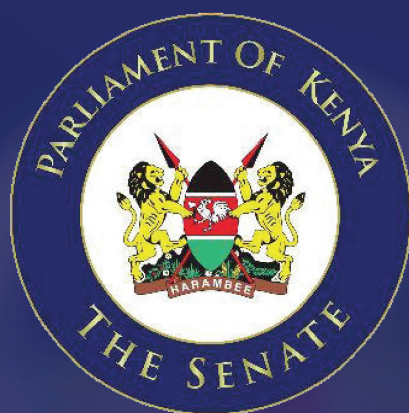


1ST EDITION



REMOVAL OF COUNTY GOVERNORS AND DEPUTY COUNTY GOVERNORS FROM OFFICE THROUGH IMPEACHMENT

A DIGEST OF THE LAW AND PRACTICE







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FOREWORD

Accountable governance is a core part of the Constitution of Kenya 2010. In turn, the Constitution of Kenya 2010 establishes the removal from office through impeachment as one of the tools of governance, among many other avenues of exercising oversight and facilitating accountability. The Constitution provides for the impeachment of Governors under Article 181 of the Constitution.

In 2012, Parliament enacted the County Governments Act, which provides for the process of impeachment. The Act vests the role of impeachment on the County Assembly and the Senate. The second and third Senate (2013-2017 and 2017-2022), handled a total of 12 impeachment proceedings: Governor of Embu (twice in 2014), Governor of Kericho (2014), Deputy Governor of Machakos (2014), Governor of Murang'a (2015), Governor of Nyeri (2016), Governor of Taita Taveta (2019), Governor of Kiambu (2020), Governor of Kirinyaga (2020), and Governor of Nairobi (2020). Of these impeachment proceedings, only four were upheld (Governor of Embu (twice), Governor of Kiambu, and Governor of Nairobi) by the Senate, while the Senate dismissed the rest. The courts reversed the impeachment of the Governor of Embu, which means that only two impeachments led to the actual removal of Governors from office (Kiambu and Nairobi counties). The Fourth Senate (2022-2027) has handled four impeachment proceedings (the Governor Meru (thrice) the Deputy Governor Siaya, and the Deputy Governor Kisii) and confirmed the impeachment of the Deputy Governor of Kisii.

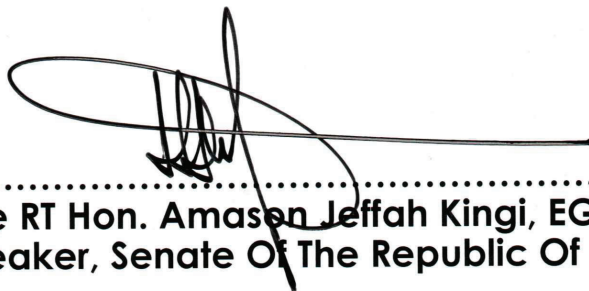
From the first impeachment, the Senate has had to gradually develop rules and procedures through the various impeachments in order to enable the Senate to conduct its role effectively. Furthermore, courts have provided guidance and direction on various aspects of the impeachment process. The experience and knowledge that the Senate has built since 2013 have enabled it to build structures and processes that have enabled the Senate to play its role under the law more effectively.

This Digest consolidates the jurisprudence and practice into a valuable reference point not only for senators but also for Members of County Assemblies and the Executive at the County level.



The Digest is also useful for other stakeholders interested in understanding the legal framework guiding the impeachment of County Governors and their deputies and the practice that has emerged from the process.

This first edition of the Digest was prepared and finalized during ongoing processes that may end up substantially changing the procedures of impeachment. The Senate is in the process of debating the County Governments (State Officers' Removal from Office) Procedures Bill, 2023. There are also ongoing cases challenging the current law of impeachment. Subsequent editions of the Digest will incorporate the outcomes of these processes.



.....
The RT Hon. Amason Jeffah Kingi, EGH, MP
(Speaker, Senate Of The Republic Of Kenya)







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The development of the digest included interviews and discussions with members and staff of the Senate, County Governments (the assembly and the Executive), NGOs and community organisations involved in governance. We thank all persons who took the time to give their thoughts and views that went into this Digest.

Finally, we thank Dr. Conrad Bosire, the consultant who developed the Digest.


.....
Jeremiah M. Nyegenye, CBS
(Clerk, Senate Of The Republic Of Kenya)





LIST OF ACRONYMS AND ABBREVIATIONS

CEC	County Executive Committee.
CGA	County Governments Act.
CoP	Court of Protection (UK).
COVID-19	Novel Corona Virus.
CPSB	County Public Service Board.
EACC	Ethics and Anti-Corruption Commission.
eKLR	Electronic Kenya Law Reports.
ELC	Environment and Land Court.
KESC	Supreme Court of Kenya.
NWLR	Nigeria Weekly Law Reports.
PFMA	Public Finance Management Act.
ZLR	Zimbabwe Law Reports.





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Senate (11th Parliament), 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mwangi wa Iria, the Governor of Murang'a County' (6 November 2015).

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Paula Case 'Dangerous Liaisons? Psychiatry and Law in the Court of Protection – Expert Discourses of 'Insight' (and 'Compliance')'. Med Law Rev (2016) 24 (3):360–78



CHAPTER 1: INTRODUCTION



CHAPTER 1: INTRODUCTION

1.1 Background

Accountable exercise of power is at the heart of the Constitution of Kenya, 2010 ("the Constitution"). While national and county governments are vested with respective powers and responsibilities, both levels of government are required to be accountable in the manner they exercise such powers. Furthermore, the Constitution recognises that all sovereign power belongs to the people of Kenya and should be exercised only in accordance with the Constitution. In this regard, the Constitution explicitly states that the people may exercise their sovereign power either directly or through their democratically elected representatives.

There are multiple avenues of accountability provided for or recognised and established in the Constitution. One such avenue is the process of removal of Governors and Deputy Governors from office through impeachment. Article 181 of the Constitution lays down the primary framework upon which the process of removal through impeachment is based.

The Constitution provides that a county Governor may be removed from office on the grounds of gross violation of the Constitution or any other law.¹ A county Governor may also be removed from office where there are serious reasons for believing that the county Governor has committed a crime under national or international law.² The Constitution also provides that a Governor may be removed from office for abuse of office or gross misconduct³ or for physical or mental incapacity to perform the functions of the office of county Governor.⁴ Parliament, through legislation, extended the same grounds to the removal of Deputy Governors.⁵

-
1. The Constitution, Art. 181 (1) (a).
 2. *ibid* Art. 181 (1) (b).
 3. *ibid* Art. 181 (1) (c).
 4. *ibid* Art. 181 (1) (d).
 5. The County Governments Act, s 9.



The Constitution does not specify the process of removal of a county Governor or a deputy Governor and instead leaves this for Parliament to prescribe.⁶ Accordingly, in 2012, just before the entry of county governments in March 2013, Parliament enacted the County Governments Act 2012, which lays down the procedure for the removal of a Governor or deputy Governor.⁷ The procedure for the removal of a Governor or a deputy Governor, under the County Governments Act, is initiated by the County Assembly and concludes at the Senate.⁸ This process of impeachment of Governors is thus a two-stage process that is entrusted to politicians at the County Assembly and the Senate.

During parliamentary deliberations in 2012 on the impeachment provisions, concerns were raised about the apparent infringement in the affairs of another level or organ of government by granting the Senate the responsibility to decide on the impeachment of a Governor at the county level. However, this provision was justified on the grounds that the Senate would provide stability to the process. It was argued that the exclusive vesting of impeachment in the County Assemblies would give rise to polarisation and endless impeachments, akin to the deposing of mayors in former local authorities.⁹ It was also noted that since the Senate is part of the legislature (not the Executive) and also given the Senate's role of representing and protecting county interests, the intervention by the Senate would bring political stability and legitimacy to the process.¹⁰

The role of impeaching officials has traditionally been left to the political branches of government. Impeachment, as a tool for accountability, was first used in 1376 in England and used over the years by the British Parliament "to charge royal ministers with abuse, remove them from office, and imprison them."¹¹

6. The Constitution, Art. 181 (2).

7. The County Governments Act, s 33.

8. *ibid.*

9. Musalia Mudavadi, Deputy Prime Minister and Minister of Local Government (National Assembly Hansard, 21 February 2012).

10. *ibid.*

11. House of Representatives (116 Congress, First Session), 'Constitutional Grounds for Presidential Impeachment' (Report of by the Majority Staff of the House Committee on the Judiciary) December 2019, 8.



It is noted that impeachment assisted in shifting power “away from royal absolutism and encouraged a more politically accountable administration”.¹² In 1679, the House of Commons observed that impeachment was “the chief institution for the preservation of Government”.¹³ From England, the practice of impeachment has been borrowed and applied in other legal systems around the world. As Turley aptly observes, “American impeachments stand on English feet.”¹⁴

In Kenya, politicians in the County Assembly and the Senate are entrusted with the responsibility of removal of Governors and their deputies. In older jurisdictions, such as the United States of America, the impeachment of the President is similarly vested in the Congress, and confirmation of the impeachment is vested in the Senate. The Constitution of the United States of America provides that the “Senate shall have the sole power to try all impeachments.”¹⁵ Gerhardt explains that the decision to vest Congress with powers to try impeachment is in the political pragmatism that is required in decision-making on issues of impeachment.¹⁶ He states that:

By vesting the impeachment authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well-versed in pragmatic decision-making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical rather than formalist calculations.¹⁷ There is, thus, a level of public trust that is placed in the political arms of

12. *ibid.*

13. *ibid.*

14. Jonathan Turley, ‘Written statement,’ The Impeachment Inquiry into President Donald J. Trump: The Constitutional Basis for Presidential Impeachments,’ 4 December 2019, 55.

15. Art. 1, s 2 (6) Constitution of the United States.

16. Michael J. Gerhardt, ‘The Special Constitutional Structure of the Federal Impeachment Process’, Law and Contemporary Problems, Vol. 63: Nos. 1 & 2, pages 245-256, at page 246, quoted in Martin Nyaga Wambora and 30 others v County Assembly of Embu & 4 others [2015] eKLR, para 222.

17. *ibid.*



government to balance the need for political accountability, constitutional legitimacy, and decision-making that enhances the stated constitutional objectives. As Gerhardts further noted, “the vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority.”¹⁸

More importantly, the process and substance of impeachment are constitutional processes whose substance and management are defined carefully by the Constitution. Thus, while political interests and other considerations will percolate into the impeachment process, mainly because it is a process vested in politicians, the grounds for impeachment are clearly defined. Accordingly, and over time, the process of impeachment has been managed and dealt with within the four corners of the Constitution. It has been interpreted in a manner that furthers constitutional objectives with clear jurisprudence and practices emerging from the County Assemblies, the Senate, and pronouncements of the courts on the process and substance of impeachment.

In the second and third terms of the Senate (2013-2017 and 2017-2022), there were a total of 11 impeachment proceedings: Governor of Embu (twice in 2014), Governor Kericho (2014), Deputy Governor Machakos (2014), Governor Murang’a (2015), Governor Nyeri (2016), Governor Taita Taveta (2019), Governor Kiambu (2020), Governor Kirinyaga 2020, and Governor Nairobi (2020). Of these impeachment proceedings, only four were upheld (Governor Embu (twice), Governor Kiambu, and Governor Nairobi) by the Senate, while the Senate dismissed the rest. The courts reversed the impeachment of Governor Embu, which means that only two impeachments led to the actual removal of Governors from office (Kiambu and Nairobi counties). In the 13th Parliament (2022-2027), the Senate has so far handled five impeachment proceedings (the Governor Meru (thrice) the Deputy Governor Siaya, and the Deputy Governor Kisii) and confirmed the impeachment of the Deputy Governor Kisii.

18. Quoted in Martin Nyaga Wambora & 30 others v County Assembly of Embu and 4 others [2015] eKLR, Embu Constitutional Petition 7 and 8 of 2014, para 222.



1.2 The Law on the Impeachment of Governors and Deputy Governors

Section 33 of the County Governments Act 2012 is the enabling provision for the above constitutional framework on the impeachment of Governors. The Act provides that a member of the County Assembly may, by notice to the Speaker and supported by at least one-third of the members of a County Assembly, move a motion for the removal of the Governor under Article 181 of the Constitution. If such a motion is supported by at least two-thirds of the County Assembly, the Speaker of the County Assembly shall inform the Speaker of the Senate (within two days) of the decision. The Governor or deputy shall continue to perform his or her functions pending the outcome of the impeachment. The Senate Speaker is required to convene a meeting of the Senate (within seven days of receipt of notice) to hear charges against the Governor or Deputy Governor.

The Senate may, by resolution, appoint a special committee comprising 11 of its members to investigate the matter. When a special committee is appointed, it shall investigate the matter and report to the Senate within ten days. In its report, the special committee is expected to state whether the particulars of any allegation against the Governor have been substantiated or not substantiated. The Governor shall have a right to appear before the special committee during its investigation.

Upon presentation of the report by the special committee, the Senate shall, after affording the Governor an opportunity to be heard, vote on the impeachment charges. A vote by a majority of members of the Senate in favour of impeachment will result in the Governor ceasing to hold office. If the vote fails to result in removal, the Speaker of the Senate shall notify the Speaker of the concerned County Assembly. The Act further provides that the motion by the assembly for the removal of the Governor on the same charges may only be re-introduced to the Senate after the expiration of three months from the date of the Senate vote. Section 33 further provides that the procedure for the removal of the president under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a Governor.¹⁹

19. The County Governments Act, s 33 (9) as read with section 33((A).



1.3 Procedures and Rules of Impeachment

County Assemblies and the Senate have developed their internal procedures and rules to guide the conduct of impeachments of Governors and their deputies. The rules of County Assemblies and the Senate provide details, including timelines and additional requirements and procedures, in a bid to operationalise the provisions of section 33 of the County Governments Act. The rules of the Senate and the different County Assemblies have been developed, revised, and updated over time to cater for various emerging issues regarding the conduct of impeachment of Governors and their deputies.

1.3.1 County Assembly Procedures and Rules

County Assembly Standing Orders provide for the manner in which impeachment proceedings are conducted in the County Assembly. Most of the Standing Orders have provisions that are similar and generally adapted from provisions of section 33 of the County Governments Act relevant to County Assembly proceedings.²⁰ However, there are a few County Assemblies that have further revised their standing orders relating to the process of removal of a Governor or deputy. The Standing Orders contain provisions regarding the manner of introducing impeachment motions, numbers required in support of the motion, rights of the Governor during the impeachment motion, and procedures (including timelines) for the transmission of approved motion for impeachment to the Senate at the national level.²¹

County Assembly Standing Orders also provide for the right of the Governor during the impeachment process at the County Assembly level. These include the right of the Governor to appear before the County Assembly or a committee of the County Assembly to defend their case against impeachment.²²

20. The County Governments Act, ss 33 (1) to (3).

21. See for instance, ss 65-66 of the Nakuru County Assembly Standing Orders. The standing orders of most county assemblies are textually similar (and appear to have been copied from the same template).

22. See for instance, s 68, County Assembly of Meru Standing Orders, 3 Edition (July 2022).



1.3.2 Senate Procedures and Rules

The Senate has provided for an elaborate procedure for handling impeachments in its revised Standing Orders (March 2023). Standing 80 of the Senate Standing Orders is mainly a restatement of section 33 of the County Governments Act. In addition, the Standing Orders contain provisions relevant to the impeachment process, as well as elaborate rules in the Third Schedule to the Standing Orders.

Standing 80 states that whenever the Constitution or law requires the Senate to consider a motion for removal from office, such a person holding office shall be entitled to appear before the Senate or Senate Committee considering it and is entitled to legal representation. Furthermore, the standing orders state that a motion for removal from office shall take precedence over all matters in the order paper of the Senate for that day.²³

The Third Schedule to the Standing Orders provides detailed rules of procedure on how impeachments will be conducted. The Schedule is divided into two: Part I deals with rules of procedure when considering impeachments in plenary. In contrast, Part II deals with procedures where the Senate elects to have a Special Committee. The rules of Procedure deal with various issues, including the rights of parties during the hearing and how the same is to be adhered to during hearing, invitation to parties, timelines for various processes and stages, exchange of documents between the parties, summoning of witnesses and presentation of evidence, conduct of actual proceedings in the plenary and the committee, preliminary issues and how they are to be dealt with, public access to impeachments and “in-camera” sessions, among other issues concerning the impeachment process.

23. The Senate Standing Orders (March 2023), s 82.



1.4 The Rationale and Purpose of this Digest

County Assemblies and the Senate have handled a number of impeachments involving Governors and Deputy Governors. These individual impeachment processes have touched on various procedural and substantive aspects of impeachments, which have laid down critical jurisprudence on impeachment, upon which the future processes of impeachments can be based.

While confirming the grounds for impeachment against Governors and Deputy Governors, the Senate has deliberated on various aspects. These include the purpose and objectives that impeachment is meant to serve within Kenya's system of constitutional governance, the nature and threshold of offences that fall in the category of impeachable offences under the Constitution of Kenya 2010. Other issues covered during impeachment proceedings in the Senate include the nature of evidence and standard of proof of those offences that are required under the Constitution, the constitutional requirements of fair hearing during impeachment, the nature and scope of public participation applicable to impeachment processes, and the place of court orders and ongoing court cases related to impeachment, among other issues.

Being a constitutionally entrenched process, courts have a role in ensuring that relevant constitutional provisions, especially the rights of Governors and their deputies, are respected. Courts have, therefore, intervened by defining and clarifying the constitutional boundaries within which impeachments should be conducted. The result is that courts have, on many occasions, faulted procedures undertaken at the county and national level and reinstated Governors to office. In other cases, the courts have confirmed the decision of the Senate to impeach. Yet, in other cases, the balance between the supervisory role of courts and the privileges and immunities of the legislature (which are vested in the County Assembly and the Senate) has also come up.

More importantly, during these processes, essential rules and practices emerged that formed the basis of subsequent impeachments and the codification of rules regarding impeachments at the County Assembly and the Senate. Articles 181 of the Constitution and section 33 of the County Governments Act are relatively skeletal and required fleshing out during consideration of impeachments.



The impeachments undertaken so far have enabled the development of rules and the enrichment of the practice of impeachment. In this regard, County Assemblies (especially those that have undertaken impeachment of the Governor or a deputy) have revised their standing orders and rules of procedure. The Senate has updated its Standing Orders and developed detailed rules of procedure specifically applicable to the impeachment of Governors and Deputy Governors.

The revised standing orders and rules of procedure of the Senate and County Assemblies are a consolidation of the jurisprudence that has emerged from the courts, as well as the decisions of the Senate from the various impeachments. As indicated earlier, the practice of impeachment traces its roots to 12th-century England and has been adapted to various modern systems of government. As such, Kenya's processes of impeachment of Governors and Deputy Governors have also borrowed from the practice in other jurisdictions.

This digest analyses and documents the interpretation of the constitutional and statutory provisions relating to the impeachment of Governors and Deputy Governors in Kenya. This digest consolidates the principles and rules that have emerged from impeachment processes. The digest also refers to comparative practice and decisions on impeachment Which have been referred to in Kenyan decisions, as well as other material that has relevance to the Kenyan practice. Specific areas that the digest has touched on are as follows:

- i. The objective and purpose of impeachment
- ii. Determination of articles of impeachment
- iii. Right to fair process in impeachments
- iv. Threshold of evidence and standard of proof in impeachments
- v. Public participation in impeachments
- vi. The nature and scope of the Senate's role in impeachments
- vii. The role and place of court intervention in impeachment proceedings

In each of these central issues, the digest refers to the applicable laws, the interpretation of the courts and the Senate reports, comparative jurisprudence, and scholarly opinions. In doing so, digest aims to provide a coherent and comprehensive reference point for County Assemblies, the Senate, and other persons and stakeholders who will interact with the impeachment processes for Governors and Deputy Governors.



1.5 How to Use this Digest

The digest has analysed and collated all decisions and pronouncements made by the Senate and courts of law regarding the impeachment process. The digest identifies principles that have been developed regarding the impeachment process and comparative jurisprudence from other systems that are relevant to the Kenyan system. Therefore, members of County Assemblies, the Senate, Speaker(s) of both legislative bodies and technical teams will find the case digest to be a helpful reference document at the various stages of impeachment.

The digest is arranged according to themes and issues that have emerged from the previous impeachment processes. In each theme/ issue, the judicial decisions, Senate decisions, comparative jurisprudence and pronouncement, and scholarly material have been assembled for ease of reference. For example, in the issue of fair process, the digest contains the following items:

- Constitutional and legal provisions on fair process
- Court decisions on fair process
- Senate decisions on fair process
- Comparative jurisprudence on fair process
- Scholarly work/ references on fair process
- A summary of principles on fair process

The digest, thus, provides a deeper and more detailed analysis of the principles and rules guiding impeachments and the clarity that has been provided through decisions of the Senate and court judgments on various aspects of impeachment. In this regard, the digest is a consolidation of the knowledge and practice of impeachments and a detailed reference document for practitioners of impeachment at the County Assembly and the Senate.



1.6 Structure of this Digest

Chapter one introduces the digest, including the meaning of impeachment and a broad background to the process of impeachment of Governors and Deputy Governors in Kenya, as well as an introduction to the chapters and structures of the digest.

Chapter Two analyses the objectives and purpose of impeachment. The process of impeachment has been used in different systems primarily as a tool for political accountability. The meaning, objective, and purpose of impeachment in political systems have also been developed and understood. The chapter consolidates the views and expressions regarding the purpose of impeachment and how this understanding impacts the process and substance of impeachment.

Chapter three provides a detailed review of the grounds for impeachment under Article 181 of the Constitution and what the Senate and County Assemblies have said regarding the threshold of each of the grounds. The Chapter also identifies and analyses essential aspects of each ground and the evidentiary threshold and standard of proof that is required in impeachments based on them.

Chapter four analyses the rules and procedures of impeachment and the rules and principles that have emerged to guide the fair process in impeachment at both the County Assembly and the Senate. The chapter analyses the applicable rules of procedure and how they relate to fair process, judicial interventions in impeachments, and the decisions regarding fair process from the courts, County Assemblies, and the Senate.

Chapter five reviews the place of public participation in impeachments and the emerging principles to guide public involvement in impeachments. The chapter looks at the constitutional and legal principles regarding public participation and their application to the impeachment process.



CHAPTER 2:

THE MEANING, OBJECTIVE AND PURPOSE OF IMPEACHMENT



CHAPTER 2: THE MEANING, OBJECTIVE AND PURPOSE OF IMPEACHMENT

2.1 Introduction

The process of impeachment, especially its origin, use, and development, provides general guidance regarding its legitimate purpose, objective, and place in governance. Broadly, the purpose of impeachment is to hold public officers accountable for their actions of misconduct or violation of the law through a political process that results in their exit from office. Throughout history, impeachment has provided elected representatives a chance to look into the conduct of public officials (especially in the Executive branch) and to take decisive action of removal from office.

In the Kenyan context, impeachment is among an array of other methods of holding Governors and their deputies, and other categories of leaders, accountable. Like impeachment, other means of accountability that result in removal from office include a general election (every five years) where elected officials can be shown the door, prosecution and conviction of public officers for crimes committed, which results in loss of office, recall of legislators by voters and the holding of fresh elections to choose a new representative. It is in this context that impeachment has been regarded as a tool for accountability in governance in Kenya.

This chapter sheds light on the meaning of impeachment, its purpose and objectives, and what generally lies in the category or thresholds of impeachment, as provided for in the Kenyan context. As mentioned in the last chapter, only a slim number of impeachments that have made their way to the Senate have resulted in the actual exit of a Governor from office. Part of the grounds for their return to office relates to the nature of impeachment proceedings and, specifically, whether the actual charges or counts actually amount to what is envisaged in the Constitution.

While the Constitution uses the term “impeachment” to describe the process of removal of the President and Deputy President under Articles 146 and 150, and the term “removed” or “removal” for a county Governor and other State officers.



In the Supreme Court's holding,²⁴ the process is similar. Impeachment, or removal, as used in the Constitution, refers to similar processes and has the same outcome. Indeed, the Supreme Court noted that all these words mean the same thing and used the words "removal", "to remove", "impeachment", or "impeach" interchangeably.²⁵

2.2 Nature of Impeachment Proceedings and Grounds for Impeachment

Article 181 of the Constitution lays down the general grounds that may amount to impeachable offences in the Kenyan context. As earlier elaborated, these are: a gross violation of the Constitution or any other law, where there are serious reasons for believing that the Governor or deputy has committed a crime under national or international law, abuse of office or gross misconduct, or physical or mental incapacity to perform the functions of a Governor or deputy. While these grounds²⁶ seem generally stated, they point to a category of offences that guide the thresholds and nature of offences that are the subject of impeachment.

The nature and structure of impeachment (a political process where elected representatives of the people try public officers and confirm) and the outcome, which is loss of power, both point to the nature of offences that are targeted through impeachment. Impeachment processes or what amounts to impeachment do not target what can be referred to as ordinary wrongdoing by officials. Indeed, there are criminal courts to deal with such offences or civil courts to settle any wrongdoing of a civil nature.

The Supreme Court of Kenya has broadly characterised the nature of impeachment proceedings and offences thus:

... [I]mpeachment or removal proceedings, though quasi-judicial, are not in the nature of criminal proceedings. They do not necessarily require or depend on criminal culpability to succeed. All that is required is that the allegations be substantiated. But as a constitutional remedy, impeachment serves as an essential check on the exercise of Executive power.

24. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 16. Fixing Uder holding

25. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 16.

26. The digest deals with the grounds contained in paragraphs (a) to (c) of Art. 181.



The purpose of impeachment is generally to protect the public interest and to preserve constitutional norms while at the same time observing the rules of natural justice throughout the process. Both interests must be balanced.²⁷

In another case, the Court of Appeal noted the unique nature of impeachment proceedings as contra-distinguished from criminal or civil trials. The Court stated:

The process of removal of a Governor from office is neither a civil nor criminal trial; it is a sui generis political and quasi-judicial process that must adhere to constitutional criteria and thresholds. The process involves policy and political responsibility and is a tool for ensuring good governance.²⁸

The Court of Appeal has emphasised the political and constitutional nature of impeachments and sought to strike a balance between the two in its description. The Court of Appeal stated that:

Our reading and interpretation of Article 181 of the Constitution, as read with section 33 of the County Governments Act, shows that the removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial, and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that the removal of a Governor is not about criminality or culpability but is about accountability, political governance, as well as policy and political responsibility.²⁹

The characterisation of impeachable offences in other jurisdictions similarly demonstrates the unique nature and weight that is given to impeachable offences. The American Constitution provides that a President can be impeached for “treason, bribery, or other high crimes and misdemeanours.” The use of the word “high” in the description of crimes and misdemeanours”

27. The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru’ (30 December 2022) 79, para 148.

28. *ibid* 79.

29. *Martin Nyaga Wambora & 3 others v Speaker of the Senate and 6 others* [2014] eKLR, paragraph 31.



has been interpreted as “great and dangerous offences” against the Constitution”.³⁰ The impeachment report of President Richard Nixon noted that an impeachable offence, within the meaning of the US Constitution, has been objectively assessed and found to be “seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the Office.”³¹

It is in this context that Alexander Hamilton, one of the founders of the United States of America, notes that ‘impeachment concerns an “abuse or violation of some public trust” with injuries done immediately to the society itself.’³² As the House Committee on the Judiciary summed up the purpose of the process, “Impeachment process is reserved for offences against our political system. It is therefore prosecuted and judged by Congress, speaking for the nation.”³³ The House Committee on the Judiciary further observes that “history teaches that ‘high crimes and misdemeanours’ referred mainly to acts committed by public officials, using their power and privileges that inflicted grave harm on our political order.”³⁴

David Kendall et al. in ‘Memorandum Regarding Standards for impeachment note that:

“Impeachment is a constitutional remedy addressed to serious offences against the system of government. . . . It does not control whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government or undermine the integrity of the office and even the Constitution itself, and thus are ‘high’ offences in the sense that word was used in English impeachments. . . . The emphasis has been on the significant effects of the conduct -- undermining the integrity of the office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government.

30. House of Representatives (116 Congress, First Session), ‘Constitutional Grounds for Presidential Impeachment’ (Report of by the Majority Staff of the House Committee on the Judiciary) December 2019, 3.

31. Report of the Committee on the Judiciary, Impeachment of Richard M. Nixon, President of the United States of America, H.R. Rep No. 93-1305 8 (1974)

32. Alexander Hamilton, Federalist No. 69, at 444.

33. House of Representatives (116 Congress, First Session), ‘Constitutional Grounds for Presidential Impeachment’ (Report of by the Majority Staff of the House Committee on the Judiciary) December 2019, 10.

34. *ibid* 4-5.



... Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the president office.” (emphasis added)

The Kenya Senate, by virtue of its statutorily conferred role of confirming the impeachment of county Governors, has the responsibility to set and maintain the standard for impeachment that adheres to the constitutional mandates of due process, fairness and justice. This, it has endeavoured to accomplish in the previous impeachments undertaken, as evidenced by the reports of its special committees.

In one of its first impeachment cases in the Senate, the Special Committee that was selected to hear the charges against the first Governor of Kericho County provided what can be termed a checklist for County Assemblies to use as a basis for assessment of the nature of the offence, in determining whether it falls within the category of impeachable offences under Article 181 of the Constitution. The Committee recommended that the oversight tool of impeachment should only be deployed where:

- i. The allegations are serious, substantial and weighty;
- ii. The violation is flagrant and glaring;
- iii. There is a nexus between the violation and the Governor;
- iv. The violation led to harm, loss or damage to society;
- v. The violation has led to a loss of dignity in the office held and a loss of confidence or trust in the person holding office to conduct the functions of that office with integrity and accountability.³⁵

35. The Senate (11th Parliament), 'Report of the Special Committee on the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County' (3 June 2014) 99, para. 260.



2.3 Impeachment is a Tool for Political Accountability

Ultimately, the broad purpose of impeachment is political accountability, as distinguished from other categories of offences that may be private. The purpose of impeachment or removal from public office in the context of the Constitution is to enforce integrity in leadership.³⁶

The Supreme Court of Kenya has held that:

"Impeachment," "recall," and "removal" are, therefore, the Constitution's final answer, a safety valve, to a State officer or a public servant who mistakes himself for a monarch. As they say, power corrupts, and the framers of the Constitution, being aware of this fact, built guardrails against the autocratic exercise of power by the leaders."³⁷

The process is intended to serve as a reminder to the holders of the office of Governor and Deputy Governor that the immense power vested in that office is to be exercised for the benefit of the people and is not a license for lawlessness. It is in this context that the House Committee on the Judiciary notes (and Kenya's Supreme Court endorses) that impeachment is the Constitution's final answer to a ... [Governor or Deputy Governor] who mistakes himself for a monarch.³⁸

This nature of impeachment as a tool for political accountability can be grasped from both the nature of the process (trial/ confirmation by elected representatives on weighty offences) and the outcome of loss of office/ authority as a consequence. Justice Joseph Story of the United States Supreme Court notes that "The design of impeachment is to remove the impeachable officer from office, not to punish",³⁹ which emphasises the principle of political accountability as opposed to guilt of a private nature.

36. Sonko v County Assembly of Nairobi City and 11 others [2022] KESC 76 (KLR) para. 1.

37. *ibid*, para. 14.

38. House of Representatives (116 Congress, First Session), 'Constitutional Grounds for Presidential Impeachment' (Report of by the Majority Staff of the House Committee on the Judiciary) December 2019.

39. Joseph Story, Commentaries on the Constitution of the United States, 221 (1833).



Furthermore, while loss of office may be seen as a form of penalty for impeachable offences, the approach to adjudication of impeachable offences is different. It is not punishment for individual wrongdoing, which the courts can do in the case of punishable offences. Instead, removal from office for infractions against the political system or the Constitution is aimed at ensuring that the holder of office's continued stay does not imperil the rule of law, democracy, and the Constitution. Put differently, the motivation and approach to impeach from office is not to sanction but to preserve the government. As Staff of the House Committee on Judiciary note regarding the impeachment of the President in the United States:

Critically, though, impeachment goes no further. It results only in loss of political power. This speaks to the nature of impeachment. It exists not to inflict punishment for past wrongdoings, but rather to save the nation from misconduct that endangers democracy and the rule of law.⁴⁰

Most notably, the outcome of impeachment results in the reversal of the popular will of the people by removing an elected official from office. It is, therefore, necessary that the accountability sought from the person impeached is weighty enough. As David Kendall et al. pose:

[W]hen the issue of impeachment is raised, the House (and ultimately the Senate) confront this inescapable question: is the alleged misconduct so profoundly serious, so evil, that it justifies undoing the people's decision? Is the wrong allegation of a sort that not only demands the removal of the president before the ordinary electoral cycle can do its work but also justifies the national trauma that accompanies the impeachment process itself?

Impeachment is, thus, not a platform to settle political scores but to seek legitimate accountability for offences against the Constitution or the political system. Those vested with the duty to impeach should bear in mind that the processes and procedures for removal are designed to achieve accountability, political governance and personal responsibility and are not necessarily aimed at finding criminal responsibility.⁴¹

40. House of Representatives (116 Congress, First Session), 'Constitutional Grounds for Presidential Impeachment' (Report of by the Majority Staff of the House Committee on the Judiciary) December 2019, 2.

41. *ibid* para 116.



It is for this reasons that it is said (of the American system) that:

The president cannot be removed based on poor management, general incompetence, or unpopular policies. Instead, the question in any impeachment inquiry is whether the President has engaged in misconduct justifying an early end to his term in office.⁴²

The purpose of impeachment of Governors or deputies is not to apportion blame, criminal or otherwise, but to ensure that the residents of a county are governed in a manner consistent with the Constitution and laws of Kenya. Accordingly, there are offences, “like jaywalking”⁴³ or other offences unrelated to the Executive function, that may amount to criminality that is unrelated to issues of political accountability for office. Indeed, “even though the president’s commission of indictable crimes may further support a case for impeachment and removal. Ultimately, the House must judge whether a President’s conduct offends and endangers the Constitution itself.”⁴⁴

The Senate Special Committee, in the first impeachment matter against the Governor of Meru, observed that impeaching a Governor need not be based on criminal culpability. Still, they must meet the minimum constitutional threshold on gross misconduct to remove the officer holder from office. The Special Committee noted that a Governor who has committed crimes might, after impeachment, face criminal prosecution in ordinary courts.⁴⁵ The special committee in the impeachment of the Governor of Kirinyaga stated thus:

The impeachment process is not a panacea for all incidents of maladministration or criminal conduct. Where allegations are made of a criminal nature, it may be the case that while the committee has neither the time nor the resources to make a conclusive finding, the matter is nevertheless severe and may require the relevant organs of government to pursue.⁴⁶

42. *ibid* 10.

43. *ibid* 5.

44. *Ibid*.

45. The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru’ (30 December 2022) 78.

46. Senate, ‘Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Ann Waiguru Mumbi, the Governor of Kirinyaga County’ (26 June 2020) 82-82, para 229.



Questions of political accountability, as opposed to the settling of political scores, must be the motivation and driving factor for the commencement of impeachment proceedings. In the Supreme Court of Nigeria's case of Hon. Muiwa Inakoju and others v Hon. Abraham Adeolu Addeke and 3 others,⁴⁷ which has been cited with approval by the Supreme Court of Kenya,⁴⁸ the Court observed that:

It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor at a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a powerful political weapon at the disposal of the House, which must be used only in appropriate cases of serious wrongdoing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrongdoing. A Governor or Deputy Governor, as a human being, cannot always be right, and he cannot claim to be right always.⁴⁹

It is in the above regard that the Senate Special Committee that inquired into the first impeachment of the Governor of Meru took the position that in order to find that any particular allegation of the charges is substantiated, a determination must be made both that evidence has been adduced pointing to wrongdoing in the manner alleged in the Charge and that the threshold for an impeachable offence has been attained.⁵⁰

47. S.C. 272 of 2006.

48. Martin Nyaga Wambora and 4 others v Speaker of the Senate and 6 others [2014] eKLR

49. In the Supreme Court Nigerian Case of Hon. Muiwa Inakoju & others v Hon. Abraham Adeolu Addeke and 3 others S.C. 272 of 2006; quoted and relied upon by the Supreme Court of Kenya in Martin Nyaga Wambora and 4 others v Speaker of the Senate and 6 others [2014] eKLR.

50. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru' (30 December 2022), 82.



The process of impeachment is not a blank cheque to the County Assembly or the Senate. It is a guided process of political decision-making that is designed to assist in achieving political accountability in political office for the Executive. For this reason, the County Assembly and the Senate are expected to exercise this power predictably and judiciously and not capriciously, and in a manner that promotes the political legitimacy of the process and contributes to overall accountability in democratic governance.

2.4 Impeachment is a Drastic Measure of Last Resort

The process of impeachment (trial by the political branch) and the outcome (ceasing to hold office) both demonstrate the drastic nature of both the process and outcome of impeachment. It is not an everyday occurrence. As the Supreme Court of Kenya has noted, “[t]he consequences of impeachment are grave and may include disqualifications from engaging in any elective public position or to hold a public office.”⁵¹ Accordingly, impeachment, while it is one among the numerous avenues for holding the Executive accountable, is only available when an official has committed offences that meet the threshold for impeachment.

Indeed, the nature of impeachment and its use in history shows that it is a measure that is invoked when a set of unique circumstances emerge that warrant its use. Justice Joseph Story of the United States has further noted (and the Supreme Court of Kenya has endorsed the statement) that the power of impeachment, removal or recall is not one expected to be in constant or frequent exercise.⁵² The Supreme Court of Kenya has added that “it is only in the face of credible evidence of extraordinary wrongdoing that the conduct of a State officer will be investigated, and even then, only upon sufficient proof of the allegations that impeachment, removal or a recall would be warranted.”⁵³

51. Sonko v County Assembly of Nairobi City and 11 others [2022] KESC 76 (KLR), para 160.

52. Joseph Story, Commentaries on the Constitution of the United States, 221 (1833).

53. Sonko v County Assembly of Nairobi City and 11 others [2022] KESC 76 (KLR).paras 17 and 18.



The report of the Special Senate Committee for the impeachment of the Governor of Kericho County noted that:

[B] Before initiating impeachment proceedings, the County Assemblies consider the other oversight mechanisms that are available to legislatures the world over and which are also at the disposal of the County Assemblies. Impeachment need not be the default oversight tool to be applied to every and any violation of the Constitution and the laws. However, the Special Committee hastens to add that where, in terms of Article 181 of the Constitution, impeachment of a Governor is called for, the Senate will undoubtedly execute its constitutional mandate in that regard.⁵⁴

In the first impeachment of the Governor of Meru County, the Special Committee also noted that the approach of the Senate, through its past decision, is that not every aberration, even if established, will lead to the impeachment of a Governor.⁵⁵ Therefore, and as warned by the courts, the power of impeachment, removal or recall is not one expected to be in constant or frequent exercise.

Following from the above, where the Special Committee of the Senate finds flaws in processes that require other agencies, the committee may, due to difficulties of time, require the matter to be investigated by those agencies. The issues presented must, thus, be apparent and fall within the ambit of the impeachable offences threshold. In the impeachment matter of Governor Wa Iria of Murang'a County, the special committee noted in its report that "[d]ue to the complex nature of this land purchase transaction, the Committee recommends that the Public Procurement Oversight Authority and the Ethics and Anti-Corruption Commission investigates this matter and reports to the Senate the outcome of the investigations."⁵⁶

54. The Senate (11th Parliament), 'Report of the Special Committee on the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County' (3 June 2014) para. 261, 99.

55. Kawira The Senate, 'The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru' (30 December 2022) 82.

56. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mwangi Wa Iria, the Governor of Murang'a County' (6 November 2015) 50 para 129.



In the impeachment of the Governor of Kirinyaga, the special committee recommended the EACC to investigate apparent corrupt practices in the county.⁵⁷

2.5 Conclusion

Impeachment as a tool of political accountability is vested in the legislative organs at the county and national levels. However, the Constitution goes further to define the category of offences and other grounds that can be the subject of impeachment processes. Therefore, while it is an explicitly political process that is entrusted in the hands of politicians, the boundaries within which it must be conducted have been constitutionally and legally defined. This means that County Assemblies must keep within the boundaries of legitimacy and constitutional objectives of the process. Namely, the impeachment tool may only be deployed where the offences or infractions of a Governor or deputy come within the boundaries defined under Article 181, as defined by the courts and the Senate's decisions. Any other issues that overlap with the oversight and accountability mandate of the County Assembly must be dealt with through other avenues of accountability, other than impeachment, for the simple reason that they do not fall within such category.

57. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Ann Waiguru Mumbi, the Governor of Kirinyaga County' (26 June 2020) 40.





CHAPTER 3:

GROUND FOR IMPEACHMENT



CHAPTER 3: GROUNDS FOR IMPEACHMENT

3.1 Introduction

The grounds for impeachment that form the basis of impeachable offences against Governors and Deputy Governors are clearly listed in the Constitution. The grounds, as stated in the Constitution, are:

- a. Gross violation of the Constitution or any other law;
- b. Where there are serious reasons for believing that the county governor [or deputy governor] has committed a crime under national or international law;
- c. Abuse of office or gross misconduct; or
- d. Physical or mental incapacity to perform the functions of the office of county governor

The first three grounds have all featured prominently in the impeachment motions that have come before the County Assembly assemblies and the Senate. In the process, the meaning, scope, and extent of offences covered in the three grounds have been deliberated on by the County Assemblies and the Senate. As a result, there are extensive deliberations on what amounts to impeachable offences under the Constitution. Furthermore, courts of law have had the opportunity to consider the meaning of the grounds and essential elements that form part of the grounds for impeachment.

This chapter consolidates the jurisprudence that has emerged on the drawing of the substance of the charges that constitute grounds for impeachment and the scope of what amounts to an impeachable offence as defined in the Constitution. Naturally, both the courts and the Senate have relied on comparative jurisprudence obtained from systems where impeachment has been practised in order to enrich the procedural and substantive aspects of the emerging Kenyan practice.

No proceedings have been commenced against a Governor or deputy Governor on the grounds of physical or mental incapacity. Therefore, there is no Kenyan jurisprudence that is specific to this ground as it concerns a Governor or deputy Governor.



However, the Supreme Court has had to consider essential elements of this ground.⁵⁸ The Court reviewed the decision of a Tribunal that recommended the removal from office of a Judge of the Environment and Land Court (ELC) and laid down critical general principles that are applicable to Governors and Deputy Governors.

Collectively, the four grounds for impeachment constitute the objectives or purpose of impeachment, as elaborated in the last chapter. Each of the grounds and the elements that define it is meant to ensure that the purpose and objective of impeachment are safeguarded through the specific impeachment processes.

The decisions and jurisprudence emerging from each of the four constitutional grounds for impeachment are discussed in detail, followed by a discussion of what has emerged as essential elements that are connected to the proving of the charges of impeachment.

3.2 Gross Violation of the Constitution

The Constitution neither defines the word “gross” nor the phrase “gross violation” as used under Article 181. Accordingly, the County Assemblies, Senate and the courts have had to define what amounts to gross violation when determining specific cases or matters involving Governors or their deputies. In doing so, they have relied on comparative jurisprudence from other jurisdictions and approaches to defining “gross violation” as well as from other branches of the law.

The Nigerian case of *Muyiwa Inakoju and Others v Abraham Adalolu Adeleke*⁵⁹ dealt at length with what can be defined as “gross violation” or gross misconduct.”

58. Hon. Justice Mary Muthoni Gitumbi v The Tribunal appointed to investigate the conduct of Hon. Justice Mary Gitumbi, Judge of the Environment and Land Court, Supreme Court Petition No. 10 (E013) of 2022.

59. [2007] 4 NWLR 403.



The Court stated that:

By this definition, it is not every violation or breach of the Constitution that can lead to the removal of a Governor or Deputy Governor. Only a grave violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. Grave in this context does not mean an excavation in the earth in which a dead body is buried; instead, it means, in my view, serious, substantial, and weighty.

The Courts and the Senate have endorsed what the Supreme Court of Nigeria classified as a gross violation in the case of *Muyiwa Inakoju and Others v Abraham Adaeleke*.⁶⁰ In the case, the Supreme Court of Nigeria held the following to constitute a gross violation of the Constitution:

- a. interference with the constitutional functions of the legislature and the judiciary by an exhibition of over-constitutional Executive power;
- b. abuse of the fiscal provisions of the Constitution;
- c. abuse of the Code of Conduct for public officers;
- d. disregard and breach of the provisions on fundamental rights;
- e. interference with local government funds and stealing from the funds, robbing of the funds...for personal gains...;
- f. instigation of military rule and military government; and
- g. any other subversive conduct which is directly adverse to the implementation of some other significant sectors of the Constitution.

The High Court of Kenya, agreed with the persuasive decision of the Nigerian Supreme Court as to what constitutes a grave violation or breach of the Constitution as listed above.⁶¹ The High Court stated thus on how to determine what constitutes gross violation, "We are of the view that the standard to be used does not require a mathematical formula, but it must take into account the intent of Article 181 (1) of the Constitution."⁶² The High Court went on to hold that whatever is alleged against the Governor must be—

"serious, substantial, and weighty" and that "[t]he charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law."⁶³

60. *ibid.*

61. *Martin Nyaga Wambora & 4 others v Speaker of the Senate and 6 others* [2014] eKLR, para 252.

62. *ibid.*

63. *ibid.*



The Kenyan Court of Appeal endorsed the above approach in the High Court and further noted that what constitutes a gross violation of the Constitution is to be determined on a case-by-case basis.⁶⁴ The Court of Appeal then proceeded to provide what can inform the threshold of an impeachable offence under the Constitution. The Court stated:

Gross violation of the Constitution includes violation of the values and principles enshrined under Article 10 of the Constitution and violation of Chapter Six (Leadership & Integrity) of the Constitution; or intentional and persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya's constitutional system. Under Article 10 (1), these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ.⁶⁵

The Supreme Court of Nigeria has added that a body exercising its quasi-judicial function should be careful in deciding what amounts to gross violation or misconduct. The Court stated that:

It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor at a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a powerful political weapon at the disposal of the House, which must be used only in appropriate cases of serious wrongdoing on the part of the Governor or Deputy Governor, which is tantamount to gross.

64. Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others [2014] eKLR, paras 43-46.

65. *ibid.*



misconduct within the meaning of subsection (11). section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrongdoing. A Governor or deputy Governor, as a human being, cannot always be correct, and he cannot always claim to be correct. That explains why section 188 talks about gross misconduct. Accordingly, where misconduct is not gross, the Section 188 weapon of removal is not available to the House of Assembly.⁶⁶

The Court of Appeal in Kenya identified examples of Articles of the Constitution whose violation amounts to a gross violation. These include:

- a. Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution, more specifically Articles 1, 2, and 3 (2) of the Constitution.
 - b. Chapter 2- Article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.
 - c. Article 10 on national values and principles of good governance.
 - d. Chapter 4 on the Bill of Rights.
 - e. Chapter 6- Articles 73 to 78 on Leadership and Integrity.
 - f. Chapter 12 - Article 201 on principles of public finance.
 - g. Chapter 13- Article 232 on values and principles of public service.
 - h. Chapter 14 - Article 238 on principles of national security.
- Article 259 (11) on advice and recommendation.⁶⁷

The Court also noted that any conduct that comes within the definition of the offence of treason in the Penal Code⁶⁸ may amount to gross violation.

The Special Committee investigating the removal of the Governor of Kericho identified crucial factors that were necessary when considering grounds for impeachment.

66. [2007] 4 NWLR 403.

67. Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR, paras 43-46.

68. Cap 63 of the Laws of Kenya.



- a. The allegations must be serious, substantial and weighty;
- b. The violation must be flagrant and glaring;
- c. There must be a nexus between the violation and the Governor;
- d. The violation must have led to harm, loss or damage to society;

The violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to conduct the functions of that office with integrity and accountability.⁶⁹

The Supreme Court⁷⁰ has adopted the definitions above, which the High Court and the Court of Appeal applied.⁷¹ Similarly, all decisions of the special committees of the Senate have also adopted the above definitions of “gross violation” in their committee reports on impeachment. These include The Special Committee that investigated the first impeachment of the Meru Governor and special committees that investigated the impeachment of Honourable Mwangi wa Iria, the Governor of Murang’a County in November 2015 and the Honourable Granton Samboja, the Governor of Taita Taveta County.

In their reports, the findings of the different special committees of the Senate on what does not amount to “gross violation” under the Constitution can shed light on what amounts to an impeachable offence or not:

In their reports, the findings of the different special committees of the Senate on what does not amount to “gross violation” under the Constitution can shed light on what amounts to an impeachable offence or not:

In the first impeachment of the Governor of Meru County, the Governor was accused of appointing persons to public office without following due procedure. Evidence demonstrated that the alleged appointment was not actualised with the issuance of an appointment letter as required by law. The Committee found that there was a violation of the law in failing to seek the approval of the County Assembly for the reappointment of the County Secretary. Still, the violation did not meet the threshold for removal from office. The allegation was, therefore, not substantiated.⁷²

69. The Senate (11th Parliament), ‘Report of the Special Committee on the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County’ (3 June 2014).

70. *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR).

71. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] eKLR.

72. The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru’ (30 December 2022) 83.



In the impeachment hearing against the Governor of Wajir, the special committee of the Senate noted that while the Governor did not comply with the requirement under section 30 (2) (j) of the County Governments Act to submit the annual report on the implementation status of the county policies and plans, this violation was not a gross violation of the Constitution or any other law as it is not serious, substantial, and weighty as to warrant the Governor's removal from office under Article 81 and section 33 of the County Governments Act.⁷³

In the impeachment motion against the Governor of Murang'a County, the special committee found that the Governor was in breach of provisions of public finance provisions of the Constitution⁷⁴ and the PFMA⁷⁵ by committing and paying KES. 27 Million to Murang'a Investment Cooperative Society, a private entity. However, the Special Committee considered whether this violation amounted to gross violation necessitating removal of the Governor from office and found that the required threshold for removal had not been met. Instead, the Special Committee recommended the recovery of the money from the entity.⁷⁶

- In the impeachment case against the Governor of Murang'a, the County Assembly alleged that the Governor had implemented programmes on Napier grass and Artificial Insemination without a requisite policy as required by the law. The Senate noted that the County Assembly had proved that there was no accompanying policy, and this allegation was, thus, substantiated. However, the Senate noted that "the failure to develop policy frameworks was not a breach of the law that rose to the standards of gross violation. The committee recommended that the county government develops the necessary policy frameworks as soon as possible."⁷⁷

73. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mohamed Abdi Mohamud, the Governor of Wajir County' (17 May 2021) 55-56, para 119 and 120.

74. The Constitution, Arts. 10, 201 (a), (b) and (d).

75. The Public Finance Management Act, s 5.

76. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mwangi Wa Iria, the Governor of Murang'a County' (6 November 2015) 31, para 66-68.

77. *ibid* 36, para 82-83.



- The Governor of Murang'a had delayed setting up the County Budget and Economic Forum (CBEF), defying the need to establish the forum "as soon as practicable," however, the special committee noted that this did not rise to the level of "gross violation" of the law.⁷⁸
- The special committee on the impeachment of the Governor of Murang'a noted that failure to nominate a chairperson for County Public Service Board (CPSB) for over one year was a violation of the CGA. However, this did not rise to the level of gross violation.⁷⁹
- The special committee found that the Governor of Murang'a had violated the law by not gazetting County Executive Committee (CEC) members. However, this did not rise to the level of gross violation. The special committee also noted that failure to submit reports to the County Assembly did not amount to gross violations.⁸⁰
- In the first impeachment of the Meru County Governor, the special committee observed that failure to surrender an imprest within seven days is a violation, but not of the threshold for impeachment.⁸¹

However, it is also important to note that while a single incident of violation of a law or the Constitution may not amount to gross violation, from the examples given above, "intentional" or "persistent" conduct in the commission of the same wrongs may amount to gross violation. Where the commission a crime is demonstrably wilful or is done persistently, the threshold may reach that which is prescribed in the law and jurisprudence on this issue.

78. *ibid* 37, para 87-88.

79. *ibid* 36, para 192-193.

80. *ibid* 74-75.

81. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Ann Waiguru Mumbi, the Governor of Kirinyaga County' (26 June 2020) 86 para 247.



3.3 Abuse of Office and Gross Misconduct

The Constitution does not define the phrase “gross misconduct.” It leaves the same to courts and the Senate to construct constitutional intent and meaning in matters of impeachment. The use of the word “gross” has been construed to mean that not all forms of misconduct are impeachable. The misconduct, or abuse of office, has to be of a nature that is aggravated or raised to the level of an impeachable offence.

In this regard, the Supreme Court agreed with the High Court and the Court of Appeal⁸² on the meaning of the word “gross” and concurred that “the word gross can only mean any of the following: atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking”⁸³ Supreme Court of Kenya stated that “all the words used to describe “gross” express some extreme negative conduct; a degree of misconduct of such a serious, outrageous and flagrant nature”⁸⁴

The Nigerian Supreme Court has also stated that “Gross misconduct is defined as (a) a grave violation or breach of the provisions of the Constitution and (b) a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.”⁸⁵ In the widely cited Nigerian case of *Muyiwa Inakoju and Others v Abraham Adaolu Adeleke*,⁸⁶ The Supreme Court of Nigeria suggested specific offences that may fall under the category of gross or grave misconduct; the Court stated:

The following, in my view, are some acts which, in the opinion of the House of Assembly, could constitute grave misconduct: (a) Refusal to perform constitutional functions, (b) Corruption. (c) Abuse of office or power, (d) Sexual harassment. I should clarify this because of the parochial societal interpretation of it to refer to only the male gender. The misconduct can arise from a male or female Governor or Deputy Governor, as the case may be. (e) A drunkard whose drinking conduct is exposed to the glare and consumption of the public and public humiliation and disgrace unbecoming of the holder of the office of Governor or Deputy Governor,

82. *Martin Nyaga Wambora and 3 others v Speaker of the Senate & 6 others* [2014] eKLR.

83. *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya*, Judge of the High Court of Kenya [2022] KESC 16 (KLR), para 180.

84. *ibid* para 183.

85. [2007] 4 NWLR 403.

86. *ibid*.



(f) Using, diverting, converting or siphoning State and Local Government funds for electioneering campaigns of the Governor, Deputy Governor or any other person, (g) Certificate forgery and racketeering. Where this is directly connected, related or traceable to the procurement of the office of the Governor or Deputy Governor, it will not, in my view, matter whether the misconduct was before the person was sworn in. Once the misconduct flows into the office, it qualifies as gross misconduct because he could not have held the office but for the misconduct. Such a person, in my view, is not fit and proper to hold the office of Governor or Deputy Governor. It is merely saying the obvious that a Governor or Deputy Governor who is involved in certificate forgery and racketeering during his tenure has committed gross misconduct.⁸⁷

The Senate Special Committee that considered the impeachment of the Governor of Wajir also considered the meaning of the word “gross” and observed that:

It is helpful to note that various meanings of the word “gross” in relation to violation. Gross violation is a flagrant violation, a glaring error, nasty, crass. It must be a severe transgression of the constitution or law.⁸⁸ The Court of Appeal has also observed that the phrase “gross misconduct”, where it appears in the Constitution, has the same meaning.

The Court observed that:

It is a principle of interpretation that provisions in part material are construed to have the same meaning as the term. We hold that the term “gross misconduct” in Articles 145 (1) (a) and (b) and 181 (1) (a) and (c) of the Constitution is the same. The facts that give rise to the invocation of the provisions of the repetitive articles may differ, but the meaning and import of the terms remain the same.⁸⁹ Ghai and Cottrell have observed that “whether a conduct is gross or not will depend on the matter as exposed by the facts”⁹⁰

87. *ibid.*

88. Senate, ‘Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mohamed Abdi Mohamud, the Governor of Wajir County’ (17 May 2021) 129 para 266.

89. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] eKLR, para 55.

90. Yash Pal Ghai, ‘Constitution: An instrument for Change’ (2013)



The Supreme Court has also pointed out that persistent and intentional conduct may amount to gross misconduct as provided in the Constitution.⁹¹

Special Committees of the Senate have considered what may amount to gross misconduct or abuse of office during the hearing of different impeachment matters. One of the charges against the Governor of Muranga County was abuse of office and gross misconduct by branding county projects with his name. The special committee noted that:

The Governor is under an obligation to build the brand of Murang'a County without making it synonymous with his image. The Governor's use of his name and image on billboards and other advertisements, as well as the mock examination papers, smirks of personal branding and political aggrandisement. This is the use of public resources to advance personal and political goals. This is contrary to Articles 73 and 75 of the Constitution.⁹²

However, in the above case, the special committee did not find this gross misconduct and was, thus, not of the threshold of an impeachable offence. In the Wambora impeachment matter, the Senate, after citing Article 73 of the Constitution on the responsibility of leadership, the Senate concluded that:

These are, therefore, the standards by which the Governor should be judged when considering the allegations against him and the evidence produced in support of the allegations. The violations must be gross, that is, a glaring error, flagrant and extreme. The violation must be such that it brings dishonour and lowers the dignity of the office of the Governor. A minor infraction of the law cannot attract the sanction of impeachment.⁹³

91. *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya*, Judge of the High Court of Kenya [2022] KESC 16 (KLR). para 68.

92. The report of the Special Committee in the proposed removal, by Impeachment, of the Hon. Mwangi Wa Iria, the Governor of Murang'a County (6 November 2015) at 62 para. 162 and 163.

93. *ibid* 37.



In the impeachment matter of the Governor of Nairobi, Mike Mbuvi Sonko, the Governor was accused of gross misconduct and behaving in a manner that placed the office of the Governor in serious disrepute. The specific charge was that the Governor admitted, in public, of signing the transfer documents while he was intoxicated. The Senate found that this amounted to a severe dereliction of duty that was sufficient to remove the Governor from office.

However, in this impeachment the matter was heard and tried in plenary, and there was no formal report of detailed findings, as is usually the case when a special committee hears impeachment matters.

3.4 Commission of a Crime under National or International Law

A Governor or his deputy can be removed from office where there are serious reasons to believe that the Governor has committed a crime either on national or international law pursuant to Article 181 of the Constitution. Furthermore, when a public officer is convicted of a crime that attracts a sentence of more than six months, such an officer automatically ceases to have the capacity to hold public office.⁹⁴ While the Senate has had to determine whether allegations disclose “serious reasons to believe” that a Governor has committed a crime, this ground has not been common in the impeachments that have been heard and determined by the Senate. As a result, the particulars of what constitutes “serious reasons to believe” that a Governor has committed a crime under domestic or international law have not been subjected to as much rigorous debate as is the case with gross violation or gross misconduct.

In the impeachment of the Nairobi Governor, Governor Sonko was believed to have committed corruption crimes.⁹⁵ Massive loss of county funds in three years of office had occurred. This was indicated in the Auditor General’s report for the financial year 2018 -2019 where an expenditure of KShs. 204.2 million on projects was flagged.⁹⁶ In addition to this, Governor Sonko was accused of using public funds to fund his daughter’s trip to New York to attend the First Ladies’ Conference.

94. The County Governments Act, s 32C (e).

95. Mike Sonko Mbuvi Gideon Kioko and another v Clerk, Nairobi City County Assembly and 9 others High Court of Kenya (Nairobi) Constitutional Petition No. E425 of 2020, para 114.

96. *ibid* para 241.



During the proceedings, which were conducted by way of plenary as opposed to a special committee, the County Assembly tendered evidence of facilitation of his family members to attend official functions abroad. The Senate observed that the Governor merely denied the said allegations without offering the Senate any evidence to the contrary.⁹⁷ However, the Senate did not delve into or interrogate the issues deeply as it would have in an investigation through a particular committee procedure. The Supreme Court reviewed the procedures that were applied in the hearing of charges against Governor Sonko and was satisfied with the threshold that was applied by both the Senate and the courts below. The Supreme Court stated:

We maintain that the High Court received and evaluated the evidence presented to it in support and rebuttal of the four charges. The Court of Appeal re-evaluated that evidence before coming to its independent determination. The two courts came to a common conclusion that Articles 47 and 50 of the Constitution were adhered to by both the County Assembly and the Senate and that the process was, in the circumstances, expeditious, lawful and procedurally fair. We cannot substitute ourselves into the two courts and assume their roles by re-analysing the evidence afresh for the third time. We can only disturb the concurrent factual conclusions, as we have repeatedly said in this judgment, if those conclusions were based on no evidence or not supported by the facts or evidence on record, or that the conclusions were 'so perverse,' or so illegal, that no reasonable court would have arrived at the same. The four charges against the appellant were, no doubt, weighty, but they were not vague. They contained detailed particulars of the alleged violations of the Constitution and the law, specifying with precision the provisions of the Constitution and the law that were alleged to have been contravened.⁹⁸

The Supreme Court further observed that:

Before the question of impeachment was escalated to the two courts, both the County Assembly and the Senate had equally and independently found merit in the charges.

97. The Senate, 'The Hansard' (Thursday, 17 December 2020) (Special Sitting) 14552.

98. Sonko v County Assembly of Nairobi City and 11 others [2022] KESC 76 (KLR), para 152.



Though there is no obligation in impeachment charges to prove every charge, in this instance, all the organs involved, from the County Assembly to the Court of Appeal, found proof of all the charges. Nothing has been placed before us to warrant our interference with those conclusions by the two superior courts.⁹⁹

It can, thus, be concluded that where a Governor or deputy is faced with charges of “serious reasons to believe that a Governor has committed a crime under national or international law,” the threshold is that there has to be accompanying evidence of such grounds upon which the belief is based.

There is also no particular requirement, based on the events related to Governor Sonko, that there should be an actual conviction of a crime. Indeed, the County Assembly, or Senate, can rely on separate evidence (distinct from a contemplated or ongoing criminal justice process) to arrive at impeachment on this ground.

3.5 Physical or Mental Incapacity to Perform Functions

The Constitution provides that a Governor or deputy may be removed from office on grounds of physical or mental incapacity to perform the functions of office. However, there has been no removal from office of a Governor or deputy based on this ground. Furthermore, while this is one of the grounds under the Constitution for the removal of a Governor or deputy, the enabling legislation or regulations do not contain any further guidance on the procedure and details of how this ground may be realised. Article 168 (1) of the Constitution contains a similar provision, but which is applicable to the removal of judges from office.

The Court of Appeal has held that, in accordance with principles of interpretation, provisions in part material are to be construed to have the same meaning.¹⁰⁰ Accordingly, Articles 168 (1) (a) and 181 (1) (d) can be interpreted and be given the same approach and meaning, especially with regard to the substance and details of this provision.

99. *ibid* para 153.

100. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] eKLR, para 55.



The Supreme Court has, in the past, handled a matter relating to removal on the basis of mental incapacity to perform the functions of the office of a judge. In the matter, the Supreme Court considered an appeal from the decision of a tribunal that was set up to investigate whether the judge had the mental capacity to discharge the duties of a judge of the Environment and Land Court. The Tribunal had reached a unanimous decision that the Judge had a mental condition that affected her capacity to discharge the duties of a judge. It fell upon the Supreme Court to assess the issues and process undertaken by the tribunal to reach its verdict. In the process, the Supreme Court made essential pronouncements regarding the constitutional standards whenever a court or any other body considered the grounds of mental incapacity.

What is required to be established before this Tribunal is not the issue of breach of code of conduct applicable to Judges, bankruptcy, incompetence, gross misconduct or misbehaviour by the Judge but alleged incapacity arising from a mental condition. The instant tribunal must first establish the existence of a mental illness and secondly answer the question of whether that illness has resulted in mental incapacity, leading to an inability on the part of the judge to perform the expected functions of that office.¹⁰¹

On the question of whether mental incapacity was established, the Court noted that there were gaps in the relevant Kenyan legislation and resorted to comparative jurisprudence. The Court quoted several sources, mainly from UK and Australian jurisprudence on the subject, in order to explain critical issues that underpin the determination of unfitness to hold office on the basis of mental incapacity.

With regard to mental conditions and their relation to mental incapacity, the Court quoted Halsbury's laws of England,¹⁰² which are based on the Mental Health Act of the United Kingdom and which states that "a wide range of

101. Report of the Tribunal appointed to investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Land Court of Kenya, p87, para 554, quoted in Hon. Lady Justice Mary Muthoni Gitumbi v The Tribunal appointed to Investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya (S. C. Petition No. 10 (E013) of 2022, para 41.

102. Halsbury's Laws of England, 75.



conditions can result in loss of capacity to make decisions, e.g. psychiatric illness, learning disability, dementia, brain damage, toxic confusional state.” With regard to reliance on expert testimony regarding mental condition and incapacity, the Court noted that Halsbury’s laws state that “expert evidence does not relieve the court from the obligation of forming its judgment.”¹⁰³

On the nature of the assessment that needs to take place in order to conclude mental incapacity, the Supreme Court quoted, with approval, the following reference in the judgment:

The domain of mental capacity assessment defies categorisation – it is “... not straightforwardly medical, legal, biological, or psychological.” In cases where P’s mental capacity is disputed, the Mental Capacity Act 2005 (MCA) applies a test that fuses clinical and legal competencies. The statutory test for incapacity demonstrates that P is “unable to make a decision” because of the “impairment” or disturbance in the functioning of the mind or brain. In cases that come before the Court of Protection (CoP), the evidence of an expert witness (usually a psychiatrist) that P is suffering from “impairment” is generally accepted. Still, the courts claim to be the ultimate judge of whether P is, in fact, “unable to make a decision.”¹⁰⁴

After the observations above, the Court made the following observation regarding the assessment of the mental incapacity of a person within Kenyan law and practice:

This Court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual,

103. Quoted in Hon. Lady Justice Mary Muthoni Gitumbi v The Tribunal appointed to Investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya (S. C. Petition No. 10 (E013) of 2022, para 55.

104. Paula Case ‘Dangerous Liaisons? Psychiatry and Law in the Court of Protection-Expert Discourses of ‘Insight’ (and ‘Compliance’). Med Law Rev (2016) 24 (3): 360–78, quoted in Hon. Lady Justice Mary Muthoni Gitumbi v The Tribunal appointed to Investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya (S. C. Petition No. 10 (E013) of 2022, para 56.



employment environment, and society at large, from the adverse effects of mental illnesses and disorders. Therefore, in determining cases of mental incapacity and bearing in mind that conclusions cannot be transposed from one case to another, we establish the following guidelines for courts to follow in matters which involve an assessment of mental incapacity:

- a. Mental incapacity includes but is not limited to a person's inability to decide, understand information about a decision, remember information, use the information to decide, or communicate a decision.
- b. Mental incapacity can result from mental illness, but it does not necessarily follow that mental illness equals mental incapacity.
- c. A qualified professional must diagnose mental incapacity.
- d. A court is bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee is, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.
- e. If an employee's mental illness is adversely affecting their ability to perform their duties, in some instances, the employer, following due process, may terminate the employee's contract of employment or recommend the employee's removal from office.
- f. A court must consider the diagnosis by a qualified professional and medical expert evidence and assess whether, on a balance of probabilities, the employee's mental illness affects their work duties.
- g. Where a person is deemed to lack mental capacity, any interference with their fundamental rights and freedoms must be the least restrictive possible.

The Supreme Court proffered a two-stage test on issues of mental incapacity that the courts can apply:

We find it necessary at this stage, based on persuasive comparative jurisdiction outlined in the earlier part of this Judgment, to establish a two-stage test that will guide courts when they are faced with the issue of establishing whether mental incapacity affects the performance of a person in their work duties.



Firstly, there must be proof that a person has an illness or injury that affects the manner in which the brain or mind works; secondly, that the illness or injury affects the person to the extent that they are unable to perform their duties to the requisite standard.¹⁰⁵

The County Assembly and the Senate are vested with the constitutional and statutory power to consider the grounds of mental or physical incapacity to undertake duties of the office of Governor or a deputy Governor. The principles developed by the Supreme Court and applied to the process of removal of judges are not only valuable for the Senate and County Assemblies but are also binding to the County Assembly or the Senate whenever considering any impeachment matter that comes up on the basis of the ground of mental incapacity.

3.6 Essential Elements in proving Grounds for Impeachment

There are elements that the Senate and courts have developed that are deemed necessary for an impeachment process to succeed. While the preceding parts above have discussed and analysed the essential elements of each ground of impeachment, this section identifies cross-cutting elements that must accompany any of the grounds for impeachment, without which the process may be deemed or declared invalid by the courts or not confirmed by the Senate.

These elements range from the description of a charge, the nexus between a ground of impeachment and the person of the Governor or deputy Governor to be impeached, the specificity of the charge or allegation, and the link between the specific charge and the grounds provided for under Article 181 (1) of the Constitution.

3.6.1 Each Allegation Must be Correctly Captured and Described

The courts have noted that it is essential to make a distinction between the category of violations of the Constitution or other laws that are impeachable. In the case of *Martin Nyaga Wambora*,¹⁰⁶

105. Hon. Lady Justice Mary Muthoni Gitumbi v The Tribunal appointed to Investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya (S. C. Petition No. 10 (E013) of 2022, para 86.

106. *Martin Nyaga Wambora and 3 others v Speaker of the Senate & 6 others* [2014] eKLR, Court of Appeal at Nyeri, Civil Appeal No. 21 of 2014, paras 43-46.



The court held that if a violation of the Constitution is alleged to be gross, the motion and charges against the Governor must expressly indicate the words “gross violation” in the charge and the specific particulars of the alleged gross violation must be given. Relying on the criminal case of *Juma v R*¹⁰⁷ where, the Court stated as follows:

Where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one.

The Court noted that the nature of the violation of the Constitution (gross) must be indicated as not all violations of the Constitution, or the law may rise to the scale of an impeachable offence. The rationale for this is that where the violation is not gross, then the removal process under Article 181 of the Constitution is not available. In the instant case, the word “gross” was omitted from the charges levelled against the Governor. The Court noted that a Governor is entitled to notice the particulars of the charges facing him and notice as to whether the allegation is merely an allegation of violation of the Constitution or other laws or a gross violation of the Constitution and other laws.

3.6.2 Nexus between the Governor and the Grounds for Impeachment

The Court of Appeal held in the matter of impeachment of Governor Wambora that the High Court erred by not deciding as to whether, on the facts before it, there was a nexus established between the Governor and the alleged gross violation, and specifically whether the evidence and facts presented to the court demonstrated such nexus. The Court of Appeal stated:

We are fortified in this view by the provisions of Article 165 (3) (d) (ii) of the Constitution, which vests the High Court with jurisdiction to determine if anything done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution.¹⁰⁸

107. [2003] 2 EA 471.

108. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] eKLR, Court of Appeal at Nyeri, Civil Appeal No. 21 of 2014, para 41.



The Court of Appeal further held that to establish personal liability in collective responsibility, the element of personal knowledge that includes intentional, brazen or wilful gross violation of the Constitution or other written law must be established.

The Court further held that collective responsibility is a policy, governance and accountability concept and not a principle of personal liability or individual culpability.¹⁰⁹ The court added that if this were the case, collective responsibility would imply that all individual members of the various organs of the County Government would be personally responsible for acts or omissions of any person in the employ of the County Government. The Court further observed that it was not the intention of the well-known principle of collective accountability to confer individual culpability and liability on another person. The principle of collective responsibility is not applicable with regard to the responsibility for offences that form the ground for impeachment, as confirmed by various Senate reports and case law.¹¹⁰

3.6.3 The Allegations Must be Specific

Both the courts and the Senate have underscored the need for specificity in the charges or counts that are brought against a governor or deputy governor who is set to be impeached. The High Court, in the matter of impeachment of Governor Wambora, stated that “[t]he charges as framed must state with degree of precision the Article(s) or even sub-article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.”¹¹¹

The Special Committee of the Senate, in the matter of the impeachment of the Governor of Muranga County noted that the County Assembly had accused the Governor of failure to provide leadership to the County Executive Committee (CEC) and administration based on the county policies and plans. The Special Committee noted that:

109. *ibid.*

110. *ibid.*

111. *Martin Nyaga Wambora & 4 others v Speaker of the Senate and 6 others* [2014] eKLR, para 253.



The allegation was broad and seemed to relate to virtually all programmes in the county. The committee was, therefore, of the view that the committee could not conclude as broad as captured in the allegation, which was that the Governor had failed to provide leadership to the County Executive Committee on the generation of county policies, plans, legislation and full and regular reports regarding critical programmes.¹¹²

In the same matter (impeachment of the Governor of Murang'a County), the Senate noted that the charge of failure to gazette important decisions should have specified which specific decisions required publishing in the gazette and which the Governor had omitted to do so.¹¹³

The grounds for impeachment of a Governor or a deputy and the charges are severe and weighty offences. The outcome of the impeachment is that the Governor or deputy Governor will vacate their office and may be barred from seeking elective office or being appointed to the public. It is, thus, necessary that any process that seeks to impugn the conduct of such an officer begins by accurately describing the wrongdoing that is the subject of the impeachment process.

The charges should also be linked to the listed grounds for impeachment. In practice, county assemblies do not necessarily link the charges, allegations, or counts to the grounds for impeachment stated in the Constitution. For example, the second impeachment of the Governor of Meru listed seven counts, and there was no direct linkage or specification of whether a count was related to gross misconduct or gross violation.

The direct linking of charges or counts to the specific ground makes it easier for the Senate or the courts to assess the threshold and other aspects necessary to substantiate the charges.

112. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mwangi Wa Iria, the Governor of Murang'a County' (6 November 2015) 35-36, para 81-82.

113. *ibid* 76, para. 209.



It is also necessary to ensure that all evidence is submitted to enable the Senate to conduct the confirmation. In the impeachment of the Kirinyaga Governor, the committee stated: "If parties choose to appear, it will assist the committee if they are prepared for such appearance, and they avail to the committee such material as will enable the committee to reach a fair determination on the matter."¹¹⁴

3.7 Threshold of Evidence (Burden and Standard of Proof)

The evidence to be submitted in support of the grounds for impeachment should match the weight that is placed on impeachable offences as described in the preceding parts.

3.7.1 Burden of proof

The burden of proof lies with the party that alleges. The Court of Appeal has observed that where a County Assembly alleges misconduct, violation, or any conduct on the part of the Governor that amounts to impeachable offences under Article 181 of the Constitution, it is for the County Assembly to submit evidence of such conduct.¹¹⁵ Furthermore, where a party must fulfil a procedural requirement, it is upon such a party to prove that the requirement was fulfilled.¹¹⁶ Where evidence has been provided as required, the burden shifts to the party disputing such evidence to prove that, indeed, there was no misconduct or that a procedural requirement was not met as provided for in the law. In summary, he who alleges must submit proof.

3.7.2 Substantiation of Allegations

The Senate Special Committee that inquired into the first impeachment of the Governor of Meru took the position that in order to find that any particular allegation of the charges is substantiated, a determination must be made both that evidence has been adduced pointing to wrongdoing in the manner

114. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Ann Waiguru Mumbi, the Governor of Kirinyaga County' (26 June 2020) 82, para 228.

115. *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR, in the Court of Appeal at Nairobi, Civil Appeal No. 194 of 2015, para 18.

116. *ibid* para 44.



alleged in the Charge and that the threshold for an impeachable offence has been attained.¹¹⁷ The Special Committee considered the allegation of gross violation of the Constitution in the impeachment of the Governor of Embu County. The Committee made several observations regarding the need to discharge the burden of proof:

The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been “it was not me.” This response by the Governor does little to “promote public confidence” in the office of the Governor as required under Article 73 (1) (a) (iv) of the Constitution. The Governor seems to have surrendered from taking any responsibility for the goings on in his office and in his County despite being the elected chief Executive of the County. This violates section (sic) 73 (2) (d) of the Constitution, which requires that State officers be guided by the principle of “accountability to the public for decisions and actions.”¹¹⁸

Allegations must be substantiated. In the impeachment of Anne Mumbi Waiguru, the County Assembly alleged that the county government paid board members of a county corporation outside of Integrated Financial Management Information System (IFMIS) and the county payroll. However, no evidence was tendered to support this. The Special Committee noted that no evidence to this effect was adduced, and the ground was, therefore, not substantiated. The special committee cautioned parties not to handle motions such as this casually.¹¹⁹

3.7.3 Standard of Proof

The question of the threshold or standard of proof for impeachment has been the subject of debate and consideration by legislatures vested with the power to impeach. Charles Black Jr., in “Impeachment: A Handbook”, observes as follows regarding the standard of proof in impeachment matters:

117. The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru’ (30 December 2022) 82.

118. *ibid* p66-67 para 150.

119. Senate, ‘Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Ann Waiguru Mumbi, the Governor of Kirinyaga County’ (26 June 2020) 59-60.



“Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere ‘preponderance’ of an ordinary civil trial, but perhaps must be satisfied with something less than the ‘beyond a reasonable doubt’ standard of the ordinary criminal trial, in the full literal meaning of that standard. ‘Overwhelming preponderance of the evidence’ comes perhaps as close as can to denoting the desired standard.”¹²⁰

Part of the demonstrable uncertainty with regard to the standard of proof to be proffered in impeachment cases can be traced to the fact that impeachment offence traverse the realm of criminal and civil law matters with no particular clarity about which area impeachable offence fall.

In the impeachment of US Judge Harry Claiborne in 1986, the attorneys of the judge had claimed that the standard required in impeachment was beyond reasonable doubt. However, the House Managers, in opposition to the motion, noted that the reasonable doubt standard was designed to protect criminal defendants who risk forfeitures of life, liberty, and property. They argued that such a standard was inappropriate because the Constitution limits the consequences of a Senate impeachment trial to removal from office and disqualification from holding office in the future. Consequently, the United States Senate has left the choice of the applicable standard of proof to each Senator¹²¹. As such, there is no justification to place the standard of proof to be at par with that of criminal offence.

The Supreme Court of Kenya has also noted that impeachment or removal proceedings, though quasi-judicial, are not in the nature of criminal proceedings. They do not necessarily require or depend on criminal culpability to succeed. All that is required is that the allegations be substantiated. But as a constitutional remedy, impeachment serves as an essential check on the exercise of Executive power.

120. The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru’ (30 December 2022) 77.

121. *ibid* 78.



The purpose of impeachment is generally to protect the public interest and to preserve constitutional norms while at the same time observing the rules of natural justice throughout the process. Both interests must be balanced.

Initially, the Senate, in its decision, left the standard of proof to senators to decide when weighing the evidence supporting impeachment charges. The Supreme Court also noted that the actual standard applied by the senators in the first impeachment of Governor Wambora of Embu County was higher than the standard of proof that the Court of Appeal applied. The Supreme Court observed that:

“As a matter of observation, we note that the decision of the Senate came before the decision of the Court of Appeal. In its Report, the Special Committee grappled with the issue of the standard of proof required in removal proceedings. Although it did not make any specific conclusion, it appears to have left the standard of proof, which was deemed to be above a balance of probabilities and rising to beyond reasonable doubt, to the discretion of individual senators. Depending on the individual senators, their standard of proof was higher than that set by the Court of Appeal.”¹²²

The Court of Appeal, in its judgment, had found that to impeach a Governor requires a high threshold but, as the Court added:

“What standard should be applied in implementing the threshold for removal of a Governor?” The learned Judges of the High Court stated that there is a need to maintain a high threshold for the removal of the Governor and the need to ensure that the law is strictly followed. We do concur with the learned Judges and add that the standard of proof is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a Governor involves “gross violation of the Constitution,” we hold that the standard of proof required for removal of a Governor is above a balance of probability but below reasonable doubt.”¹²³

122. Supreme Court, Wambora 1 appeal.

123. Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others [2014] eKLR, para 42.



The Supreme Court then went on to confirm the standard proffered by the Court of Appeal and stated that the standard of proof in such proceedings is:

“... neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a Governor involves “gross violation of the Constitution,” we hold that the standard of proof required for removal of a Governor is above a balance of probability but below reasonable doubt.” If that be so, then we do not hesitate to hold that the Senate attained this standard.”¹²⁴

The Supreme Court reiterated the standard of above balance of probabilities but below reasonable standard in the impeachment case of Governor Mike Sonko, where the Court noted that:

[T]hat standard is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a Governor involves “gross violation of the Constitution”, we hold that the standard of proof required for removal of a Governor is above a balance of probability but below reasonable doubt.¹²⁵

However, a different standard of proof has been proffered for cases of impeachment on the basis of mental incapacity to perform functions of office. While neither the Senate nor any County Assembly has ever handled a case of physical and mental incapacity to perform functions of the office of county Governor or deputy, the Supreme Court has handled a case involving a Judge of the Environment and Land Court.

In the matter, the Supreme Court upheld the decision of the Tribunal that proof of the existence of mental incapacity should be beyond reasonable doubt. Still, the inability to perform functions should be below reasonable doubt but above the balance of probability.

124. *ibid.*

125. *Mike Mbuvi Sonko v The Clerk, County Assembly of Nairobi City and 11 Others the Supreme Court* quoted approval of the decision of the Court of Appeal in *Martin Nyaga Wambora & 3 others v Speaker of the Senate and 6 others*, Civil Appeal No. 21 of 2014; [2014] eKLR,



The Supreme Court stated:

The Tribunal also pointed out that the subject matter before it was distinct from that considered by other Tribunals before it because the matter related to the inability to perform the functions of a Judge arising from mental incapacity and not misconduct. Thus, having considered the applicable law and precedent, it concluded that the standard of proof is 'beyond reasonable doubt' in establishing the alleged mental illness and with regard to the inability to perform the expected functions of the office of Judge of a superior court, the applicable standard is 'below reasonable doubt but above a balance of probability.'¹²⁶

3.8 Conclusion

While the Constitution states, in very general terms, the grounds for impeachment, the courts and the Senate have sought to interpret the grounds in the past impeachments. The courts have relied on comparative jurisprudence to enrich and provide detail to the grounds for impeachment as provided for under the Constitution.

As stated in the last chapter, impeachment is a quasi-judicial process that is in the hands of politicians at the county and the national level. This very fact, coupled with the political factors at play at the county and national level, may end up determining how and when an impeachment is invoked. However, what amounts to an impeachable offence or not is emerging clearly from the practice. Such delineation will form the proper basis for the legitimate use of impeachment as envisaged in the Constitution.

126. Hon. Justice Mary Muthoni Gitumbi v The Tribunal appointed to investigate the conduct of Hon. Justice Mary Gitumbi, Judge of the Environment and Land Court, Supreme Court Petition No. 10 (E013) of 2022, para 67.



CHAPTER 4:

IMPEACHMENT PROCEDURES



CHAPTER 4: IMPEACHMENT PROCEDURES

4.1 Introduction

Different rules and procedures govern the different stages or aspects of the impeachment process for Governors and Deputy Governors. The Constitution protects the rights of Governors and Deputy Governors during their impeachment. For instance, the right to a fair process, in all its aspects, is provided for in the Constitution and must be adhered to by the County Assembly and the Senate. Other provisions in the law are binding on the County Assembly and the Senate as they conduct the impeachment process. Furthermore, the County Assemblies and the Senate all have internal procedures, some of which are in place to ensure adherence to legal and constitutional provisions but also to facilitate a smooth process. Since March 2013, there have been disputes regarding adherence to the applicable procedures during impeachments. The courts of law, as well as the Senate, have pronounced themselves on various aspects.

Both the courts of law and the Senate have noted that relevant constitutional provisions are binding on the County Assembly and the Senate, and there is a need to ensure adherence. In some instances, courts have annulled the impeachment of Governors as a result of what was seen as flawed procedures either in the County Assembly or the Senate. The Senate has also noted that while it upholds the tradition of non-interference with the internal processes of another legislative organ (in this case, the County Assembly), it will consider whether the County Assembly adhered to relevant and binding constitutional provisions. Indeed, the Senate too has, on some occasions, voted against the confirmation of impeachment of Governors where the Senate found that the County Assembly did not follow constitutional provisions on fair process.

Furthermore, the courts have also indicated that while parliamentary immunities and privileges protect the legislature, the courts can intervene where constitutional provisions have been breached. However, the courts have also outlined rules for such intervention in order to avoid preventing the County Assemblies and the Senate from exercising their rightful roles. Considered rulings by the Senate, especially by special committees investigating impeachments, have also made numerous decisions defining the place and role of the Senate as provided for by the law.



This chapter analyses the jurisprudence that has emerged from the impeachment cases that have been decided by the Senate, as well as matters related to impeachment that have been heard and determined by courts of law. The chapter also refers to comparative jurisprudence that is relevant to the impeachment procedures in Kenya.

4.2 Right to Fair Trial

The impeachment process of a Governor is, as noted in Chapter Two of this Digest, a quasi-judicial process whose outcome or decision affects the rights of a Governor. The Constitution requires that such a process that results in the removal of an officeholder upholds the right to fair administrative action and the right to a fair hearing as provided for in the Constitution. In turn, the right to fair administrative action, which is provided for under Article 47 of the Constitution, and the right to a fair trial, under Article 50, contain sub-components that prescribe the manner in which impeachment should be conducted.

Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In particular, the Constitution provides that a person whose fundamental rights are likely to be affected has a right to be given written reasons for the action.¹²⁷ The Constitution further provides that a law should provide for a review of any such action taken by a court or other independent and impartial tribunal.¹²⁸

Article 50 of the Constitution provides that any person having a dispute has a right to have such dispute resolved by application of the law, decided in a fair and public hearing before a court or other independent tribunal or body.¹²⁹ Other specific rights (relevant to the impeachment of Governors and deputies) include the right to be informed of the charge, with sufficient detail to answer it; the right to have adequate time and facilities to prepare a defence; the right to a public trial; the right to have the trial begin and conclude without unreasonable delay; the right to be present during the trial; the right to legal representation and the right to such information.¹³⁰

127. Art. 47 (2) