

SPECIAL ISSUE



THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. CXIV—No. 86

NAIROBI, 18th September, 2012

Price Sh. 60

GAZETTE NOTICE No. 13113

THE CONSTITUTION OF KENYA

THE JUDICIAL SERVICE ACT

(No. 1 of 2011)

PURSUANT to the provisions of section 18 (3), part IV of the Second Schedule of the Judicial Service Act, the Secretary of the Tribunal to Investigate the Conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya, hereby publishes the Report and Recommendation of the Tribunal, dated 3rd August, 2012.

TRIBUNAL TO INVESTIGATE THE CONDUCT OF
THE DEPUTY CHIEF JUSTICE AND
VICE-PRESIDENT OF THE SUPREME COURT OF
THE REPUBLIC OF KENYA

TRIBUNAL MATTER NO.1 OF 2012

REPORT AND RECOMMENDATION
INTO THE CONDUCT OF THE
HON. LADY JUSTICE NANCY MAKOKHA BARAZA

Chairman:

Chief Justice (Rtd.) Augustino S. L. Ramadhani

Vice-Chairperson:

Mrs. Surinder Kapila

Members:

Justice (Rtd.) Philip J. Ransley

Prof. Judith M. Bahemuka

Grace B. N. Madoka

Mr. Beattah A. Siganga

Prof. Mugambi J. N. Kanyua

Presented to:

His Excellency

Hon. Mwai Kibaki, C.G.H., M.P.

President and Commander-in-Chief of the
Defence Forces of the Republic of Kenya

August 2012

Letter of Transmittal

REPUBLIC OF KENYA

TRIBUNAL TO INVESTIGATE THE CONDUCT OF THE
DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF KENYA

Your Excellency

The Hon. Mwai Kibaki, C.G.H., M.P.,
President and Commander – In - Chief of the
Armed Forces of the Republic of Kenya,
State House,
NAIROBI.

Your Excellency,

We Justice Augustino Stephen Lawrence Ramadhani, Chairman (Retired Chief Justice of the United Republic of Tanzania), Prof. Judith Mbula Bahemuka, Retired Justice Philip J. Ransley, Mrs. Surinder Kapila, Mr. Beattah Alukhava Siganga, Grace Barbara Ngele Madoka and Prof. Mugambi Jesse Ndwiga Kanyua were, in exercise of the powers conferred on Your Excellency by Section 168 (5) (b) of the Constitution of Kenya, appointed on 26th January, 2012 by Gazette Notice No. 664 and amended by Gazette Notice No. 2057 of 24th February 2012, to be members of a Tribunal to investigate the conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya, Justice Nancy Makokha Baraza.

The mandate of the Tribunal, as set out in the Gazette Notice was to investigate the conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya, Justice Nancy Makokha Baraza on the basis of Article 168 (10) (e) and 75 (1) and (2) of the Constitution; the Judicial Service Code of Conduct and Ethics; Legal Notice No. 50 of 2003; other relevant laws and the following:

The allegations contained in the petition by the Judicial Service Commission of Kenya dated 19th January, 2012 and presented to you regarding the conduct of the Deputy Chief Justice, Justice Nancy Makokha Baraza.

In the discharge of its functions, the Tribunal was empowered to:

- Prepare and submit a report and its recommendations thereon to Your Excellency expeditiously;
- Exercise all the powers conferred upon it by law for the proper execution of its mandate.

On the first day of hearing, the Counsel for the Deputy Chief Justice objected to two of the five allegations on the ground that the judgment of the High Court in Petition No. 23 of 2012 filed by the Deputy Chief Justice restricted the mandate of the Tribunal to "the matters submitted in the Petition to the President by the Judicial Service Commission." That petition referred to Article 168 (1) (e) read together with Article 75 (1) (c) of the Constitution. The Tribunal gave a ruling upholding the objection and retained the allegations that referred to the said Articles which are:

- That the Deputy Chief Justice conducted herself in a way and manner demeaning to the said office,
- That the Deputy Chief Justice threatened to shoot Rebecca Kerubo with a pistol,
- That the Deputy Chief Justice created a disturbance in a manner likely to cause breach of the peace.

The Tribunal, the, first of its kind since the promulgation of the Constitution in August 2010, is fully aware of the immense national importance of its work, and the implication of the recommendations on the behaviour of all state officers. Therefore, in our deliberations, in addition to making reference to Article 168 (1) (e) and Article 75 (1) (c) of the Constitution, as specified in the Petition, we have spread our net wide and made reference to Chapter 4 on the Bill of Rights, Article 10, Article 28 and Article 73.

In accordance with Article 168 (7) (b) of the Constitution we have carried out and completed our investigations into the allegations of gross misconduct and misbehaviour against the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya, Justice Nancy Makokha Baraza. Derived from the investigations of the facts, the Tribunal is of the unanimous view that the allegations have been established and are true.

The Tribunal, therefore, is of the considered opinion that the Deputy Chief Justice be removed from office.

We now have the honour, Your Excellency, to submit our Report and Recommendations to you and to thank you for the trust that you bestowed on us.

Yours Sincerely,

(Signed)

Chief Justice (Rtd.) Augustino S. L. Ramadhani
Mrs. Surinder Kapila
Justice (Rtd.) Philip J. Ransley
Prof. Judith M. Bahemuka
Mr. Beattah A. Siganga
Grace B. N. Madoka
Prof. Mugambi J. N. Kanyua

ACKNOWLEDGEMENTS

We wish to record our gratitude to His Excellency Mwai Kibaki, the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, for having appointed us to this Tribunal mandated with the task of looking into the conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya, on the incident that occurred on 31st December 2011 at the Village Market, Nairobi.

We wish to appreciate the logistical support given by the Cabinet Office in the Office of the President and acknowledge Mr. Kennedy W. Kihara, Mr. Tom M. Nyamorata and Mrs. Jestina W. Hanjari.

We owe special thanks to the Counsel Assisting the Tribunal, the Lead Counsel Mrs. Valeria Onyango and Assistant Counsel Mr. Gideon S. Kilakoi. It was amply evident that they carried out much research and ably presented their authorities. We also commend the Counsel on record for the Deputy Chief Justice, Ms. Judith Guserwa, Mr. Kioko Kilukumi and Mr. Solomon Wamwayi.

Next we wish to express our gratitude to the entire Tribunal Secretariat for their contribution in the entire process and particularly to the Secretary Mr. Macdonald O. Oguya; Assistant Secretary Ms. Wambui Ngugi; Records Manager Mr. Kenneth N. Mamboleo; Executive Secretaries Ms. Pamela A. Wachanga and Mrs. Lydia W. Murugami; Support Staff Mr. Joseph N. Mbithi; Investigators, Security and Transport Teams.

The publication of this Report is the result of a combined effort and industry. We owe many thanks to all who participated, for the efficient way in which they gathered materials, conducted the hearings, handled and analysed information, and the production of this report.

We would finally like to thank the Kenyatta International Conference Centre which placed at our disposal, physical and other facilities.

(Signed)

Chief Justice (Rtd.) Augustino S. L. Ramadhani
Mrs. Surinder Kapila
Justice (Rtd.) Philip J. Ransley
Prof. Judith M. Bahemuka
Mr. Beattah A. Siganga
Prof. Mugambi J. N. Kanyua

Preamble

1. On 19th January 2010, the Honourable Justice Dr. Willy M. Mutunga, SC, the Chief Justice of the Republic of Kenya, as the Chairman and on behalf of the Judicial Service Commission, sent a petition to His Excellency Mwai Kibaki, the President and Commander-in-Chief of the Armed Forces of Kenya, recommending to him among other things, the appointment of a Tribunal in terms of Article 168 (5) (b) of the Constitution of Kenya to inquire into the conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya, Justice Nancy Makokha Baraza, (hereinafter 'DCJ') and to determine whether she was in breach of Article 168 (1) (e) read together with Article 75 (1) (c) of the Constitution.

2. As a result of that Petition, His Excellency Mwai Kibaki vide Gazette Notice number 664 of 26th January, 2012, as amended by Gazette Notice No. 2057 of 24th February, 2012, appointed a Tribunal consisting of: Justice Augustino Stephen Lawrence Ramadhani (Retired Chief Justice of the United Republic of Tanzania) as the Chairman and the following six Members: Prof. Judith Mbula Bahemuka; Retired Justice Philip J. Ransley; Mrs. Surinder Kapila; Mr. Beattah Alukhava Siganga; Grace Barbara Ngele Madoka; and Prof. Mugambi Jesse Ndwiga Kanyua. The Chairman and the Honourable Members of the Tribunal took oath of office before the Hon. Chief Justice on 1st February, 2012, and immediately embarked on the appointment. Members of the Tribunal unanimously elected Mrs. Surinder Kapila to be their Vice-Chair.

3. However, as the learned Deputy Chief Justice had filed Petition No. 23 of 2012 in the High Court of Kenya, the Tribunal stayed the investigation pending the finalization of the Petition. On 13th March, 2012, the High Court gave its judgment, and after the statutory period for the DCJ to lodge an appeal before the Court of Appeal had lapsed without there being a notice of appeal lodged, the Tribunal proceeded with the necessary arrangements for investigation. Rules of the Tribunal were made by Gazette Notice No. 5376 of 20th April 2012. The DCJ was served with a Hearing Notice and a List of Charges giving her fourteen days as required by section 8 (1) of the Second Schedule to the Judicial Service Act, 2011. The hearing started on 2nd July, 2012, in private as provided by section 9 (1) and as preferred by the DCJ.

4. His Excellency the President also appointed Mrs. Valeria Onyango as the Lead Counsel and Mr. Gideon Solonka Kilakoi as the Assistant Counsel vide Gazette Notice No. 665 of 26th January, 2012, as amended by Gazette Notice No. 2058 of 24th February, 2012. At the hearing of the investigation the DCJ was represented by three learned advocates: Ms. Judith Guserwa as the Lead Counsel, and who was assisted by Mr. Kioko Kilukumi and Mr. Solomon Wamwayi.

5. The List of Allegations contained five allegations but on the first day of hearing the Counsel for the DCJ objected to Allegations Four and Five on grounds that the judgment of High Court in Petition No. 23 of 2012, restricted the mandate of the Tribunal to "the matters submitted in the Petition to the President by the Judicial Service Commission." That Petition referred to Article 168 (1) (e) read together with Article 75 (1) (c) of the Constitution. It was pointed out that Allegations Four and five were based on Article 73 (1) (a) and (b) of the Constitution. The Tribunal gave a ruling upholding the objection and struck out Allegations Four and Five but retained Allegations One, Two and Three which were couched as follows:

Allegation Number One

STATEMENT OF GROSS MISCONDUCT AND MISBEHAVIOUR

That the Hon. Lady Justice Nancy Makokha Baraza, while holding the Office of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, conducted yourself in a way and manner demeaning the said office.

PARTICULARS OF GROSS MISCONDUCT AND MISBEHAVIOUR

That on 31st December, 2011, the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, Hon. Lady Justice Nancy Makokha Baraza refused to submit herself to be searched by the duly authorized security officer and walked on without being searched at the Village Market, a shopping complex along Limuru Road in Nairobi in breach of security protocol. The said event triggered a chain reaction of events which allegedly included her intrusive and unwelcome behavior on the person of Mrs. Rebecca Kerubo Ogweche by pinching her nose while indicating to her that "she should know important people."

Allegation Number Two

STATEMENT OF GROSS MISCONDUCT AND MISBEHAVIOUR

That while holding the Office of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, you threatened to shoot Mrs. Rebecca Kerubo Ogweche with a pistol.

PARTICULARS OF GROSS MISCONDUCT AND MISBEHAVIOUR

That on 31st December, 2011, at the Village Market, a shopping complex along Limuru Road, in Nairobi, the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, threatened to shoot Mrs. Rebecca Kerubo Ogweche with a pistol.

Allegation Number Three

STATEMENT OF GROSS MISCONDUCT AND MISBEHAVIOUR

That while holding the Office of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, you created disturbance in a manner likely to cause breach of the peace.

Evidence

6. It is common ground that at about 6.30 p.m. on 31st December, 2011, the DCJ entered the Village Market shopping complex through the Nakumatt entrance and by-passed the security desk without undergoing screening. There are two versions of what transpired after that: One is that narrated by Rebecca Kerubo (hereinafter 'Kerubo') and Anthony Makhanu (hereinafter 'Makhanu') while the second version is as related by the DCJ and her driver Eric Omondi (hereinafter 'Omondi').

First version

7. Kerubo testified that on the material day she was screening female customers, and next to her was Makhanu who was screening male customers. She saw the DCJ by-passing the security desk on the side that male customers were being screened. Customers in the queue started grumbling about discrimination. Kerubo called out to the DCJ and told her that she wanted to screen her handbag. The DCJ however continued to walk away rapidly and entered Belladonna Pharmacy (hereinafter 'Pharmacy'). Kerubo followed the DCJ and stopped at the entrance of the Pharmacy. The DCJ who had entered the pharmacy came out and Kerubo told her "excuse me Madam, Madam I have to check your bag." The DCJ, who was very harsh, responded by pinching Kerubo's nose and told her "you should know people." The DCJ re-entered the Pharmacy and beckoned Kerubo to follow her. Kerubo did, expecting the DCJ to identify herself. Instead, the DCJ informed Kerubo that she was an important government official and that Kerubo should know people. Kerubo told the DCJ that she too should respect her work.

8. The DCJ then placed a hand on Kerubo's shoulder after telling her "Don't call me your sister, I am not your sister." Kerubo then resumed her duties at the security desk. A short while later the same DCJ re-appeared at the desk. The DCJ told Omondi who was standing nearby "I want you to shoot this lady now." Omondi did not respond but he asked Kerubo to keep quiet. Kerubo continued with her work when suddenly the DCJ appeared and pointed a pistol at her and said "I want to kill you now. If you want I can kill you now." Kerubo begged for mercy, and people standing nearby asked the DCJ to cool down. Kerubo ran away from the scene and went into the Village Market security office and reported the matter to the Security Manager, Jared Obonyo Meshack (hereinafter 'Meshack'). He asked her to go home and return the following day.

9. On 1st January 2012 Kerubo reported the matter at the Gigiri Police Station. Kerubo recorded her statement and she spoke on

telephone to the DCJ who had been called by Hassan Bwogo, (hereinafter 'Bwogo') the Officer Commanding the Station. The DCJ came to the station and met Kerubo, and they talked. Kerubo told the DCJ that she would first wish to talk to her husband about any reconciliation.

10. On the 2nd of January 2012 Kerubo went with her husband Bernard Morara (hereafter 'Morara') to the Gigiri Police Station and met with the DCJ, who was angry and said that she was unhappy with what she had heard in the news, and that the case could go to court. The DCJ further said that she was a judge and the government would assist her. Thereafter, they parted ways without reconciliation.

11. Earlier, on 1st January 2012, Kerubo had gone to the Village Market security control room and was shown a CCTV clip of the previous evening's events by John Makori (hereinafter 'Makori'). Kerubo said she distinctly saw the DCJ's hand pinch her nose. When she next viewed the clip on 6th January 2012 in the presence of police officers, she was shocked that it no longer showed her nose being pinched. Kerubo did not tell this to the police officers present as she was in shock, but she later informed Makhanu. She reiterated to the Tribunal that the DCJ pinched her nose and pointed a pistol at her. Kerubo said that she planned to report the nose pinching after she completed her work. Upon further examination, Kerubo said that when she was threatened with a pistol, she immediately went to make a report to the Village Market security officer. She testified that she subsequently met the DCJ at the DCJ's request in February 2012 and on 27th June 2012. During the second meeting the DCJ tried to get Kerubo to change her testimony to say that she did not see a pistol but instead heard the words "bunduki! Bunduki!"

12. In his testimony before the Tribunal, Makhanu, who was screening male customers at the security desk, he said he saw the DCJ pass by the side the male customers were being screened. He then heard Kerubo call out to the DCJ that she needed to be screened but the DCJ did not stop. Makhanu said that Kerubo followed the DCJ and near the entrance of the Pharmacy Makhanu saw the DCJ turn back and pinch Kerubo's nose saying "stupid lady, you should know people. Why are you shouting at me?" The DCJ then entered the Pharmacy. Kerubo followed her into the Pharmacy but came out soon thereafter when Makhanu called her to return to the security desk. A short while later, the DCJ came to the security desk and asked Kerubo "Why are you shouting at me? I am a senior person, why are you shouting at me?" Kerubo tried to explain that she did not know her and that she was under instructions to search everyone who wished to enter the shopping mall. As they were talking, the DCJ said to Omondi who was nearby "Bodyguard, I want you to shoot this lady right now." Omondi did not take any action. Kerubo apologized and explained to the DCJ that she did not let her know who she was before passing the screening desk. The DCJ said "give me a minute," she left, and a short while later returned holding a pistol which she pointed at Kerubo and said "I have come to shoot this lady." Kerubo begged for mercy and told the DCJ that she was sorry. A man who was standing nearby, told the DCJ "Madam what you are doing is wrong" and the DCJ cooled down and left. Makhanu had rung the control room but by the time the supervisor arrived, the DCJ had left. In his testimony Makhanu stated that Kerubo did not use any abusive words against the DCJ.

13. Makhanu further testified that on 26th June 2012 the DCJ rang him and told him that she wanted to meet him and Kerubo. Makhanu contacted Kerubo and they met with the DCJ on 27th June 2012 at Gigiri Shopping Centre. They went into a restaurant but left after the DCJ got concerned that a worker called Faith had recognized Kerubo and Makhanu. The three of them then entered the DCJ's official car which the DCJ drove to the Karura Forest parking area. The DCJ told Kerubo that she wanted them to forgive one another, and said that "to err is human". She gave Makhanu Kshs. 2,000 and Kerubo Kshs. 5,000 for their fare.

14. Makhanu further explained that if a customer refuses to be screened, that the guards on duty are required to ask such a person to identify him/herself and ask the reason for refusing to be screened. If the person is still adamant, the guards call their supervisors. On the material day, the supervisors came about twenty minutes after Makhanu first called. He further said that he first called the control room after the DCJ passed the security desk and the second time he called the control room after her return from the Pharmacy. In his testimony to the Tribunal, Makhanu clarified his statement to the Judicial Service Commission, that his words to Kerubo "we will deal with her" meant that on the DCJ's return from the Pharmacy they

would ask the DCJ to identify herself and explain why she had pinched Kerubo's nose.

15. Makhanu in his testimony said that he did not remember screening anyone carrying a pistol on the 31st December 2011.

SECOND VERSION

16. The DCJ in her testimony before the Tribunal said that on 31st December 2011 she went to Limuru to see her son who was sick. She spent that afternoon with him. She was driven there by Omondi. Her son was distraught because of the fact that he might not get the opportunity to go back to school. It was a disturbing visit. She said that her son required some medication; she therefore decided to drive to the Village Market to buy the medicine. She arrived at the Village Market at about 6.00 p.m. She wanted to get the medication before the Pharmacy closed and planned to have the medicine delivered to him the same evening. She was in a hurry and inadvertently passed the security desk without submitting her bag for screening and continued to walk. She noticed people standing in a queue at the security desk. Someone called after her saying, in Kiswahili, *"wewe mama, unapita bila kuangaliwa? Wewe mjinga namna gani?"* The DCJ looked back and saw Kerubo was addressing her. She continued walking and entered the Pharmacy. Kerubo followed her in. The DCJ tried to explain to Kerubo why she had not stopped, but Kerubo was angry and her eyes were red, and she would not listen to her. Kerubo said *"I do not care who you are. Everybody is to be checked."* The DCJ tried to calm Kerubo down by touching her shoulder and covering Kerubo's mouth with her hand whilst identifying herself. A shop attendant in the Pharmacy intervened and the DCJ walked away to the counter. She did not see Kerubo after that.

17. The DCJ purchased the medication and as she left the Pharmacy, she met Omondi along the corridor. Omondi took her handbag and they walked towards the car. On her way out she saw Omondi talking to Makhanu at the security desk.

18. In her testimony before the Tribunal the DCJ denied that she pinched Kerubo's nose, or that she asked Omondi to shoot Kerubo or that she threatened her with a pistol. The DCJ further denied that she went to the car and got a pistol, as she did not know where the car was parked, and in any event did not possess or is licensed to carry a pistol. Omondi was armed but she did not take his pistol.

19. She further stated that on her appointment as DCJ she had received a security briefing from the Police. Her strict instructions were never to step out of her car without her security. She had however gone to several places without her VIP escort/bodyguard, Annalice Kaburu (hereinafter 'Kaburu'). She stated that the reason for not always having Kaburu with her was that Kaburu lived at the Central Police Station Lines while the DCJ lived in Gigiri. The DCJ said she found it inconvenient to call Kaburu if the DCJ wanted to go to the supermarket at the Village Market. The DCJ further said that she had driven herself to the Village Market on 23rd and 25th December 2011 without a bodyguard. The DCJ had given Kaburu leave from the 23rd December 2011 onwards and had not asked for a substitute or replacement. She testified that she had shopped at the Village Market for many years and had always submitted herself for screening except when she had Kaburu, who would go ahead of her and "clear the way".

20. The DCJ further stated in her testimony before the Tribunal that on 1st January 2012, she received a call from Bwego who told her that a complaint had been lodged against her to the effect that she had threatened Kerubo with a pistol. She spoke to Kerubo over the phone and met her later that day at the Police Station. She said that they spoke about reconciling and Kerubo said that she would first speak to her husband. On 2nd January 2012 the DCJ said that she went back to the Police Station and met with Kerubo and Morara. He spoke, and asked for Kshs. 10 million as compensation in the event that his wife lost her job. The DCJ said that she refused to consider a financial payout for reconciliation or forgiveness.

21. The DCJ self-recorded her statement with the police at her house on 3rd January 2012. She stated that the next day a journalist called her and asked her about the incident which was carried by news media for many days thereafter.

22. The DCJ further stated that in the first week of February 2012, she met Kerubo after Omondi and one, David Onyapidi (hereafter 'Onyapidi') told her that Kerubo wanted to reconcile. At the meeting Kerubo's lawyer asked for Kshs. 10 million to withdraw the case and reconcile. The lawyer told the DCJ that she did not know what she was

fighting and what she was up against. The DCJ said that after she refused to pay any money, the lawyer scaled down his demand to Kshs. 4 million, which proposition she rebuffed. The lawyer called her several times thereafter but that the DCJ put him off. The DCJ further denied before the Tribunal that she offered Kerubo Kshs. 3.5 million in order to settle the matter.

23. The DCJ further confirmed that she called Makhanu to arrange a meeting between her and Kerubo. On 27th June 2012 she met with Kerubo and Makhanu. They met in the DCJ's car at Karura Forest. The DCJ said that Kerubo told her that if she got some money she would withdraw her complaint. The DCJ did not agree to the proposal to pay the money and they parted. The DCJ then gave Kerubo Kshs. 5,000 and Makhanu Kshs. 2,000 after they asked her for fare. The DCJ stated that this was not an inducement for them to change their evidence.

24. The DCJ said that Kerubo had told her that she feared for her life, and the DCJ wrote to the Chief Justice on 8th February 2012 to provide Kerubo with security. The DCJ further stated that she was apprehensive that if any harm befell Kerubo she would be blamed. The Chief Justice wrote to the Commissioner of Police to provide Kerubo with security and copied the letter to the DCJ.

25. The DCJ denied that she ever sent emissaries to Kerubo's house. But that she was however aware that several people, including her friends, had tried to intervene to assist her.

26. Omondi told the Tribunal that on the evening of 31st December 2011 he dropped the DCJ off at the Nakumatt entrance of the Village Market. He parked the car and walked back to the same entrance. The DCJ had not told him where she was going. He was screened at the security check, where he showed his police identification card and informed Makhanu that he had a pistol. As he stood at the security desk he heard a scuffle and shouting. From where he stood he could see inside the Pharmacy and all that was going on inside. He heard Kerubo tell the DCJ *"wewe mama mjinga. Unajiona sana."* The DCJ did not respond to the words. He also said that he saw Kerubo grabbing the DCJ's bag; and on further questioning, Omondi said he was not alarmed by this as he noticed that it was a security guard pulling the handbag, and so he did not intervene. When the DCJ reached Omondi's position, he took possession of her handbag. Kerubo remained in the Pharmacy. Then on his way out Omondi spoke to Makhanu and told him that they should not have embarrassed the DCJ. Omondi then accompanied the DCJ to the car and they drove off. He denied that he gave his pistol to the DCJ. He also denied seeing the DCJ brandishing a pistol at Kerubo.

27. Omondi further stated that sometime in March 2012 he met Onyapidi, a co-parent at their children's school. Onyapidi told Omondi that Kerubo, who was his colleague at work, wished to reconcile with the DCJ. Omondi organised a meeting between the DCJ, Kerubo and her husband Morara. Omondi went to Kerubo's house at Gachie to collect them. He took them to a restaurant at Gigiri where they met the DCJ, and later went with them to the DCJ's house. Omondi told us he did not know what they discussed, but they evidently did not reconcile.

28. Omondi stated that his duties were to protect the official car and to perform his work as a driver, but did not include the protection of the person he was driving. He said he was not supposed to be a bodyguard and had not received any training for that role. On the material day he followed the DCJ into the Village Market with the intention of carrying her bags.

INDEPENDENT WITNESSES

29. Benedict Ichingwa Muhani (hereinafter 'Muhani') worked at Pharmacy. On the evening of 31st December 2011 he saw a security guard enter the pharmacy. She was arguing with another lady that he did not know. He moved closer to hear what they were saying. He could not hear what they were saying. A colleague of his told the guard she was out of order in coming into the pharmacy and she left. The customer who he identified as the DCJ remained in the shop and was served. Muhani did not hear any of the words the DCJ uttered. The talk between the two had not been friendly.

30. Dr. James Wathigo (hereinafter 'Wathigo') was a Pharmacist at Belladonna Pharmacy. He testified that at about 6 p.m. on 31st December 2011 after he had served his last client for the day he heard unusual noises from outside the Pharmacy. He then saw two ladies come in. One was dressed in a security guard's uniform. He recognised the other as the DCJ, who was their customer. He heard the DCJ tell the guard that they were not sisters. The guard told the DCJ that she needed to be searched. The DCJ looked annoyed at the treatment she

was receiving from the guard. The DCJ responded that she was the DCJ and that the guard *"should know people around here"*. The DCJ then walked to the counter. A short while later she beckoned the guard and asked her to apologise. The guard apologised in low tones and then left the Pharmacy. At some point, Wathigo asked his colleague to call the Village Market security to deal with the problem. The DCJ completed her transaction and then left. Fifteen to twenty minutes later Wathigo went to the Nakumatt entrance where he found a security man and a multitude of people. He also saw the security guard who had seen earlier in the Pharmacy, leaving while carrying a handgun and a paper bag.

OTHER WITNESSES

31. Among the other witnesses the largest group is of Police Officers of various ranks. These conducted investigation of the incident and their evidence is largely what they were told by the three principal witnesses: Kerubo, Makhanu and the DCJ. These were eight but two of them were attached to the DCJ as a driver and a bodyguard. We shall deal with them separately. The remaining six were: Police Constable Daniel Kioko (hereinafter 'Kioko') who was the desk officer on duty at Gigiri Police Station on 1st January, 2012 and so received Kerubo and recorded the matter in the Occurrence Book. He told Kerubo to report to Bwogo, who passed on the investigation to Superintendent of Police Peter Mungai (hereinafter 'Mungai'), the Divisional Criminal Investigation Officer, Gigiri. Mungai was of the opinion that Kerubo and Makhanu concocted the story to save their skins after they realized who the DCJ was. He recommended that the duo be charged. The case was taken over from Mungai by Senior Assistant Commissioner of Police Peter Mwau Muinde (hereinafter 'Muinde') and Senior Assistant Commissioner of Police Mohammed Amin (hereinafter 'Amin'), the Officer in Charge of Investigations Branch at the CID Headquarters. The two officers irregularly recorded a confession of the DCJ which the Tribunal refused to admit in evidence. Then there was Mr. Maxwell Kibenei Kiplimo (hereinafter 'Kiplimo') who had been in Charge of the CID Cybercrime Unit of the Kenya Police. He investigated the CCTV system of the Village Market and found out that the cameras which would have taken pictures of the security desk supervised by Kerubo and Makhanu were not working and so there could not be pictures of the pistol incident.

32. There is nothing much in the evidence of these officers apart from what we have said above or we are going to point out later on regarding any officer. They have largely repeated what they were told by Kerubo, Makhanu and the DCJ.

33. Bansio Ngota (hereinafter 'Ngota') was Supervisor at the Village Market. On the evening of 31st December 2011 he received a radio call message from the control room asking him to proceed to the Nakumatt entrance where there had been an incident. He started off immediately and arrived there after five to ten minutes. He found a crowd of between ten to fifteen people. He went to his guard, Makhanu. Kerubo was not present. Makhanu told him what he told the Tribunal as to what had transpired. Kerubo returned and she too told Ngota what had transpired and she started crying and so he asked her to go to the control room, where the Security Manager Mr. Obonyo sent her home. Ngota watched the CCTV on 1st January 2012 and saw the DCJ raise her right hand towards Kerubo.

34. Jared Obonyo Meshack (hereinafter 'Meshack') is the Chief Security Manager at the Village Market. On 31st December 2011 at about 6.30 p.m. he heard over his radio handset that an incident had occurred at the Nakumatt corridor and that a supervisor was required on the spot. A supervisor is usually asked for by the guards on fixed assignments whenever an incident occurs which they feel they cannot handle. Meshack did not go to the scene as he had other engagements. Twenty minutes later, at about 7.00 p.m., he went to the control room and found Kerubo who told him what had happened. He saw that Kerubo was distressed and allowed her to go home to rest. He watched the CCTV clip of the incident and saw that *"there was a stretch of the hand towards the guard and it pointed around the shoulders."* He stated that the camera that covered the security desk was off at the time of the incident and therefore there was no video evidence of a pistol incident. On 1st January 2012 he permitted Kerubo to go and make a report to the police. He said Kerubo should not have left her post to follow the lady, and that this was a security lapse. He produced the job cards confirming that the CCTV cameras had been taken for repair on the material day.

He however stated that at the Village Market they did not do body search as they did not touch people, but rather they only checked bags and passed a scanner over their bodies,

35. John Onyango Makori (hereinafter 'Makori') is a Surveillance Controller at the Village Market. On 31st December 2012 he was watching the CCTV's and receiving calls. He received a telephone call from Makhanu who said there was a problem at Belladonna corridor. He viewed the video from the camera and he witnessed an argument between a lady and a guard, but did not know who the lady was. He called his supervisor to visit the scene. After a short time Makhanu rang him again and informed him that the incident still continued. It was only the next day when the police visited the control room that he realised the magnitude of the incident. He took the Tribunal through the CCTV footage and described each event in the clip. As the Tribunal watched the clip, the evidence of Omondi was interposed. Omondi denied being the man with the white shirt who took the DCJ's bag and whom Makori had identified as the DCJ's bodyguard.

36. On further examination by the Tribunal, Makori denied that he organized for a viewing of the CCTV clip by Kerubo on 1st January 2012. He further stated that the schedule he prepared on the CCTV footage shows that Kerubo left the Pharmacy at 18:29:52, about 3 minutes after the DCJ exited. He stood by his notes, but confirmed that he did not receive any input from eyewitnesses.

37. Morara testified that on 31st December 2011 at around 7.00 p.m. he was in the sitting room of his house with their children. Kerubo arrived. Typically on her arrival she would greet them all, proceed to the bathroom and thereafter sit with Morara until bedtime when they would go to bed together. On this day she went straight to bed. He followed her, and asked her if she was feeling unwell. Kerubo asked him to let her sleep and she would speak to him in the morning. On 1st January 2012 Kerubo told him what happened the previous evening at the Village Market. Morara accompanied Kerubo to Gigiri Police Station on 2nd January 2012 where the DCJ arrived. The DCJ was angry and nothing positive came out of the discussion. Later several people came to their home seeking forgiveness for the DCJ. In late January 2012 or early February 2012 he met the DCJ at her house and Kerubo told him that the DCJ had offered her Kshs. 3.5 million to drop the complaint and go to live elsewhere. He denied ever asking for money as a condition for Kerubo forgiving the DCJ. He also testified that the DCJ did not offer him any money to settle the matter.

38. Police Constable Annalice Kaburu (hereinafter Kaburu) is the DCJ's bodyguard. On 23rd December 2011 the DCJ allowed the witness three days off to attend to personal business in Meru. She returned to Nairobi on 26th December 2011 and rang the DCJ on 27th December 2011 to inform her that she was back and available. She was not with the DCJ on 31st December 2011. The DCJ did not communicate with her on that day. She was in her house all day, and had her firearm in her possession. Kaburu reported back on duty on 3rd January 2012. She stated that, in her absence, the driver can accompany the DCJ, in which case he acts as driver and bodyguard.

LEGALITY OF SEARCH

39. Mr. Kilukumi in his closing address submitted that the security check at the Village Market was unlawful as it breached the provisions of the Constitution. He referred to Article 31 (a) of the Constitution which states 'Every person has the right to privacy, which includes the right not to have (a) their person, home or property searched'; and Article 58 (6) which states that 'Any legislation enacted in consequence of a declaration of a state of emergency--(i) the limitation is strictly required by the emergency; and (ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency; and (b) shall not take effect until it is published in the Gazette.

He also referred to Article 24 (1) that set limitations on a right or fundamental freedom contained in the Bill of Rights.

Lastly he referred to Section 26 (1) (c) of the Criminal Procedure Code which gave the police certain powers to stop, search and detain a person.

Relying on these sections it was his submission that the right to search either person or their property offended Article 31 (a) and (b) of the Constitution, and as such they were unlawful and that there was no legislation limiting the right to privacy as anticipated by Article 24.

That being the case Kerubo and Makhanu had no right in law to stop people at the security desk and search them before allowing them to enter the Village Market.

Such a proposition has wide ranging implications and it would require a court of law to adjudicate on such a proposition.

In this Tribunal, we are only concerned with the matters relating to the alleged conduct of the DCJ and even if the security guard had no power to stop and search the DCJ, it would, if the allegations are sustained, be no answer to such conduct.

It is our view, however, that no one has a right to enter any premises without the consent of the owner and if a condition for such entry is a mandatory search of a person, then the person has the option of either acquiescing in such a search or not enter the premises.

STANDARD OF PROOF AND MATTERS TO BE CONSIDERED

40. Mrs Valeria Onyango, the Tribunal's Lead Counsel, and Mr. Kioko Kilukumi, Counsel for the DCJ, were in agreement that the standard of proof is neither that of the criminal law, that is beyond reasonable doubt nor that in civil cases, which is on a balance of probability. They instead urged us to adopt the standard set out in the Tanzanian decision, *The Judicial Tribunal of Inquiry in respect of Justice C.G. Mtenga and Mr. Justice M. J. Mwakibete*, as well as the Kenyan case, *Matter No. 3 of 2003 The Tribunal to investigate the Conduct of the Hon. Mr. Justice Daniel K.S. Aganyaya*, which would be somewhere between beyond reasonable doubt and a balance of probability. Mr. Kilukumi added that one would have to achieve a score of 8 out of 10 to consider a fact proved.

41. We agree with the standard of proof referred to in the cases quoted above but take note of the fact that in order to prove gross misconduct or misbehavior we must confirm that the allegations have been proved to our satisfaction and that we have no doubt in our minds that what is alleged to have occurred did in fact occur.

42. However, it is our decided view that since the case of *the Hon. Mr. Justice Daniel K.S. Aganyaya* was decided under the previous Constitution whose relevant provisions are significantly different from those in the current one, there are other aspects which must be taken into account when considering the standard of proof to be observed by this Tribunal.

PROVISIONS OF THE CONSTITUTION

43. While under section 62 (3) of the former Constitution a judge could be removed for "misbehavior," under the current one, Article 168(1) (e), the judge must have committed "gross misconduct or misbehaviour", where gross suggests that the conduct was glaring, flagrant or very bad. Additionally, while a Tribunal to investigate a Puisne Judge under the former Constitution comprised five people, all of whom had legal training and had gained experience either as judges or were Senior Counsel, the Constitution of Kenya (2010) provides in Article 168(5) (b) for a Tribunal with 7 members, 5 of whom are required to have legal training while the other two are selected from among "persons with experience in public affairs"

44. It is evident that the determination of the allegations against a Judge of a Superior Court is no longer solely a legal process of sifting through the evidence and finding whether the facts proved support the charge. Now, apart from looking at whether a judge has breached his ethical responsibilities, one has to determine whether the judge has also committed an infraction of other provisions of the Constitution of Kenya relative to the Bill of Rights, national values and principles, as well as those of leadership and integrity. Hence the inclusion of two persons with experience in public affairs in the membership of the Tribunal.

NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

45. Article 10(1) of the Constitution (2010) refers to the national values and principles of governance binding on all persons with regard to:

(a) application or interpretation of the constitution; (b) enactment, application or interpretation of any law; (c) making or implementation of any policy. In the same Article 10 the national values include 2(b) human dignity, equity, human rights, nondiscrimination and protection of the marginalized; 2(c) good governance, integrity, transparency, accountability.

46. Article 73 specifies that the authority assigned to a state officer (a) is a public trust to be exercised in a matter that: (b) vests in the state officer the responsibility to serve the people, rather than to rule them. The same Article 73 defines the guiding principles of leadership and integrity, including 2(c) selfless service based solely on the public interest, demonstrated by: (i) honesty in the execution of public duties; (ii) the declaration of any personal interest that may

conflict with public duties and (e) discipline and commitment in service of the people.

47. The Preamble to the Judicial Service Code of Conduct and Ethics, based on Section 5 (1) of the Public Officer Ethics Act No. 4 of 2003 provides that: "The Code is intended to establish standards of ethical conduct of judicial officers and to be applied consistently with constitutional requirements, statutes, court rules and legal authorities and in the context of all relevant circumstances. It should always be remembered that each judicial officer occupies a special and revered position which must be protected both in public and private life, so as not to bring the Judicial Service generally, into disrepute. It is imperative, therefore, that every judicial officer should adhere to this Code with scrupulous care. A judicial calling is one of sacrifice and restricted lifestyle, a lifestyle which is automatically accepted on appointment to the bench."

48. The following rules in the Judicial Service Code of Conduct are relevant for this Tribunal:

Rule 3 (5) In all activities, a judicial officer shall exhibit respect for the rule of law, comply with the law, avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and impartiality of the Judicial Service.

Rule 12 (1) [Professionalism & Courtesy] - A judicial officer or any other officer in the Judicial Service shall ensure that his official and private conduct upholds at all times, the dignity and integrity of the Judicial Service by conducting himself, both officially and in private, in a dignified, honest and impeccable manner.

Rule 22 [Breach of Code] Where an officer has committed a breach of this Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act 2003, Judicial Service Commission Regulations or the Constitution as the case may be.

Article 28 of the Constitution (2010) stipulates: "Every person has inherent dignity and the right to have that dignity respected and protected."

With regard to rules of evidence in Tribunals, the Judicial Service Act, No. 1 of 2011, Second Schedule, Clause 13 specifies that "The Tribunal shall not be bound by strict rules of evidence but shall be guided by the rules of natural justice and relevancy".

49. Justice Ojwang [currently a Judge of the Supreme Court of Kenya], while serving as a judge of the High Court, made the following observation in *Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another*, Mombasa HCCC No. 190 of 2010:

"I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010."

50. All these references indicate that while determining the culpability of a Judge of a Superior Court, a Tribunal appointed is expected to take into account a wide range of considerations, while applying a broad interpretation of "national values and principles of governance binding on all persons" which constitute Kenya's national ethos.

51. From the perspective of social justice, there are basic ethical values presupposed and implied in the interpretation and application of Articles 10, 28, 73 and 168 of the Constitution of the Republic of Kenya (2010). Thus the evaluation of conduct of the holders of public office at all levels extends beyond the provisions and limits of legislation. It includes and presupposes the social domain, whose expectations are taken for granted within society, though not expressed in written law. We have set out in the Schedule 1, a list of the National Values illustrative Kenya, but it is not exhaustive.

Thus the standard of proof applied by this Tribunal has to take into consideration this broad range of ethical values in addition to ascertainment of truth pertaining to the allegations on record.

EVALUATION OF THE EVIDENCE

52. It is now for the Tribunal to evaluate the evidence taking into account the standard of proof we have set for ourselves. To a very large extent what is in issue is the credibility of witnesses. As we have already pointed out, there are two versions of what transpired on the fateful day: that of Kerubo, on the one hand, and that of the DCJ, on the other hand.

53. Admittedly, the DCJ conceded a great deal of what took place that evening. She admitted to have gone to the Village Market, to have passed the security desk and to have been followed by Kerubo who demanded that the DCJ's handbag be searched.

54. There is no doubt that there was an altercation between the DCJ and Kerubo. The DCJ said that all that she was doing was to stop Kerubo from shouting. From the CCTV it is clear that the DCJ's arm was outstretched outside the Pharmacy whereas according to her this incident took place inside the Pharmacy. This would corroborate Kerubo's story that her nose was pinched. There is also the evidence of Wathigo and that of his assistant, Muhani, who both worked at the Pharmacy.

55. The controversy is on whether the DCJ pinched the nose of Kerubo, as the latter claimed, or that there was no such thing as the DCJ maintains. Kerubo testified that the DCJ pinched her nose outside the Pharmacy, and when she followed her into the pharmacy the DCJ placed her hand on her shoulder. Indeed the DCJ testified that she did place her hand on her shoulder inside the pharmacy and also placed her hand over Kerubo's mouth to stop her from shouting. The DCJ made no mention of the touching of Kerubo outside the Pharmacy.

56. Kerubo had stated in her evidence that on 1st January, 2012, when she first viewed the CCTV footage it was clear that her nose was pinched. However, on the other occasions the CCTV footage merely showed the DCJ's hand being stretched towards her.

57. When the Tribunal viewed the CCTV we observed that the DCJ turned around between the security desk and the Pharmacy, and then turned to proceed into the Pharmacy; she then came out, and Kerubo could be seen standing outside and looking into the Pharmacy. The image then showed DCJ with her arm outstretched towards Kerubo, and then turning and going back to the Pharmacy.

58. Kerubo suggested that the films have been tampered with. However, that was never established. But it is our considered opinion that that is not absolutely necessary for our determination in these investigations.

59. From that CCTV evidence at our disposal, showing the DCJ stretching her arm towards Kerubo, the question for us to determine is why was the arm stretched?

60. For Kerubo the arm was stretched to pinch her nose. As for the DCJ she merely confirmed that it was her stretching her hand, but she provided no explanation. Kerubo's account of the incident was corroborated by Makhanu.

61. We have seen both witnesses, Kerubo and the DCJ, giving their evidence. We find Kerubo to be credible from the way she confidently and steadfastly gave her evidence and especially in cross examination. In fact she has been consistent in her statements since 31st December, 2011. What she did not know she forthrightly admitted her lack of knowledge. She never contradicted herself.

62. Kerubo's evidence was corroborated in material particulars by the clear and consistent evidence of Makhanu who remained unshaken even under cross examination.

63. On the other hand, we were not thus impressed by the evidence given by the DCJ. There were discrepancies in her evidence. For instance she testified that after she entered the Belladonna Pharmacy, Kerubo followed her and used disrespectful language. This was denied by Kerubo. Wathigo who was in the Pharmacy testified that Kerubo told the DCJ that she needed to be searched. The DCJ responded that Kerubo *"should know people around here"* and walked away to the counter and from there directed Kerubo to apologise to her. The DCJ further informed the Tribunal that she was without her bodyguard, Kaburu, because she had given her leave of absence to attend to family matters in Meru. But Kaburu stated that she came back on 26th

December 2011 and that she phoned the DCJ the following day. So, there was no reason for the DCJ to be without her body guard on the 31st December 2011.

64. The other matter is whether the DCJ brandished a pistol at Kerubo threatening to kill her. The cameras which would have captured what was happening at the point of entry and point of exit of the DCJ were said not to be working. That was the evidence of Makori, who works in the Control Room, Meshack, the Chief Security Officer of the Village Market; and Kiplimo, who was working with the CID in Cybercrime Unit. So, the only evidence was that of the DCJ against that of Kerubo and Makhanu.

65. We have already found that Kerubo was a credible witness but it may not be out of place to show why she should be believed in this issue, too. Her nose was pinched outside the Belladonna Pharmacy and yet she went back to her security desk to proceed with her duties. We ask ourselves what then made her scared to the marrow and caused her to go home prematurely and then straight to bed until the following morning, as narrated by her husband, Morara. Certainly it was not the pinching of the nose. Equally it was not the realization that the lady she was confronting was a VIP because the DCJ herself told her inside the Pharmacy who she was. The only plausible explanation is what she said: that the DCJ brandished a pistol and threatened to shoot her. It is significant that Kerubo only referred to the pistol incident in the report captured in the occurrence book at Gigiri Police station. It appeared to the Tribunal that had there been no pistol incident, no report would have been made to the police as despite having her nose pinched Kerubo went back and carried on with her duties.

66. The DCJ's evidence is that as she does not possess a pistol and that she has no license to carry one; therefore, she could not possibly have threatened Kerubo with a pistol. The DCJ's driver, Omondi, and her body guard, Kaburu both carry a pistol in their assignment with the DCJ and both stated that the pistols were in their possession throughout.

67. We find Omondi to be an unabashed liar. He claimed that he went into the Village Market on that fateful day with his pistol on his body and that he had to show his Police identity card to Makhanu. The latter denied there having been any person who passed through the security desk with a pistol on that day. We believe Makhanu on this issue for the simple reason that this is an occurrence which one would never have forgotten. Besides, in his earlier statement before the JSC, Omondi said that he entered the Village Market without being checked. He also contradicted the DCJ in that he claimed he saw Kerubo pulling the hand bag from the DCJ while the DCJ said no one touched her bag.

68. As for Kaburu we take her testimony with a pinch of salt. Going on leave for four days is not being on duty entitling her to take home her personal weapon. It may be because she was on french leave and that is why she did not return the pistol to the armoury.

69. We are satisfied that it is not necessary to establish how the DCJ came across a pistol if we believe that she actually had one. Here we must observe that the investigators, if they had pulled their weight, could have produced independent witnesses to prove or disprove that assertion of brandishing a pistol. There were two independent guards close to the Security Desk; one was Peter guarding the Diamond Trust Bank (DTB), according to Mungai, and the other KK Security in the parking lot.

70. Had this been a criminal matter we would require proof beyond reasonable doubt. But the proof required in this matter is below "beyond reasonable doubt" but above a "balance of probability" and we find that it has been met. We are satisfied that the allegations have been proved and that we have no doubt in our mind that what was alleged to have occurred did in fact occur.

FINDINGS

We, therefore, find that:

71. Allegation Number One has been sufficiently proved that the DCJ pinched the nose of Kerubo and that conduct displayed by the DCJ was demeaning her office, to say the least.

72. Allegation Number Two has also been sufficiently proved that the DCJ threatened to shoot Kerubo with a pistol and that conduct constitutes gross misconduct on her part.

73. Allegation Number Three has automatically been proved after the proof of the First and the Second Allegations that the DCJ

created disturbance in a manner likely to cause a breach of the peace which constitutes gross misconduct and misbehavior.

MITIGATING AND AGGRAVATING CONSIDERATIONS

74. In determining whether, taken together, all the facts and circumstances already found as established would entitle this Tribunal to make a recommendation to the President on whether to retain or remove the Deputy Chief Justice from office, we also have to consider whether there are any mitigating or aggravating circumstances.

75. Ms. Guserwa, the lead Counsel for the DCJ, led her client who gave a narration of her brilliant career. We have taken that into account. The DCJ has made an outstanding contribution to this nation. She has had an illustrious career as an Advocate of the High Court of Kenya. She also served as a Commissioner with the Constitution of Kenya Review Commission. In that capacity she chaired the Committee which drafted Chapter Four of the Constitution, that is, The Bill of Rights. Immediately before she was appointed DCJ she served as the Vice Chairperson of the Kenya Law Reform Commission as well as the Chairperson of the Media Complaints Commission.

76. The number of acts of alleged gross misconduct or misbehaviour is relevant in assessing the suitability of a judge to hold office. An isolated incident may be evidence of the fact that the act complained about was an aberration, a lapse from the normal and which is unlikely to recur. On the other hand, a pattern of conduct might show that the judge lacks judicial temperament and the ability to perform judicial functions in the manner anticipated by the Constitution and the Judicial Service Code of Conduct. In this inquiry we are dealing with a single incident.

77. In determining the proper sanction, this Tribunal also has to consider the impact of the DCJ's conduct on the Judiciary. It must be remembered that every single Judge has the potential of preserving or tarnishing the integrity of the Judiciary on every occasion.

78. On 27th June 2012, about one week before the Tribunal was scheduled to start its hearings, and after the DCJ had been served with a list of witnesses as well as witness statements, she contacted Kerubo and Makhanu.

79. The DCJ's testimony was that she wished to reconcile with Kerubo, while Kerubo stated that she asked them to change their evidence and to remove references that she (the DCJ) brandished a pistol and threatened to shoot Kerubo. That was a very serious undertaking conducted by a judicial officer.

80. We are therefore not convinced that the Deputy Chief Justice can be expected not to engage in this kind of misconduct or misbehaviour in the future. Even if she does not engage in similar misconduct in future, we are not convinced that she would not engage in other types of misconduct. Her failure to consider the effect of her misconduct on her staff and the reputation of the judiciary at the time of her actions leaves us with little confidence in her ability to refrain from future misconduct demeaning to the esteem of the judiciary. The fact that she improperly contacted witnesses in the absence of the Lead Counsel to the Tribunal also raises concerns about her ability to refrain from future misconduct. She has shown an inability to control her behaviour, demonstrating the strong likelihood she will continue to commit misconduct or misbehaviour in future.

81. The DCJ has raised the issue of her state of mind on the evening of 31st December 2011. She stated that she was distressed after visiting her son who is in a rehabilitation centre and whose condition and state of mind are worrisome. A doctor was to be produced to substantiate that submission. However, as the doctor would have taken a lot of time to appear before the Tribunal he was discarded by the DCJ. We are prepared to take the word of the DCJ on this score and to accept that such a situation is very disturbing.

82. We comment that the DCJ mishandled the whole incident otherwise it would not have been as it has turned out to be. Let us assume that her state of mind was disturbed as aforesaid. When Kerubo trailed her to the Pharmacy and demanding to search her hand bag she should have let her do so. Her story that Kerubo called her discourteously finds no purchase with us. Wathigo who is an independent witness told the Tribunal that she heard the DCJ telling Kerubo who she was and that she should be respected and also that the

DCJ told Kerubo that they were not sisters. This clearly indicated that Kerubo addressed the DCJ as "my sister" and that is far from being discourteous, otherwise all judges are discourteous to one another.

83. Then even assuming that she was provoked by the way she was addressed and handled with disrespect, which we refuse to have been the case, after the altercation there was enough time to cool down. But what did she do? She went away and came back with a pistol and brandished it at the unfortunate woman who was just performing her duty. Surely the second highest judicial officer ought to have done better than that.

84. In our opinion a judge who engages in lawless conduct and thereafter tries to explain it away with misleading testimony, should not continue in office.

CONCLUSION

85. Having determined the facts of the allegations facing the DCJ, and having found all that we have as displayed above, we have concluded that the DCJ committed gross misconduct and misbehaviour.

86. The actions of the DCJ were not done in connection with her office duties but rather with her private life. Rule 12 of the Judicial Service Code of Conduct and Ethics states as follows: "A judicial officer and any other officer in the Judicial Service shall ensure that his official and private conduct upholds at all times, the dignity and integrity of the Judicial Service by conducting himself, both officially and in private, in a dignified, honest and impeccable manner."

87. The Tribunal is satisfied that the conduct of the DCJ breached the provisions of Article 168 (1) (e) read together with Article 75 (1) (c) of the Constitution, 2010 and of the Judicial Code of Conduct, and was of such a serious nature to amount to gross misconduct and misbehaviour.

RECOMMENDATION

The Tribunal members having unanimously found that the conduct of the DCJ on 31st December, 2011 at the Village Market, Nairobi, amounted to both gross misconduct and misbehavior, we therefore recommend to your Excellency Mwai Kibaki, C.G.H., M.P., President and Commander-In-Chief of the Armed Forces of the Republic of Kenya, that Lady Justice Nancy Makokha Baraza, the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya, be removed from office.

SCHEDULE OF VALUES

Acceptability; accountability; acumen; agreeableness; alacrity; alertness; allegiance; amicability; amity; appreciativeness; candour; care; carefulness; caution; cautiousness; character; civility; commitment; compassion; compatibility; composure; concern; confidence; confidentiality; conscience; conscientiousness; considerateness; consistency; contentment; convictions; cordiality; correctness; corrigibility; courtesy; credibility; decency; dedication; demeanour; devotion; dignity; diligence; discretion; dutifulness; empathy; endurance; elegance; eloquence; etiquette; excellence; expectations; fairness; faithfulness; felicity; fidelity; firmness; forbearance; forgiveness; gentleness; gentility; graciousness; gratitude; harmony; heartiness; honesty; honour; humaneness; humility; identity; impartiality; impeccability; impressiveness; incorruptibility; integrity; intuitiveness; kindness; laudability; leanness; leniency; lenity; likeability; likeableness; manners; mercifulness; moderation; modesty; mutuality; patience; patriotism; peacefulness; perseverance; persistence; personality; pleasantness; politeness; praiseworthiness; predilection; preference; privacy; professionalism; propriety; providence; prudence; purposefulness; reasonableness; reciprocity; reliability; remorsefulness; resourcefulness; respectability; respectfulness; responsibility; responsiveness; reticence; righteousness; sagacity; satisfaction; self-control; self-confidence; self-discipline; self-respect; self-restraint; selflessness; sensibleness; sensibility; sincerity; sobriety; sociability; stewardship; tenacity; thoroughness; tolerance; transparency; trustworthiness; truthfulness; unselfishness; veracity; verity; virtue; vocation; volition; wariness; weal; well-being; wisdom; zeal.

"APPENDIX "A"

REPUBLIC OF KENYA

THE JUDICIAL SERVICE COMMISSION

A PETITION TO THE PRESIDENT OF THE REPUBLIC OF KENYA, HIS EXCELLENCY MWAI KIBAKI, PRESIDENT AND COMMANDER-IN-CHIEF OF THE DEFENCE FORCES OF THE REPUBLIC OF KENYA BY THE JUDICIAL SERVICE COMMISSION PURSUANT TO ARTICLE 168 (4) OF THE CONSTITUTION TO SUSPEND AND APPOINT A TRIBUNAL TO INVESTIGATE THE CONDUCT OF THE HONOURABLE DEPUTY CHIEF JUSTICE, LADY JUSTICE NANCY MAKOKHA BARAZA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 168 (1) (e) AS READ WITH ARTICLES 73 (1) (a) AND (b), AND 75 (1) AND (2) OF THE CONSTITUTION OF KENYA AND ALLEGED BREACH OF RULE 3 (5) AND RULE 12 (1) OF THE JUDICIAL SERVICE CODE OF CONDUCT AND ETHICS, LEGAL NOTICE NO.50.

PETITION

1. THIS IS THE PETITION of the Judicial Service Commission to Your Excellency Mwai Kibaki, President and Commander in-Chief of the Defence Forces of the Republic of Kenya seeking to suspend from office the Deputy Chief Justice, Hon. Lady Justice Nancy Makokha Baraza and appoint a tribunal to investigate allegations of gross misconduct and misbehavior on Saturday, 31st December, 2011 at the Village Market in Nairobi, Kenya.
2. This Petition is premised on the Constitutional provisions on removal from office of a Judge of a Superior Court, under ARTICLE 168 of the CONSTITUTION OF KENYA 2010 and is pursuant to the findings of a Sub-Committee that the Judicial Service Commission instituted on 9th January, 2012.
3. That the findings of the Sub- Committee were adopted by the full Judicial Service Commission meeting on 13. 1. 2012.
4. The findings of the Sub Committee revealed that;
 - (i) The Deputy Chief Justice on 31st December, 2011 by passed a Mandatory Security Check at the Village Market in breach of security protocol at the Mall and this event triggered a chain reaction of events which allegedly included the Deputy Chief Justice's intrusive and unwelcome behavior on the person of Mrs. Rebecca Kerubo while indicating to her that "she should know important people" and culminated in brandishing and threatening to shoot her with a gun which she retrieved from her vehicle.
 - (ii) That the complainant, Mrs. Rebecca Kerubo reported this incident at Gigiri Police Station the following day, prompting the Police to call on the Deputy Chief Justice to also record her statement.
 - (iii) That on 17th January, 2012, the Deputy Chief Justice recorded a further statement with two (2) Police Officers namely, Mr. Peter Mwau Muinde, Senior Assistant Commissioner of Police/PCIO, Nairobi and Mr. Mohamed Amin, Senior Assistant Commissioner of Police and Officer-In-Charge Serious Crimes Unit at the C.I.D. Headquarters, Kiambu Road, Nairobi.
 - (iv) That in this second statement, the Deputy Chief Justice gave both oral and written statements that incriminated her. She admitted in her evidence that she indeed threatened Mrs. Rebecca Kerubo Ogweche with a gun.
 - (v) The Judicial Service Commission found the Confession made by the Deputy Chief Justice to be grave and had been given voluntarily and willingly, devoid of any duress and/or intimidation.
 - (vi) That from the statement of the witnesses who appeared before the Judicial Service Commission Sub-Committee appointed to investigate this incident and from the Deputy Chief Justice's confession and circumstances

surrounding the incident, it was dear that the Deputy Chief Justice was in breach of ARTICLES 73 (1) (a) and 75 (1) and (2) of the CONSTITUTION which requires a state officer to behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids demeaning the office that the officer holds.

- (vii) That the action on the part of the Deputy Chief Justice was also in breach of THE JUDICIAL SERVICE CODE OF CONDUCT AND ETHICS which provides at the preamble that:

"It should always be remembered that each judicial officer occupies a special and revered position which must be protected both in public and private life, so as not to bring the Judicial Service generally into disrepute. It is imperative, therefore that every judicial officer should adhere to this Code with scrupulous care" and Rule 12 (1) which requires judges to conduct themselves with dignity and integrity. Rule 3 (5) reads in part that "In all activities, a judicial officer shall exhibit respect for the rule of law, comply with the law...."

- (viii) That the threshold on the conduct required of a judicial officer is very high and is one that is beyond reproach or suspicion. The conduct and actions by the Deputy Chief Justice on 31st December, 2011 at the Village Market constitutes gross misbehavior and misconduct unwarranted of a judge.
- (ix) The Judicial Service Commission took cognizance of all the relevant facts relating to the investigation as to whether the Deputy Chief Justice had breached the Judicial Code of Conduct or acted in a gross manner or showed, exhibited conduct that can be seen to be a gross misconduct or misbehavior under ARTICLE 168 of the CONSTITUTION OF KENYA.
- (x) That in assessing these facts, the Commission was aware that it was not conducting a criminal trial on the Deputy Chief Justice but was merely investigating her conduct and therefore the standard of proof of the allegations on this incident was not the proof required in a criminal trial.
- (xi) The Commission defined "gross misconduct" and "misbehaviour" to mean "unlawful or improper behaviour or bad conduct."
- (xii) That the alleged conduct by the Deputy Chief Justice by her unwelcome and intrusive conduct on the person of the complainant, Mrs. Rebecca Kerubo and the fact that she brandished a gun at her is conduct that amounts to gross misbehaviour and misconduct.
- (xiii) The Commission having considered the conduct of the Deputy Chief Justice in this incident is satisfied that the conduct amounts to gross misconduct or misbehaviour warranting her removal from office under Article 168 (1) (e) of the Constitution.

IT IS THE HUMBLE PETITION AND RECOMMENDATION of the Judicial Service Commission that:

1. Your Excellency suspends the Deputy Chief Justice, Mrs. Nancy Makokha Baraza from the office of the Deputy Chief Justice, Judge and Vice-President of the Supreme Court of Kenya.

2. That Your Excellency do Appoint a Tribunal in terms of ARTICLE 168 (5) (b) of the CONSTITUTION to inquire into the conduct of the Deputy Chief Justice in this incident and to determine whether she was in breach of ARTICLE 168 (1) (e) as read with ARTICLE 75 (1) (c) of the CONSTITUTION OF KENYA, 2010.

Dated This 19th day of January, 2012.

(Signed)

Hon. Justice Dr. Willy M. Mutunga, SC,

CHIEF JUSTICE/CHAIRMAN
JUDICIAL SERVICE COMMISSION

"APPENDIX "B"

GAZETTE NOTICE No. 664

THE CONSTITUTION OF KENYA

APPOINTMENT OF CHAIRPERSON AND MEMBERS OF A TRIBUNAL TO INVESTIGATE THE CONDUCT OF DEPUTY CHIEF JUSTICE, SUPREME COURT OF KENYA, JUSTICE NANCY MAKOKHA BARAZA

WHEREAS the question has arisen that the conduct of the Deputy Chief Justice, Supreme Court of Kenya, Justice Nancy Makokha Baraza, ought to be investigated,

NOW therefore, in exercise of the powers conferred by Article 168 (5) (b) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Defences Forces of the Republic of Kenya, do appoint—

Augustino Stephen Lawrence Ramadhan—(*Chairman*)

Members:

Judith Mbula Behemuka (Prof.)
Justice (Rtd.) Philip J. Ransley
Surinder Kapila
Beauttah Alukhava Siganga
Grace Barbara Ngele Madoka
Mugambi Jesse Ndwiga Kanyua (Prof.)

The mandate of the Tribunal shall be:

To investigate the conduct of the Deputy Chief Justice, Supreme Court of Kenya, Justice Nancy Makokha Baraza on the basis of Article 168 (1) (e); 73 (1) (a) and (b); and 75 (1) and (2) of the Constitution and the Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of 2003 and other relevant laws and matters including but not limited to:

The allegations contained in the petition by the Judicial Service Commission of Kenya dated 19th January, 2012 and presented to myself regarding the conduct of the Deputy Chief Justice, Justice Nancy Makokha Baraza.

In the discharge of its functions, the tribunal shall:

- (a) Prepare and submit a report and its recommendations thereon to me expeditiously.
- (b) Exercise all the powers conferred upon it by law for the proper execution of its mandate.

In the meantime, Justice Nancy Makokha Baraza, the Deputy Chief Justice, Supreme Court of Kenya, stands suspended from exercising the functions of her office with immediate effect according to Article 168 (5) of the Constitution.

Dated the 25th January, 2012.

MWAI KIBAKI,
President.

GAZETTE NOTICE No. 665

THE CONSTITUTION OF KENYA

THE JUDICIAL SERVICE ACT

(No. 1 of 2011)

APPOINTMENT OF COUNSEL TO ASSIST THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF DEPUTY CHIEF JUSTICE, SUPREME COURT OF KENYA, JUSTICE NANCY MAKOKHA BARAZA

IN EXERCISE of the powers conferred by section 31 (4) of the Judicial Service Act, I, Mwai Kibaki, President and Commander-in-Chief of the Kenya Defence Forces, appoint—

Valeria Onyango—Lead Counsel
Gideon Solonka Kilakoi—Assistant Counsel

as counsel to assist the Tribunal appointed to investigate the conduct of the Deputy Chief Justice, Supreme Court of Kenya, Justice Nancy Makokha Baraza.

Dated the 25th January, 2012.

MWAI KIBAKI,
President.

"APPENDIX "C"

GAZETTE NOTICE No. 2057

THE CONSTITUTION OF KENYA

APPOINTMENT OF CHAIRPERSON AND MEMBERS OF A TRIBUNAL TO INVESTIGATE THE CONDUCT OF DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND VICE-PRESIDENT OF THE SUPREME COURT, LADY JUSTICE NANCY MAKOKHA BARAZA

WHEREAS the question has arisen that the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, Lady Justice Nancy Makokha Baraza, ought to be investigated,

NOW therefore, in exercise of the powers conferred by Article 168 (5) (b) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Defence Forces of the Republic of Kenya, do appoint—

C. J. (Rtd.) Augustino Stephen Lawrence Ramadhani—(*Chairman*)

Members:

Judith Mbula Bahemuka (Prof.)
Justice (Rtd.) Philip J. Ransley
Surinder Kapila
Beauttah Alukhava Siganga
Grace Barbara Ngele Madoka
Mugambi Jesse Ndwiga Kanyua (Prof.)

The mandate of the Tribunal shall be:

To investigate the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, Lady Justice Nancy Makokha Baraza on the basis of Article 168 (1) (e); 73 (1) (a) and (b); and 75 (1) and (2) of the Constitution and the Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of 2003 and other relevant laws and matters including but not limited to:

The allegations contained in the petition by the Judicial Service Commission of Kenya dated 19th January, 2012 and presented to myself regarding the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, Lady Justice Nancy Makokha Baraza.

In the discharge of its functions, the Tribunal shall:

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

In the meantime, Lady Justice Nancy Makokha Baraza, Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, stands suspended from exercising the functions of her office with immediate effect according to Article 168 (5) of the Constitution.

Gazette Notice No 664 of 2012, is amended.

Gazette Notice No. 1612 of 2012, is revoked.

MWAI KIBAKI,
President.

GAZETTE NOTICE No. 2058

THE CONSTITUTION OF KENYA

THE JUDICIAL SERVICE ACT

(No. 1 of 2011)

APPOINTMENT OF COUNSEL TO ASSIST THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND VICE-PRESIDENT OF THE SUPREME COURT, LADY JUSTICE NANCY MAKOKHA BARAZA

IN EXERCISE of the powers conferred by section 31 (4) of the Judicial Service Act, I, Mwai Kibaki, President and Commander-in-Chief of the Kenya Defence Forces, appoint—

Valeria Onyango—(*Lead Counsel*)
Gideon Solonka Kilakoi—(*Assistant Counsel*)

as Counsel to assist the Tribunal appointed to investigate the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, Lady Justice Nancy Makokha Baraza.

Gazette Notice No. 665 of 2012, is amended.

Gazette Notice No. 1613 of 2012, is revoked.

MWAI KIBAKI,
President.

“APPENDIX “D”

GAZETTE NOTICE NO. 5376

THE CONSTITUTION OF KENYA

IN THE MATTER OF A TRIBUNAL APPOINTED UNDER
ARTICLE 168 (5) (b) OF THE CONSTITUTION TO
INVESTIGATE / INQUIRE INTO THE CONDUCT OF THE
DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND
VICE-PRESIDENT OF THE SUPREME COURT, LADY JUSTICE
NANCY MAKOKHA BARAZA

RULES OF PROCEDURE

This Tribunal has been convened pursuant to its appointment vide Gazette Notice No. 664 of 26th January, 2012 as amended by Gazette Notice No. 2057 of 24th February, 2012 to investigate / inquire into the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, Lady Justice Nancy Makokha Baraza, the allegations contained in the Petition by the Judicial Service Commission of Kenya dated 19th January, 2012 and presented to His Excellency the President of the Republic of Kenya regarding the conduct of the said Lady Justice which allegations include conduct and actions of gross misbehaviour and misconduct unwarranted of a Judge contrary to Article 168 (1) (e) as read with Article 73 (1) (a) (b) and 75 (1) and (2) of the Constitution and further breaches of Rule 3 (5) and 12 (1) of the Judicial Service Code of Conduct and Ethics (Legal Notice 50 of 2003).

The Tribunal makes the following Rules for the conduct and management of the proceedings of the investigation / inquiry pursuant to its mandate under the Constitution of Kenya and the aforementioned Gazette Notices under Section 31(5) of the Judicial Service Act:

1. The principles of the Constitution and that of substantive justice shall apply to these Rules.
2. The Tribunal shall sit on such days, at such times and venues as it may determine.
3. The quorum necessary for the conduct of the hearing of the Tribunal shall be the Chair and four (4) other members of the Tribunal.
4. The business of the Tribunal shall be carried on by the Chair, any three (3) members of the Tribunal and the Secretary.
5. In the absence of the Chairperson the business of the Tribunal shall be carried on by the Vice-Chairperson, any three (3) members of the Tribunal and the Secretary.
6. If by reason of death, illness, resignation from the Tribunal or for any other reason, a member is unable to continue sitting in the proceedings the Tribunal may continue to conclude the hearing despite the absence of the member.
7. Where a member, for reasons beyond the control of the Tribunal, is unable to sign the decision of the Tribunal, the reason shall be recorded, and the decision signed by the other members.
8. The decisions and recommendations of the Tribunal shall be carried by a simple majority.
9. The hearing shall be held in private save that the subject of the investigation / inquiry may choose to have the hearing in public.
10. The Tribunal may exclude any person or class of persons from all or any part of the investigation / inquiry if satisfied that it is desirable so to do for:
 - (a) The preservation of order; or
 - (b) The due conduct of the investigation / inquiry, or
 - (c) The protection of any witness in the investigation / inquiry or any person referred to in the course of the investigation / inquiry or the property or reputation of such witness or person and
 - (d) May if satisfied that it is desirable for any of the purposes aforesaid so to do, order that no person shall publish the name,

address, or photograph of such witness or person or any evidence or information whereby he would or may be identified.

11. The Subject of the investigation / inquiry shall have the right to be present during all the proceedings that relate to her and shall be entitled to legal representation by counsel.

12. The Counsel assisting the Tribunal will present evidence relating to the conduct of the subject and any matter relevant to the investigation / inquiry.

13. (i) The Tribunal shall serve the subject of the investigation / inquiry a hearing notice at least fourteen (14) days before the date of the hearing.
- (ii) Service on the subject shall be effected through personal service or through the Chief Registrar of the Judiciary.
- (iii) A hearing notice under this Rule shall be in Form 1 in the Schedule.

14. The Counsel assisting the Tribunal shall draw up a list of allegations against the subject of the investigation / inquiry together with a summary of the evidence in support of the allegations and shall serve the documents containing the allegations and the summary of the evidence on the subject of investigation at least fourteen (14) days before the date of hearing.

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

16. A request made under Paragraph 15 shall be in writing and shall be addressed to the Secretary of the Tribunal.

17. (i) Summons issued by the Tribunal shall be endorsed by and bear the signature of the Secretary.

- (ii) A witness summons under this Rule shall be in Form 2 of the Schedule.

18. The subject of the investigation / inquiry shall have the right to cross-examine any or all the witnesses in the investigation / inquiry.

19. The subject of the investigation / inquiry shall be entitled to call evidence to rebut allegations made against her.

20. The subject, duly served may elect not to attend in person or by Counsel or at all in which event the Tribunal shall be entitled to consider the evidence available and make a report and appropriate recommendations.

21. The Tribunal and Counsel assisting the Tribunal shall be entitled to cross-examine the subject and any of the witnesses called by the subject of investigation / inquiry.

22. The Tribunal shall have the power to recall any witness or witnesses.

23. Evidence before the Tribunal may be presented in the form of Memorandum, affidavit or other documentation and the Tribunal shall be entitled to receive such documents and to use the contents thereof in forming its opinion.

24. The Tribunal shall not be bound by the strict rules of evidence but shall be guided by the rules of natural justice and relevancy.

25. The subject of the investigation shall be furnished with copies of any documentary evidence and may seek leave to address the Tribunal thereon.

26. At the close of the hearing of all evidence before the Tribunal, Counsel assisting the Tribunal and the subject of investigation / inquiry or her Counsel shall be entitled to make submissions.

27. The Chairperson may issue Practice Directions for the just, efficient and economical determination of proceedings, and in relation to these Rules.

28. Nothing in these Rules shall limit or otherwise affect the inherent power of the Tribunal conferred to it by Article 168 of the Constitution either on its own motion or on the application of a party to make such orders as may be necessary for the ends of justice or to prevent abuse of its process.

29. The Tribunal may, from time to time by notice in the Gazette amend these Rules.

SCHEDULE

FORM 1

(Rule 13 iii)

HEARING NOTICE

To: ----- (Subject)

WHEREAS His Excellency the President and Commander-in-Chief of the Kenya Defence Forces has appointed a Tribunal to investigate / inquire the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court Lady Justice Nancy Makokha Baraza as per the mandate of the Tribunal set out in Gazette Notice No. 664 of 26th January 2012 as amended by Legal Notice No. 2057 of 24th February 2012 Annexed hereto:

TAKE NOTICE that we, the said Tribunal will assemble at ----- (Venue),

at ----- a.m. on ----- 2012, to carry out the said investigation / inquiry.

AND FURTHER, TAKE NOTICE that you ----- (subject) may appear either in person or by your advocate at the hearing of the evidence, to cross-examine any witness testifying thereto, and to adduce, without unreasonable delay, material evidence on your behalf in rebuttal of, or otherwise in relation to the evidence.

AND FURTHER, TAKE NOTICE that the Tribunal will proceed to conduct the investigation / inquiry and receive evidence pertaining thereto your absence notwithstanding.

GIVEN under the hand of the Secretary for and on behalf of the said Tribunal this ----- day of ----- 2012.

Secretary of the Tribunal

Please acknowledge this Notice and the attached instrument by signing hereunder:

FORM 2

Rule (17 ii)

WITNESS SUMMONS

To: ----- (Subject)

WHEREAS His Excellency the President and Commander-in-Chief of the Kenya Defence Forces has appointed a Tribunal to investigate / inquire the conduct of the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court Lady Justice Nancy Makokha Baraza, the mandate of which is set out in Gazette Notice No. 664 of 26th January 2012 as amended by Legal Notice No. 2057 of 24th February 2012. Annexed hereto:

AND WHEREAS your personal attendance is required as a witness to give evidence.

NOW THEREFORE you are commanded to attend the investigation / inquiry at ----- (Venue), at ----- a.m. on the ----- day of ----- 2012, as a witness in the said investigation / inquiry and to remain in attendance until released by the Tribunal.

GIVEN under the hand of the Secretary for and on behalf of the said Tribunal this ----- day of ----- 2012.

Secretary of the Tribunal

Please acknowledge this witness summons by signing hereunder:

Made on the 11th April. 2012.

CHIEF JUSTICE (RTD.) AUGUSTINO S. L. RAMADHANI,
Chairman of the Tribunal.

APPENDIX "E"

TRIBUNAL APPOINTED TO INVESTIGATE THE CONDUCT OF THE DEPUTY CHIEF JUSTICE AND VICE-PRESIDENT OF THE SUPREME COURT OF THE REPUBLIC OF KENYA, JUSTICE NANCY MAKOKHA BARAZA

LIST OF WITNESSES

S/No.	Name	Referred to as	Date of Testimony	Hansard Volume
1	Mr. Peter Mwau Muinde P.C.I.O. Nairobi Area	Muinde	3rd July, 2012 10th July, 2012 11th July, 2012	2 6 7
2.	Ms. Rebecca Kerubo Ogweche	Rebecca	3rd July, 2012 4th July, 2012 12th July, 2012	2 3 8
3.	Mr. Anthony Makhanu Muchuma	Makhanu	4th July, 2012 12th July, 2012	3 8
4.	Mr. Benedict Ichingwa Muhani	Muhani	4th July, 2012	3
5.	Dr. James Wathigo	Wathigo	5th July, 2012	4
6.	Mr. Bansio Ngota	Ngota	5th July, 2012	4
7.	Mr. Bernard Morara	Morara	5th July, 2012	4
8.	Mr. Jared Obonyo Meshack	Meshack	5th July, 2012 12th July, 2012	4 8
9.	Mr. John Onyango Makori	Makori	5th July, 2012	4
10.	P.C. Eric Omondi	Omondi	6th July, 2012	5
11.	Mr. Peter Mungai D.C.I.O. Gigiri Police Division	Mungai	6th July, 2012 12th July, 2012	5 8
12.	P.C. Daniel Kioko	Kioko	6th July, 2012	5
13.	Mr. Hassan Musa Bwego O.C.S. Gigiri Police Station	Bwego	6th July, 2012	5
14.	Mr. Mohamed I. Amin	Amin	11th July, 2012	7
15.	Mr. Maxwell Kibenei Kiplimo	Kiplimo	11th July, 2012	7
16.	Justice Nancy Makokha Baraza	D.C.J.	12th July, 2012 13th July, 2012 16th July, 2012	8 9 10
17.	P.C. (W.) Annalice Kaburu	Annalice	13th July, 2012	9

APPENDIX "F"

TRIBUNAL APPOINTED TO INVESTIGATE THE CONDUCT OF THE DEPUTY CHIEF JUSTICE AND VICE-PRESIDENT OF THE SUPREME COURT OF THE REPUBLIC OF KENYA, JUSTICE NANCY MAKOKHA BARAZA

LIST OF EXHIBITS

1. Bundle A.
2. Bundle C.
3. Letter from the Deputy Chief Justice to the Chief Justice dated 8th February 2012.
4. Letter from the Chief Justice to the Commissioner of Police dated 9th February 2012.
5. Job Card No. 17942 for the Repair of Two CCTV Cameras.

MACDONALD O. OGUYA,
Secretary of the Tribunal.