IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME, GATEMBU, JJ.A)

CIVIL APPEAL NO 75 OF 2011

BETWEEN

1. KIPKOECH KANGONGO

2. ERIC TOROITICH

3. ANDREW C. KANGOR

4. MICHAEL TOROITICH

5. KIDOGO KANGONGO

6. CHELIMO CHEPYATOR

7. STEPHEN KOSGEI

8. RENOS CHEROGONY

9. REUBEN CHEBOR

10.**SAMSON TOROITICH**

11.**WESLEY K. KIPSANG**

12.**EVANS K. LIMO**

13.**JOHN. K. KIPSANG**

14.**CHERUTICH KIPTIM**

15.**DICKSON KIPTIM**

16.**KIPSOI KIPTIM**

17.**KIPYEGON KIPTIM**

18.**JAMES KIPLIMO**

19.**MOSES KIPTARUS**

20.**WILLIAM CHERUTICH**

21.**WILSON CHERUTICH**

22.**DAVID CHERUTICH**

23.**WILSON KIPKOECH**

24.**JOHN KIPKOECH**

25.**JONATHAN KIPKOECH**

26.**KOPENGENO KIPTARUS**

27.**SAMUEL KEITANY**

28.**KIPCHUMBA KEITANY**

29.**RICHARD KEITANY**

30.**CHERUTICH KEITNAY**

31.**KIPTUI KEITANY**

32.**REUBEN KEITNAY**

33.**WILLIAM KIPSOI**

34.**PHILLIP KIPSOI**

35.**CHERUCTICH KIDOGO**

36.**MUSA K. KIPSAMBU**

37.**SERECH S. NIXON**

38.**SERECH K. HOSEA**

39.**BENARD K. KOECH**

40.**KANDIE CHEPYEGON**

41.**WILLIAM K. KIPYEGON**

42.**CHELIMO KIPYEGON**

43.**DANIEL LIMO**

44.**SOLOMON K. TUITOEK**

45.**TUITOEK KIPYEGON**

46.**DICHSON K. YATICH**

47.**DAVID K. CHELIMO**

48.**KENGOR CHEPYATOR**

49.**CHARISE K. CHELIMO**

50.**SYMON T. CHELIMO**

51.**JAMES K. KANGOR**

52.**DICKSON K. KANGOR**

53.**HILARY K. LIMO**

54.**LABAN K. LIMO**

55.**RICHARD CHELIMO**

56.**SAMSON K. KIBOSA**

57.**KIPLAGAT KIRUI**

58.**ROGUMOI TILILEI**

59.**WILSON TALLAM**

60.**JOHN CHEBET**

61.**ISSAC KIPYEGON**

62.**ISAAC K. ROTICH**

63.**WYCLIFFE MATINI…….....…….…….....….APPELLANTS**

AND

THE BOARD OF GOVERNORS SACHO HIGH SCHOOL.....1ST RESPONDENT

THE MINISTER FOR EDUCATION……...…….....…..2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….....……..3RD RESPONDENT

DANIEL TOROITICH ARAP MOI…….....4TH RESPONDENT

JONATHAN KIPKEMOBI MOI……....……...…5TH RESPONDENT

JOSHUA KULEI……....……..…6TH RESPONDENT

(an appeal from the judgment of the High Court of Kenya at

Nairobi (Wendoh & Dulu, JJ.) dated the 18th February 2011

in

Constitutional Petition No 306 of 2008)

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JUDGMENT OF THE COURT

This appeal arises from a petition dated 22nd May 2008 and filed in the High Court of Kenya at Nairobi. The appellants, all who claim to be residents of Sacho Division in the former Baringo district, alleged that their fundamental rights under section 75 of the retired Constitution were infringed. They claimed that this was done when Sacho High School was privatised. In particular, the petitioners alleged that as a result of such privatisation, they were denied their interest in the said school. They therefore sought various declarations, among them that the respondent's actions of privatising the school was in contravention of their right to protection from deprivation of property and that they continued to have a right in, and interest over, the land, buildings and property of Sacho High School.

