, in conducting these proceedings, JSC was performing a *quasi-judicial* function. If the petitioner felt aggrieved by the conduct of the proceedings before JSC, which in his view amounted to a violation of his rights and fundamental freedoms, his recourse was not to the Tribunal that would be formed

many months later but to the High Court, which has jurisdiction to determine questions of whether a right or fundamental right has been denied, violated, infringed, or threatened under Article 165(3)(b) of the Constitution.

[96] The principles laid down by the Court in ***Gladys Boss Shollei v. Judicial Service Commission*** (supra) involving disciplinary proceedings against the former Chief Registrar of the Judiciary, cannot be applied in the proceedings involving a judge. While the principles enunciated in ***Gladys Boss Shollei v. Judicial Service Commission*** (supra) were based on the provisions of Section 32 of the JS Act, as read with Regulation 25 of the Third Schedule to the Act (**Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff**), the instant proceedings were initiated under Article 168(2) of the Constitution as read with Section 31 of the JS Act. The two processes have very distinct considerations, one unique to a Judge and the other to a judicial officer.

[97] True to its constitutional mandate, 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. In view of the foregoing, we find no basis upon which to conclude that the JSC violated the petitioner's right to fair administrative action, nor can we fault the Tribunal for rejecting the invitation to interrogate the proceedings before the JSC.

ii. Whether the Tribunal failed to uphold the doctrine of Judicial independence and immunity

[98] The petitioner contends that the totality of the examination of witnesses concerning the Malindi Succession Cause by both the Tribunal members and the lead counsel was tantamount to interrogating the merits of the decisions made by the petitioner as a result of which the Tribunal overstepped its mandate and assumed the role of an appellate court. What was more, according to the petitioner was the Tribunal's erroneous finding that there was a reasonable apprehension

that the petitioner would be biased against Hon. Sonko who was facing impeachment proceedings in the consolidated petitions; and that in those circumstances the petitioner ought to have disclosed this relationship to the Hon. Chief Justice, the other judges on the bench and the parties.

[99] The petitioner also took issue with the Tribunal's finding, without proof, that he had acquired an interest in parcel no. 779 through a proxy when Malindi Succession Cause, over which he was presiding was awaiting determination. Lastly, the petitioner faulted the Tribunal for finding, again without any proof, that he had engaged in subversion of justice by advising litigants on matters before the courts. The truth, according to the petitioner was that he handled the matters in question in good faith and in the lawful performance of his judicial function. Citing the proposition in the Supreme Court case of ***Bellevue Development Company v. Francis Gikonyo & 3 Others,*** SC Pt No. 42 of 2018; [2020] eKLR that judicial immunity is a public policy that enables judges to freely express themselves in matters brought before them, without fear of reprisal or of being disciplined, prosecuted or harassed. In other words, a judge or a judicial officer, in exercising the authority vested in him or her, should be free to act upon his own convictions, without apprehension of personal consequences to himself.

[100] The import of Article 160(5) of the Constitution is that a member of the Judiciary is accorded judicial immunity for anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The Constitution uses two key phrases: *anything done or omitted to be done in good faith* and *in the lawful performance of a judicial function*. The use of the two phrases was not idle but deliberate. Only things done by a judge in good faith and in the lawful discharge of the function of judicial office will merit protection. The antithesis to acting in good faith would be to act in bad faith, where a person acts dishonestly in the discharge of the functions of a judicial office. In other words, bad faith will be implied when the office-bearer has acted with a clear intent to deceive. This privilege will also be extended only when the action was done lawfully and in the

performance of judicial duties. It is not available for acts done by a judge, or a judicial officer who are out on frolics of their own, going beyond the confines of what would normally be regarded as their judicial function. From a plain and textual reading of Article 160(5) of the Constitution, and Section 6 of the Judicature Act, judicial immunity is not absolute nor does it cover improper conduct aimed at furthering personal interests.

[101] The basic principles of judicial independence under the Constitution require, among other safeguards, that judges ought to enjoy absolute freedom from liability in respect of decisions taken in their judicial function, just as their security, remuneration, conditions of service, pensions, and the age of retirement are secured by the Constitution and the law. To that extent, judges are guaranteed tenure of office until attainment of retirement age; and, barring this, they can be removed only for specified reasons; incapacity or behaviour and other grounds that render them unfit to discharge their duties.

[102] Section 45 of the JS Act protects judicial officers from any personal culpability. They are not liable for any civil action or suit arising from anything done or omitted to be done in good faith. In the Penal Code too, in Section 15, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions. Section 6 of the Judicature Act makes a similar provision to insulate a judge and judicial officer, so long as they act in good faith and within the confines of the law.

[103] In ***Bellevue Development Company v. Francis Gikonyo & 3 Others*** *(supra)* we explained the rationale for judicial immunity and stated that:

> **"[53] The concept of judicial immunity is not without foundation. Judicial immunity is an important tenet in the delivery of justice and the maintenance of the rule of law.**
>
> **……**

[59] The rationale for this judicial immunity is the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts is thus necessary so that judicial officers can make the sometimes controversial decisions that are their judicial obligation and mandate to make, independent of personal considerations, including fear of personal liability."

[104] In determining this issue, the sole consideration is whether the petitioner should be accorded protection under Article 160(5) aforesaid to extend to him the principles of judicial immunity.

[105] Re-evaluating the evidence on record, it is a statement of fact that the petitioner conceded that he knew Mr. Jirani and met him and others at his residence on two or more separate occasions. It is equally true that the purpose of the meeting was for the prospective buyer of parcel no. 799, Mr. Askar, to confirm that he knew Mr. Jirani and Hon. Sonko. parcel no. 779 was at the time registered in the name of Mr. Jirani and parcel no. 1222 was registered in the name of a company associated with Hon. Sonko. Further, apart from the recording of the meeting of 10th July 2021 in which the petitioner confirmed that Mr. Jirani was acting as his proxy, there was evidence of eyewitnesses who attended the meeting. This evidence was further corroborated by Mr. Jirani who in several instances in the recordings gave assurance that he was in the transaction as the petitioner's representative.

[106] Further, the petitioner testified that he had no blood relationship with Hon. Sonko, and that their relationship was only through marriage, his late step-cousin having married Hon. Sonko's aunt. Asked why he never disclosed his relationship with Hon. Sonko to the Chief Justice and his colleague Judges, the petitioner stated that the disclosure was not necessary since the relationship was too remote and could not have impeded his impartiality in hearing and determining the consolidated petitions. In any event, the petitioner denied that he ruled against

Hon. Sonko in the consolidated petitions because of the alleged disagreement over Parcel nos. 779 and 1222. According to him, he only became aware of the land transaction on 9th July 2021 almost one month after the judgment in the consolidated petitions had been delivered on 24th June 2021. After all, he added that the decision in the consolidated petition was unanimous, and further that it has since been upheld by the Court of Appeal and the Supreme Court. Lastly, the petitioner explained his role in the sale transaction as that of a mediator and merely expressed an opinion on how ***Malindi Civil Appeal No. 332 of 2018*** could be withdrawn to facilitate the completion of the transactions for the sale of Parcel nos. 779 and 1222.

[107] It is clear to us that the Tribunal was well aware of its limits of jurisdiction. An excerpt of the Hansard of 4th November 2022 indicates that the Tribunal had to guide the Lead Counsel not to venture into asking the petitioner questions that would suggest the Tribunal was interrogating the merits of the petitioner's decision or questioning the manner of his exercise of judicial discretion which impacts the decisional independence of the court.

[108] Upon our own assessment of the evidence, we are convinced that the petitioner had a long-standing relationship with Hon. Sonko. He met him at his private residence and held discussions which we are persuaded were intended to assist Hon. Sonko in the appeal challenging the decision to uphold his impeachment by the High Court. There was direct evidence by those who were in the meeting, including Hon. Sonko himself, that the petitioner advised him on the possible grounds of appeal. Secondly, he met and once again advised Hon. Sonko, Mr. Jirani, and Mr. Askar on the prospects of withdrawing ***Malindi Civil Appeal No. 32 of 2018*** to pave way for the finalization of the transaction for the sale of Parcel nos. 779 and 1222. How could these actions accord the petitioner protection under the principles of judicial immunity, when they were clearly outside and in excess of his mandate as a trial Judge? Judges do not entertain parties whose cases are pending or have been determined by them; they do not invite litigants into the

privacy of their homes; and they do not discuss those cases or what steps to take to advance to the next level. A judge is an impartial arbiter 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. Regulation 19. (1) prohibits a judge from anticipating a future benefit from the performance of the duties of the judicial office or from proceedings before the judge. To be involved in a transaction of the subject matter of a case pending before or determined by a judge, is outside the ambit of lawful performance of judicial function. It is an act of bad faith.

[109] Regulations 11. (1) of the Code of Conduct and Ethics requires judges to discharge the official duties, act honourably and in a manner befitting the judicial office. In this context, a judge must ensure that his or her personal and extrajudicial activities are not in conflict with the obligations of a judicial office.

[110] In view of the admitted relationship, albeit 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, and the parties, we do not find fault with the Tribunal's conclusion on this ground that the petitioner's conduct divested him of any claim to protection under the principles of judicial immunity.

iii. Whether 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 and therefore inadmissible

[111] The petitioner contends that the evidence in support of the six (6) allegations seeking his removal from office was obtained in contravention of his rights to privacy under Article 31 and to a fair hearing under Article 50(4) of the Constitution and therefore inadmissible; and that the recordings were interfered with and manipulated to meet a certain narrative. The petitioner further contends that the video and audio recordings were inadmissible for having been obtained in a deliberate scheme of entrapping him.

[112] Article 31 of the Constitution provides that:

> **"31. Every person has the right to privacy, which includes the right not to have-**
>
> **a. Their person, home or property searched;**
>
> **b. Their possession seized.**
>
> **c. Information relating to their family or private affairs unnecessarily required or revealed; or**
>
> ***d.*** **<u>the privacy of their communications infringed</u>**." [our Emphasis]

[113] Article 50(4) on the other hand provides that:

> **"(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."**

[114] In the Tribunal's view, Article 50(4) establishes a dual threshold for evidence to be excluded. First, the evidence must have been obtained in a manner that violates any right or fundamental freedom. Second, the admission of the evidence would render the trial unfair or detrimental to the administration of justice. Therefore, for the video and audio recordings to be found to be inadmissible for violating Article 31 as read with Article 50(4) of the Constitution, the petitioner was required to demonstrate that his rights were unjustifiably violated in the manner that evidence was obtained and that their admission rendered the proceedings unfair or detrimental to the administration of justice.

[115] In our fresh assessment of the evidence on record, it is our understanding that the contents of the video and audio recordings produced before the Tribunal were intended to demonstrate three things: the petitioner discussing with Hon. Sonko among others, the proposed sale of parcel no. 779 which had been the

subject of succession proceedings before him in ***Malindi Succession Cause No. 97 of 201***5; the petitioner discussing the possible withdrawal of an appeal against his decision in the said succession matter, ***Malindi Civil Appeal No. 32 of 2018*****;** and the petitioner discussing with Hon. Sonko who was the main petitioner in the consolidated petitions, in which his impeachment as a governor was the subject, and possible grounds of appeal against the decision rendered by a three-judge Bench of the High Court over which the petitioner presided. Furthermore, in the KTN News interview that took place on 18th November 2021 in which the petitioner was hosted by Ms. Sophia Wanuna, he made various concessions and admissions, *inter alia* that both Mr. Jirani, a person alleged in the video recordings to hold parcel no. 779 on his behalf, as well as Hon. Sonko, were his relatives or were persons personally known to him.

[116] Article 31 of our Constitution is the equivalent of Section 14 of the Constitution of South Africa which was the basis of the decision of ***Bernstein v. Bester NO***; 1996 (2) SA 75 where the Constitutional Court of South Africa dealt with the meaning of the right to privacy. Ackermann J. writing for the majority observed that:

> **"The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm,**

but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly." [our Emphasis]

[117] The Constitutional Court also gave instances of violation of the right to privacy and stated:

> **"(69) Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship. These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities."**

[118] It should be apparent from the two passages that the right to privacy is not absolute. We agree with the formulation that a person's privacy extends to those aspects in which a legitimate expectation of privacy can be harboured. It is our considered view therefore that the right to privacy can never be absolute and a balancing test has to be applied to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion, in this case, the recordings.

[119] To begin with, we are convinced that it was the petitioner who invited the team to his private residence where the recordings took place. He was recorded discussing cases that involved third parties and land transactions involving parties not necessarily his relatives. These recordings were made public by Hon. Sonko on his social media platforms bringing the conduct of the petitioner as a Judge into

question. As indicated earlier, four petitions were filed but later withdrawn. Already there was public interest generated by these posts; a judge recorded discussing matters that were either before him or which he had handled, with parties in some of those cases and third parties. And as if that was not enough, the judge himself appears on a live show on a national television to admit some of the allegations. Under Article 172 of the Constitution, some of the functions of the JSC include the promotion and facilitation of the independence and accountability of the judiciary and the efficient, effective, and transparent administration of justice. The original petitions having been withdrawn, was the JSC rendered impotent, in the discharge of these functions and in light of the circumstances of recordings and televised show? As it ought to in the circumstances, the JSC in terms of Article 168(2) initiated on its own motion the removal process culminating in these proceedings.

[120] By willingly discussing the matters in question with parties and third parties and on a public forum, being a live television interview, the petitioner voluntarily removed the issue from the private realm to a public platform. He cannot now claim that the evidence was obtained in a manner that violated any of his rights or fundamental freedoms.

[121] On the second limb, that the admission of audio and video recordings would render the hearing of the allegations against him unfair and detrimental to the administration of justice, the Tribunal relied on the cases of ***Mustard v Flower;*** [2019] EWHC 2623 (QB) for the proposition that even though the court found that the manner in which the covert recordings were made was reprehensible, it underscored that they were not done illegally as they were not prohibited by any written law. The court weighed the way the evidence was obtained against its relevance and probative value and what the effect of admitting the evidence or otherwise would have on the fairness of the trial, which tipped the balance in favour of admitting the evidence. The Tribunal also distinguished the above case with those of the Supreme Court in ***Electoral and Boundaries Commission***

& 2 Others (supra) and ***Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others*** [2020] eKLR where documents were obtained unprocedurally in circumstances where there was a clear mechanism for obtaining information under Article 35 of the Constitution. The petitioners in those cases had obtained the documents in violation of procedure and the evidence obtained was held to have been illegally obtained and therefore inadmissible.

[122] To that end, the Tribunal while relying on the cases cited above concluded that for covert recordings to be admissible in evidence, the following principles should be considered:

> **(i) The recording must have been done by a participant in the conversation and not by a third party;**
>
> **(ii) The recording was of a conversation between parties who were privy to the truth of the matter they were discussing and were freely talking about it;**
>
> **(iii) The court or tribunal has direct evidence of the participant who made the recording; and**
>
> **(iv) The recording is of great probative value."**

[123] Applying these principles to the instant case, we find just like the Tribunal did, that though the video and audio recordings were covertly recorded, they were recorded by participants in the conversations. Concerning the recordings of 9th and 10th July 2021, the persons depicted in the recordings were at the petitioner's residence with his permission, and the discussions therein, that flowed effortlessly were of interest both to the petitioner and his visitors. The recordings were made by parties who were privy to the transactions over Parcel nos. 779 and 1222. Indeed, there is no claim that a third party was involved in the recordings that would render the recordings inadmissible.

[124] Accordingly, we find that the audio and video recordings produced did not contravene the petitioner's right to privacy under Article 31. Additionally, we find that 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.

[125] On the allegation of entrapment, the petitioner has argued that the audio and videos were edited to fit a pre-determined narrative. Entrapment as defined by the ***Black's Law Dictionary***; 10th Edition is:

> **"A law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person."**

[126] The Canadian Supreme Court in ***R v. Mack*** [1988] 2 S.C.R. 903 stated that entrapment occurs when:

> **"(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry; and**
>
> **(b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and include the commission of an offence."**

[127] The High Court in ***Mohamed Koriow Nur v. Attorney General*** [2011] eKLR relying on ***R v. Mack*** [1988] 2 S.C.R. 903 and in ***Lydia Lubanga v. Inspector General of Police & 4 others*** [2016] eKLR, dealt with the question of entrapment and accepted the proposition that entrapment occurs when, one the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal

activity and two, although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and include the commission of an offence.

[128] It is apparent from what we have stated in the preceding paragraphs that, for entrapment to be committed, there must be authorities, law enforcement officers or government agents involved, and they must have provided an opportunity for the commission of a crime. This, however, was not the case in the proceedings of the subject of this petition. The recordings were procured by the petitioner's relatives and acquaintances. We must go ahead and add that, 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. Hon. Sonko testified that he was the immediate former Governor of Nairobi City County, Mr. Askar testified that he was the Consul of Nepal in Kenya for the past ten years. Mr. Kivuva described himself as a businessman and Mr. Jirani described himself as a farmer and land broker. Entrapment in the strict sense of the word did not, for these reasons, occur.

[129] We emphasize finally on this question that judicial response to entrapment is based on the need to uphold the rule of law. A person entrapped will be excused, not because he is less guilty of the offence he may have committed as a result, but because of the inappropriate behavior of the law enforcers. The situation is what Lord Steyn described in ***R v Latif*** [1996] 1 WLR 104, 112 as *"state-created crime"* which is not only unacceptable but also improper. We conclude that the allegation that the recordings were obtained in a deliberate scheme to entrap the petitioner cannot stand in light of the foregoing analysis.

[130] In addition, and contrary to claims that the recordings were doctored or edited, the petitioner did not call expert evidence to controvert the evidence of PC

Mutinda, a certified digital forensics examiner who examined the recording devices and prepared a Memorandum and two separate Certificates of Authenticity and those produced by Mr. Kivuva. The evidence of the two witnesses on authentication of the recordings was intended to demonstrate to the Tribunal that there was a reasonable probability that the recordings were what they purported to be, a meeting of people in the recordings and the subjects of discussion. It was for the Tribunal to determine that it is reasonably probable that there was no material alteration of the evidence. the Tribunal was justified in rejecting the allegation of manipulation. The ground therefore lacks basis and is rejected.

iv. Whether the allegations against the petitioner were proved to the required standard

[131] Earlier in this judgment we noted that JSC, in the exercise of its mandate, was performing *quasi-judicial* functions. Removal proceedings, though *quasi-judicial* are not in the nature of criminal proceedings. Such proceedings do not require or depend on criminal culpability to succeed. All that is required is that the allegations be substantiated. In both the ***Mutava*** and ***Muya Cases,*** we set the standard of proof in removal proceedings as an intermediate one; neither beyond reasonable doubt nor on a balance of probabilities, with the burden of proof being on the Assisting Counsel to bring proof to the required standard in proof of the alleged misconduct. Once the Assisting Counsel has discharged the legal burden by providing sufficient evidence, the evidential burden will normally shift to the Judge on matters which are peculiarly within the Judge's knowledge.

[132] Article 168(1) of the Constitution provides that 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) <u>gross misconduct or misbehaviour</u>." [our Emphasis]

[133] Perhaps in passing, we note that though this Court has determined questions of removal of a judge under the grounds of inability to perform the functions of office arising from mental incapacity and for gross misconduct or misbehaviour, this is the first time a removal on the ground of breach of a code of conduct for judges of the superior courts has been recommended. Of course, this is in addition to the ground of gross misconduct or misbehaviour.

[134] In addressing the latter ground, the Tribunal noted that gross misconduct or misbehaviour infers more serious infraction; that the framing of gross misconduct or misbehaviour under the Constitution and the Code of Conduct, requires the possibility of sanctioning a variety of contravening behaviour; that not every allegation of misconduct merits the removal of a judge from office; and that where a Tribunal is of the view that the allegation does not meet the constitutional standard, the Tribunal cannot recommend the removal of the judge that is the subject of the inquiry.

[135] A similar rendition was articulated by this Court in the ***Muya Case*** in these words:

> **"Whether the conduct of a judge can be typified as "gross misconduct or misbehaviour" cannot be assessed in abstract. It is a question of fact which will depend on the nature of the complaint. As the Tribunal correctly noted, it is not every misconduct that will expose a judge to a removal process.**
>
> **... that not every allegation of misconduct merits the removal of a judge from office....and where a Tribunal is of the view**

that the allegation does not meet the constitutional standard the Tribunal cannot recommend the removal of the judge".

[136] Considering everything else we have said in the preceding paragraphs regarding the conduct of the petitioner, we now turn to answer the question, whether any material has been placed before us or other any basis laid in this petition to warrant our interference with the Tribunal's recommendation to the President. To answer the question, we have to consider each of the allegations, guided by the standard of proof described above.

[137] Allegation one: Lack of impartiality contrary to Articles 10 and 168(1) of the Constitution, and Regulations 11(3)(b), 16, 20, 21 and 30 of the Code of Conduct and Ethics and **Allegation six:** Non-Disclosure of conflict of interest contrary to Articles 75 and 168(1) of the Constitution, and Regulations 19, 20 and 21(1)(c), 21(1)(d), 21(1)(e) and 21(1)(h) of the Code of Conduct and Ethics, it is common factor the petitioner had a relationship with Hon. Sonko through marriage. There is no controversy too that the petitioner met Hon. Sonko on two different occasions, on 16th March 2021 and 22nd May 2021 which are relevant to the issues under inquiry. By necessary deduction, the two meetings took place during the pendency of the consolidated petitions, regarding the removal from office of governor of Hon. Sonko. In those meetings, there was communication between the petitioner, Mr. Jirani, Mr. Askar and Hon. Sonko. The discussions, we are satisfied by the direct evidence of eyewitnesses and the audio and video evidence, centered around two subjects: the sale of parcel no. 779, and the appeal of the judgment in the consolidated petitions. Again, from overwhelming evidence on record, it was established that the petitioner had an interest in parcel no. 779 and for which Mr. Jirani fronted him. The petitioner personally and keenly followed and directed the intended sale of the parcel to Mr. Askar in a transaction involving Hon. Sonko.

[138] Three things stand out and must be remembered from the facts: the petitioner was the single presiding judge in the succession cause, where parcel no. 779 was the main subject matter; Hon. Sonko, on the other hand, was the main petitioner in the consolidated petitions, in which the petitioner was the presiding judge in a bench of three judges. Finally, Mr. Jirani was a person well known to the petitioner while Hon Sonko was both well-known to and a distant relative of the petitioner.

[139] Accordingly, these facts presented reasonable circumstances for the petitioner to either disclose the same to the Hon. Chief Justice, colleague judges of the Bench and parties in the consolidated petitions, or to recuse himself altogether from sitting. We stress that judicial impartiality is a significant element of justice. In order to maintain impartiality where there is a likelihood of conflict of interest, the proper thing to do is to recuse oneself and let the dispute be resolved by another impartial judge, because no person shall be a judge on a case in which they have interest. The old age principle that justice must not only be done but seen to be done holds true today. Regulation 20. (1) of the Code of Conduct enjoins judges to;

> **"use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judge's official duties".**

The petitioner had a *sua sponte* duty to recuse himself from the case, or to disclose the nature of the interest in the matter.

[140] For failing to opt for any of the two routes, and instead proceeding to sit to the end of the case, we agree entirely with the Tribunal that the petitioner was in breach of Articles 10, 50(1), 75, 232 of the Constitution, and Regulations 9, 19, 20 and 21 of the Code of Conduct and Ethics. Accordingly, concerning **Allegations one** and **six**, we find no fault in the conclusion reached by the Tribunal.

[141] Allegation two: Lack of integrity contrary to Articles 10, 73(2)(b), 75(c), and 168(1) of the Constitution, section 13 of the Leadership and Integrity Act, and

Regulations 11(3)(a), 11(3)(b), 17(3), 20, 21 and 30 of the Code of Conduct and Ethics, we have already determined that there were two meetings in the petitioner's private residence in Mountain View Estate involving the petitioner, Hon. Sonko and others on 9th and 10th July 2021. Similarly, on the petitioner's own concession and on the strength of direct evidence of Hon. Sonko and Mr. Jirani, we are persuaded that the petitioner and Hon. Sonko discussed the possible grounds of appeal against the High Court judgment in the consolidated petitions regarding the impeachment of Hon. Sonko. There was also discussion about the sale of land Parcel nos. 779 and 1222.

[142] In the petitioner's view, there was nothing untoward with him discussing the appeal to challenge his judgment since the grounds of appeal had been settled. That view is mistaken and, we dare say, borders on impunity. A judge makes a decision against a party and goes ahead to discuss the case with that litigant, is *contra bonos mores* and it is immaterial that the window for lodging a notice of appeal had lapsed.

[143] Regulations 18 of the Code of Conduct and Ethics directs that;

> **"a judge shall not, comment on proceedings pending in any court".**

[144] Ultimately, the totality of the evidence on record shows that the petitioner conducted himself in a manner that demonstrated a singular lack of integrity by engaging parties who were litigants before him contrary to Articles 10, 73(2)(b), 75(c) of the Constitution as well as Regulations 11(3)(a) and (b), 17(3), 20, 21 and 30 of the Code of Conduct and Ethics. It must follow that the Tribunal properly directed itself on the evidence and arrived at the correct conclusion that the allegation under this ground was established to the required standard. We dismiss this ground too.

[145] Allegation three: Lack of accountability, involvement in corrupt practices, and impropriety contrary to Articles 10, 75 and 168(1) of the

Constitution, and Regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Code of Conduct and Ethics. Based on our conclusions in allegations one and six, the petitioner had a proprietary interest in parcel no. 779 and that Mr. Jirani was his proxy and was registered as such to hold parcel no. 779 on his behalf. Accordingly, we find that by the very fact that the petitioner acquired an interest in parcel no. 779 through Mr. Jirani, after hearing ***Malindi Succession Cause No. 97 of 2015*** in which parcel no. 779 was the subject matter of succession, in itself amounted to lack of accountability, conflict of interest, involvement in corrupt practices and impropriety on the part of the petitioner.

[146] Under Value 4, Principle 4.9 of the Bangalore Principles, a judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

[147] The several meetings hosted by the petitioner at his residence on 16th March 2021, 22nd May 2021, 9th and 10th July 2021 to discuss the withdrawal of the appeal against his decision in the succession cause, completion of the sale transaction over parcel no. 779 to Mr. Askar and the distribution of the proceeds of the sale went against the provisions of Articles 10, and 75 of the Constitution, and Regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Code of Conduct and Ethics.

[148] It is as ridiculous as it is absurd for the petitioner to argue that he did not offer advice on ***Malindi Succession Cause No. 97 of 2015*** but acted purely as a mediator. As a judge of many years, the petitioner obviously knows that what he was engaged in was not mediation but an act of subversion of justice. A judge who makes a decision in a contested case cannot purport to mediate without all the parties before him, in his private house and with strangers. What was there to mediate, anyway, after the petitioner had handed down a judgment which was the subject of appeal in the Court of Appeal? His singular interest was in parcel no. 779

and how to end the pending appeal in order to complete the transaction and receive and share the proceeds of sale.

[149] The petitioner was prohibited by Regulations 30 of the Code of Conduct and Ethics from using a third party or proxy to do what he knew if done by him would constitute a contravention of the Code of Conduct and Ethics.

[150] Consequently, like the Tribunal we find that the petitioner's conduct amounted to a lack of accountability, involvement in corrupt practices, and impropriety contrary to Articles 10, 73, and 75 of the Constitution, and Regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Code of Conduct and Ethics.

[151] On **Allegation four**, it was charged that the petitioner was involved in acts that subverted justice through commenting and advising a litigant on matters pending in court contrary to Article 75(c) of the Constitution, Section 13 of the Leadership and Integrity Act and Regulation 18 of the Code of Conduct of Judges. In **Allegation five**, the petitioner was alleged to lack professionalism and to be engaged in conduct unbecoming of a judge in contravention of Articles 73 and 168(1)(e) of the Constitution of Kenya, 2010 and Regulations 15, 16(a), (b) and (c) and 17(3) of the Code of Conduct for Judges. Besides the evidence of Hon. Sonko and Mr. Jirani that the petitioner and Hon. Sonko had a private conversation in which he suggested to Hon. Sonko the points to raise in his appeal, the petitioner himself admitted that his advice amounted to nothing as the appeal had already been lodged.

[152] Regulation 17(3) of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 provides that:

> **"(3) A judge shall not engage in consultancy or practice law by offering legal advice or drafting pleadings for litigants or members of the public, while holding judicial office."**

[153] Regulation 18(1) on the other hand provides that:

> **"A judge shall not, comment on proceedings pending in any court, and shall require similar abstention on the part of the court personnel subject to the judge's direction and control."**

[154] The evidence before us and as captured in the Hansard of 4th November 2021, is that the petitioner admitted that he discussed with Hon. Sonko possible grounds of appeal–against the judgment in the consolidated petitions, being the grounds in the petition. In our view, such advice, from a judge to a person who was a litigant before him in the matter, the subject of discussion and in respect of which an appeal to the Court of Appeal was contemplated, is what is prohibited by Regulations 17(3) and 18(1) of the Code of Conduct and Ethics.

[155] Ultimately on this ground, we find that the petitioner was engaged in the subversion of justice by commenting on pending cases and suggesting to a litigant, possible points for the challenge of the judgment arising from the consolidated petitions contrary to Article 75(c) of the Constitution, and Regulation 18 of the Code of Conduct and Ethics. His conduct, apart from being unprofessional was also unbecoming of a judge and contravened Articles 73 of the Constitution as well as Regulations 15, 16(a), (b), (c) and 17(3) of the Code of Conduct and Ethics. We therefore find that **Allegations four and five** were proved to the required standard.

[156] As we conclude we make the following four points arising from the petition:

(i) Though there is no obligation in removal proceedings to prove each and every allegation, in this instance the Tribunal, found proof in all the six allegations against the petitioner. No material has been placed before us to warrant our interference with the conclusions reached by the Tribunal.

(ii) As the old saying goes, the robe magnifies the conduct, meaning judges must be held to higher ethical standards if they are to keep the trust and confidence of the people they serve. The Code of Conduct which was formulated from the provisions of Article 168(1)(b) of the Constitution

enjoins judges to preserve the integrity of the judiciary and to avoid even the appearance of impropriety.

(iii) Generally, the decisions of a judge made in the course of the discharge of judicial function cannot be questioned except through judicial review or appeal, and a judge is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

(iv) So important is judicial independence that removal of a judge can only be justified where the shortcomings complained of were of such a serious nature as to destroy the confidence in the judge's ability properly to perform the judicial function. Gross misconduct or misbehaviour as grounds for removal of a judge is an expression of something very serious.

(v) The proceedings before the Tribunal are not criminal in nature and therefore not subject to a standard of proof beyond reasonable doubt.

[157] In the end and for all the reasons we have given, this Petition of Appeal fails as we are satisfied with the Tribunal's conclusion that 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.

G. COSTS

[158] Costs follow the event but are at the discretion of the Court. We are guided by the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others***; SC Petition 4 of 2012; [2013] eKLR. Noting the nature of the appeal, we shall make no orders with regard as to costs.

H. FINAL ORDERS

[159] Accordingly, we make the following orders:

a) ***The Petition of Appeal dated 15th February 2023 is hereby dismissed;***

b) ***The Tribunal's finding that the Petitioner's conduct was in breach of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 and amounted to gross misconduct contrary to Article 168(1) (b) and (e) of the Constitution is affirmed;***

c) ***The Tribunal's recommendation to the President for the Petitioner's removal from office under Article 168(1)(e) of the Constitution is hereby affirmed;***

d) ***No orders as to costs.***

e) ***We hereby direct that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the petitioner.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **28th** Day of **December 2023.**

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**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