The facts as presented to the High Court by the appellants were that Sacho High School was set up in 1982 through various fundraising efforts of the residents of Sacho. The school also received government funds, and was also staffed by teachers from the Teachers Service Commission. The appellants further claimed that the land on which the school stands was owned by various individuals before eventually being gazetted, vide Legal Notice No 356 of 1995, as part of the Kipngochoch forest. The land on which the school stands was then alienated which the appellants take issue with since public land can only be alienated for public and not private use.

The appellants alleged that the school was registered as a public institution on the 25th January 1985 under registration certificate number G/A/386/85, and that later on, the Ministry of Education on the 19th November 1987 deregistered the school and re-registered it as a private school. This, they alleged, was as a result of the influence of the Chairman of the Board of Governors, the former President Daniel Toroitich Arap Moi, who used his influence as the local Member of Parliament, and as the President of the republic of Kenya to acquire the school for his own benefit and profit.

However, despite the registration of the school as a private institution, it continued to draw and enjoy government support, by way of government funding and the supply of highly qualified teachers from the Teachers Service Commission, who were remunerated by public funds until the 13th February, 2006. This state of affairs continued until the management of the School offered its teachers betters terms which, to the appellants, was an indication that the school had been indeed privately registered.

The appellants alleged that since the privatisation of the school in 2006, the fees charged at the school became unaffordable and thus, the local residents are locked out from benefitting from the services offered there. They further contended that since they had taken part in the establishment and development of the school, they ought to have been consulted before the conversion of the school from a public entity to a private entity.

The appellants further urged that there had been a violation of section 75 of the Constitution since they were not consulted in the change of the School's registration status, and urged the court to declare that registration as illegal and unconstitutional, and order that the business of the school, the land on which it stands as well as the buildings thereon do revert to the Ministry for Education for management as a public institution.

That petition was opposed on various fronts. The school through its principal, Richard Cherutich Moindi, swore an affidavit in which he deponed that the school was owned by the Sacho High School Trust under a Trust Deed dated 17th July 1985. He urged that the prior to 1985, schools in Kenya were categorised either as aided or unaided, and that the Sacho High School was not a Harambee school. He stated that the founder of the Trust, retired President Daniel arap Moi, was the major source of funds for the school, and not the appellants. He argued that the appellants never indicated which *harambees* were conducted between 1983 and 1985 towards the setting up of the school.

In an affidavit sworn on behalf of the respondents by Pius Kibiwott, it was averred that all those who were affected by the acquisition of the land on which the land on which the school stands were compensated, and that after the gazettement of that land into a forest, the school applied to the

Commissioner of Lands for it. The land was thereafter entrusted to the trustees of the School on 8th November 2006. It was further averred that the school continues to pay land rent, that a lawful procedure was followed in registering the school as a private school, and that the use of teachers from the Teachers Service Commission was not improper, and was in line with the objects of the school to provide service to the public.

The petition was heard and determined by Wendoh and Dulu, JJ. The learned judges isolated five issues for determination by them. The first was whether the Board of Governors of Sacho High School had been improperly sued. On this the learned judges found that they had not, and stated that since the school is owned under a Trust, it is the trustees of the school, and not the board of governors that ought to be sued. The learned judges also found that since the 1st respondent is a private entity, no constitutional orders can lie against, it, and that even if the suit was to succeed, the remedies sought, being public law remedies, could not lie against the school. The learned judges were also of the opinion that the school was a private school, and that the registration of the school was well within the knowledge of the appellants even before teachers employed by the Teachers Service Commission stopped being deployed there in 2006.

The learned judges also found that the appellants had not indicated by who their property was compulsorily acquired. They further stated that even if there was acquisition as claimed by the appellants, the subject of the acquisition was not the property upon which the school was built.

In sum, the High Court found that the appellants had failed to show that they had a cause of action based on compulsory acquisition, and even if they had, it was not a matter that could be determined in a constitutional petition but rather an ordinary civil suit that would be determined after reception of evidence from, and cross examination of, witnesses. The judges therefore found that the appellants had failed to establish that they had a claim to the school, and in what manner their rights under section 75 of the retired Constitution had been violated and subsequently dismissed the petition, thus provoking this appeal.

The appeal was presented by way of the amended memorandum of appeal which contains 21 grounds of appeal, which can be summarised as follows:

> ***a. Narrowing the scope of the issues and excluding the appellants submissions;***
>
> ***b. Failing to give consideration as to the origin and history of Sacho high School thus making an erroneous finding that the school was a private school;***
>
> ***c. Basing the appellants' case on compulsory acquisition yet the case was actually based on the doctrine of public trust;***
>
> ***d. Failing to address themselves as to whether the 1st respondent improperly converted the Sacho High School to a private school without following due procedure as stipulated by the Constitution and the Trust Land Act;***
>
> ***e. One of the learned judges was overwhelmingly biased against the appellants, having held in a previous suit, that is HCCC No 502 of 2008 Kimengich Arap Namba v The Principal Sacho High School that Sacho High School is a private school, and yet the said judge failed to disqualify herself thus occasioning a miscarriage of justice.***

These grounds were canvassed by Mr Pheroze Norwojee, learned senior counsel, who appeared on behalf of the appellants. He submitted that this appeal centres on the application of section 77 of the retired Constitution as well as the application of Article 50 of the current Constitution since the suit before the High Court was filed and heard during the pendency of the retired Constitution but the judgment was delivered after the promulgation of the current Constitution.

Mr Norwojee submitted that in the High Court, the main issue under consideration was whether Sacho High School is a public school or not. Lady Justice Wendoh was a part of the bench, and made a decision

that the school was a private school. However, the learned judge did not disclose to the parties her earlier decision in ***Kimengich Arap Namba v the Principal Sacho High School and two others*** ***High Court Civil Case No 502 of 2008*** (herein after referred to as the Namba Case), and neither did she recuse herself. In that matter, the appellants submitted, one of the issues that was before Lady Justice Wendoh was whether the Sacho High School was a public body. She stated therein that the institution was a private high school, run by a board of directors, as opposed to a private high school that was run by a board of governors. The appellants allege therefore that by the time the learned judge was hearing the petition, which is the subject of this appeal, she had already formed an opinion on the matter that she was yet to decide. The appellants consider that this was a direct violation of the right to a fair trial as was enshrined under section 77 of the former constitution and Article 50 of the current Constitution. In support of this submission, the appellants cited the American case of the Supreme Court of Texas in ***Sun exploration and Production Co V Jackson*** ***(1989) 783 SW 2D 202*** at 206 where it is stated that:

> ***"the legitimacy of the judicial process is based on the public's respect and on its confidence that the system settles controversies impartially and fairly. Judicial decisions rendered under circumstances that suggest bias, prejudice or favouritism undermine the integrity of the courts, breed skeptism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence."***

To buttress this point, counsel also relied on the decision in ***Tumaini v Republic 1972 [EA] 441*** where the Court stated that:

> ***"in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable persons."***

Mr Norwojee submitted that while there was no evidence of malice on the part of the judge involved in the matter, there was still the possibility of conscious or unconscious bias. The suspicion was based on reasonable grounds because there was an express finding made by Lady Justice Wendoh, on a matter that she had previously made, which was whether the school in question was a public school or a private school, and whether the status of the school had changed the status changed properly.

The final determination of the case left the members of the community with the impression that justice was neither done nor seen to be done. This was especially in view of the fact that the decision in the Namba case was rendered on 5th August 2009, and hearing of the present petition started on the 22nd February 2010, meaning that the respondents and the learned judge were aware of the Namba decision.

Mr Norwojee therefore prayed that since there was no evidence that the judge exhibited malice or targeted the appellants in any manner, the matter be remitted back to the High Court for determination so that the parties may have an opportunity for full and fair hearing before a proper court.

Mr Kaumba for the 2nd and 3rd respondents opposed the appeal. On bias, learned counsel submitted that bias connotes the consideration of an extraneous matter that favours one party over the other. He distinguished the previous decision in the Namba case, stating that there was a sharp difference between that case and the present one. In the constitutional petition that gave rise to this appeal, counsel submitted, the court was obliged to interrogate the rival positions of ownership, whereas in the ***Namba Case***, the issues for consideration were based on evidence that was not rebutted indicating that the school was a private school. For this reason, counsel submitted that there was no bias.

We have considered the rival submissions of the parties, and the material placed before the Court. The issue that arises for our determination is whether the learned judge was biased, and whether the right to a fair trial guaranteed by section 77 (9) of the retired Constitution was infringed. That section provided that:

> ***"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before***

such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time".

The rights contained in that section were imported into Article 50 of the current Constitution. Article 50 (1) thereof provides:

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

The right to a fair trial, defined by Black's Law Dictionary (9th Edition, Gardner, Ed.) as

"a trial by an impartial and disinterested tribunal in accordance with regular procedures", is a cardinal aspect of the right to access to justice. Article 50, read together with Article 48 of the Constitution calls upon courts to ensure access to justice. A fair trial has many facets, and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge. Black's Law Dictionary (Gardner, Ed.) states that:

"***a judge's bias toward one or more of the parties to a case over which the judge presides. Judicial bias is usually not enough to disqualify a judge from presiding over a case unless the judge's bias is personal or based on some extrajudicial reason."***

As the South African Constitutional Court stated in ***President Of The Republic Of South Africa V South African Rugby Football Union [1999] (4) SA 147***:

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

The Oxford English Dictionary defines bias "***as an inclination or prejudice for or against one thing or person***" while Black's Law Dictionary defines the word bias in the following manner:

"Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."

Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of ***Lord Goff*** in the case of ***R vs Gough, [1993] 2 All CR 724***:

"Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking 'the judge was biased'. (Emphasis ours)

In ***Metropolitan Properties Co., Ltd v Lannon*** *(1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694* it was observed that:-

> ***"Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias''.*** (Emphasis ours)

See also the Australian case of ***Webb v The Queen (1994) 181 C L R 41*** where Mason CJ and McHigh J held:

> ***"In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done ..."***

The rule against bias is an important element of the right to a fair trial. This rule is to be very strictly applied, so that even the appearance of bias is done away with. This is because it aids in public confidence in the fairness and impartiality of the judicial system. As the court stated in the English case of *R v Sussex Justices ExP. Mc Carthy [1924] 1 KB 256*

> *"Justice should not only be done but should manifestly and undoubtedly be seen to be done."*

The import of the rule against bias, as well as its strict application, is that there need not be actual bias on the part of the judge; for apprehended bias to be found; it is enough that the adjudicator might not appear to be impartial.

In determining whether or not there has been bias, the test to be applied is that of a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias. In ***Kimani v Kimani*** ***(1995-1998) 1 EA 134*** on the test of likelihood of bias Lakha JA in the majority judgment stated that:

> ***"the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias."***

In his dissent, Gicheru JA (as he was then) stated that:

> ***"…..the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would , that the judge is biased or is likely to be biased"***

This test was approved by the East African Court of Justice in ***Attorney General of the Republic of Kenya v Prof Anyang' Nyong'o and Others*** ***(5/2007) [2007] EACJ 1 (6 February 2007)*** where the Court stated that*:*

> ***"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."***

We also accept the proposition of the English Court in ***FLS Aerospace Ltd*** ***[1999] EWHC B3 (Comm) (20 April 1999)*** Ltd wherein it is stated that:

> ***"First, actual bias will of course always disqualify a person from sitting in judgment. Even in the absence of actual bias, however, the importance of public confidence in the administration of justice is such that even the appearance of bias will disqualify."***

We now turn to consider what constitutes the appearance of bias. The issue of appearance of bias arose in ***R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte [2000] 1 AC 119 (In Re Pinochet)***. In that case, an extradition warrant had been issued in respect of Augusto Pinochet Ugarte the Chilean head of state by a Spanish court. Subsequently, the Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest. He applied to the High Court to quash those warrants. He succeeded, but the High Court stayed the quashing order so that an appeal could be taken to the House of Lords as the question of the proper interpretation and scope of immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was a Head of State. This appeal was heard by five lords of the House, among them Lord Hoffmann.

Before the hearing of the main appeal, Amnesty International, along with other human rights bodies, petitioned for leave to intervene in the appeal, which was granted. Judgment was eventually granted with a majority of three to two, with Lord Hoffmann in the majority, holding that Pinochet did not have immunity. They therefore elected to restore the suspended warrant. It thereafter emerged that Lord Hofmann was connected to Amnesty International in that his wife, Lady Hoffmann, was employed by Amnesty International in an administrative position. In addition, Lord Hoffmann was a director and the Chairperson of the Amnesty International Charity Limited, a charitable institution that funds a portion of Amnesty International's activities.

Based on this, Pinochet lodged a petition before the House of Lords asking that the earlier opinion either be set aside, or the opinion of Lord Hoffmann be set aside and declared to be of no effect. This prayer was grounded on the fact that Lord Hoffmann's links to Amnesty International were such as they gave the appearance of bias. The House of Lords agreed with this assessment. Lord Browne-Wilkinson in his speech observed that:

> ***"The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias. The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."***

On his part, Lord Hope of Craighead stated that:

> ***One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause:*** *nemo debet esse judex in propria causa****. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small.***

And that:

> ***the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable.***

Lord Hope concluded that:

> ***Indeed it may be said of all the various tests which I have mentioned, including the maxim that no-one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.***

In the end result, the Lords found that the appearance of bias, and not actual bias, on the part of Lord Hoffmann was so strong, that the public confidence in the administration of justice could be shaken, so that the decision made against Pinochet could not be allowed to stand.

The approach in ***Re Pinochet*** was approved by this Court in ***Kaplan & Stratton V L.Z. Engineering Construction Limited & 2 Others [2000] eKLR (Civil Application 115 of 2000).*** In addition, the Court stated the effect of apparent bias in the following terms:

> "***Apart from that, if an allegation of apparent bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be predisposed … prejudiced against one party's case for reasons unconnected with the merits of the issue."***

There is a matter that is on all fours with the one now before us. This is the decision of the High Court in ***Homepark Caterers v Attorney General & 3 others [2007] eKLR (Petition No 671 of 2006)*** where the High Court of Kenya was confronted with a petition in which the petitioner, Home Park Caterers, sought a declaration that the continuance of a trial before the Hon. Justice Ojwang would have amounted to an infringement of their rights to a fair trial under Section 77 of the Constitution, and that justice would not have been seen to have been done.

The basis upon which the applicants sought the declarations was that a few years before, while he was the Dean of the School of Law at the University of Nairobi, the learned judge had been one of 73 consultants that prepared a report for the task force on Legal Issues relating to HIV & Aids. The recommendations made in that report were captured in a bill on HIV & Aids, and had a direct bearing on the matter that was now before the judge. In particular, there were specific questions that needed determination in the main petition that had been dwelt upon in the said report, and recommendations made against them. The learned judges (Nyamu & Wendoh) considered the issues dwelt upon in the report as well as the issues that may have to come before the trial judge for determination, and found them to be considerably similar, and while there was no evidence that there was no bias on the part of the trial judge, there was a real apprehension that the involvement of the trial judge in the work of the task force, as well as his non-disclosure gave merit to the applicant's apprehension that it may not receive a fair trial as guaranteed by section 77(9) of the Constitution of Kenya. The judges hearing the petition rendered themselves in the following manner:

> ***"We further find that the facts and circumstances as described above should have led to the both disclosure, by the judge and to his unsolicited, unprompted and automatic disqualification of the Judge himself. The fact that an opportunity was given to the need and the filing of this Petition,***

is a matter of great regret and does with greatest respect, reveal a lapse or omission by the trial judge in upholding the applicable benchmarks on this important subject as clearly set out in decided cases and the ethical position of Judges as set out in international instruments and the Constitution. The Constitution demands of us as judges, that we accord to litigants a fair, impartial and independent hearing,. Yet the inescapable conclusion in the face of the role of the trial Judge as a former Task Force consultant is that there is a risk that it is impossible for him to bring the trial an open mind to the issues before him if he were to continue with the suit and make a determination. The Petitioner and the [interested parties] in our view are reasonably apprehensive of possible bias or danger or risk of bias. In our view where there is reasonable or apparent apprehension of danger of bias, a court would not satisfy the constitutional requirements under section 77 (9) of the Constitution."

Applying the test of appearance of bias that we have discussed above to the circumstances now before us, we find ourselves constrained to find that the apprehensions of bias that have been raised by the appellants were warranted. The main issue for determination in the High Court was the status of Sacho High School. This is a matter that was extensively analysed by Lady Justice Wendoh in the Namba case. This she did in trying to determine whether judicial review orders would lie against the school. To compound this fact, the trial judge never disclosed to the parties that she had previously made a substantive determination, directly connected to the matter that was at the time before her. In the case of ***Metropolitan Properties vs Lannon (supra),*** Lord Denning stated that:

"In considering whether there was a real likelihood of bias … the Court looks at the impression which would be given to other people … What right minded persons would think."

The fact that the learned judge never disclosed to the parties that she had previously dealt with the Namba case, which was in many respects the same as the constitutional petition is another factor. In ***Taylor & Another v Lawrence & Anor [2002] EWCA Civ 90*** it was stated that:

"On the other hand, if the situation is one where a fair minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant's confidence in the judge." (Emphasis added)

In this case, a right minded person, having given due consideration to the fact that Justice Wendoh had hardly a year earlier, heard and determined the very issue that arose for determination in the petition before the High Court, would get the impression that the judge may have prejudged the subsequent matter before her; or in other words, one may get the impression that the trial judge, from an objective point of view, may not have been impartial, having already made a decision even before she was to hear the petition before her.

The fact of non-disclosure only serves to compound the appearance of the likelihood of bias or lack of impartiality. The importance of disclosure was emphasised in the case of ***Davidson v Scottish Ministers [2004] UKHL 34,*** which we adopt as the proper position, wherein it was stated that:

"Where a judge is subject to a disqualifying interest of any kind ("actual bias"), this is almost always recognised when the judge first appreciates the substance of the case which has been assigned. The procedure is then quite clear: the judge should, without more, stand down from the case. It is rare in practice for difficulties to arise. Apparent bias may raise more difficult problems. It is not unusual for a judge, at the outset of a hearing, to mention a previous activity or association which could not, properly understood, form the basis of any reasonable apprehension of lack of impartiality. Provided it is not carried to excess, this practice is not to be discouraged, since it may obviate the risk of misunderstanding, misrepresentation or misreporting after the hearing. It is also routine for judges, before or at the outset of a hearing, to disclose a previous activity or association which would or might provide the basis for a reasonable apprehension of lack of impartiality. It is very important that proper disclosure

should be made in such cases, first, because it gives the parties an opportunity to object and, secondly, because the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment. " (Emphasis ours)

In the case of ***Daktaras V Lithunia, (Application No. 42095/98)*** the European Court of Human Rights considered that:

> ***"the notion of impartiality contains both a subjective and an objective element: not only must the tribunal be impartial in that no member of the tribunal should hold any personal prejudice or bias but it must also be impartial from an objective viewpoint in that it must offer guarantees to exclude any legitimate doubt in this respect."***

Here, justice will not have been seen to have been done, and thus the subsequent judgment of the trial judge will have been a nullity.

In view of our holding on the appearance of bias on the part of the trial judge, what order best commends itself in this appeal? We borrow from ***R v Gough (supra)*** where the Court observed that*:*

> ***"Public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand."***

In the circumstances, we cannot allow the judgement of the High Court to stand. Rule 31 of the Court of Appeal Rules gives us the power to remit proceedings back to the High Court. That rule provides that:

> ***"On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs."***

We hereby allow the appeal to the extent that the judgment of the High Court made on the 18th February 2011 is set aside, with an order remitting the case back to the High Court for retrial before any other judge other than Wendoh J and Dulu J. In view of the position the parties now find themselves in, there shall be no order as to costs.

Dated and delivered at Nairobi this 30th day of January, 2015

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR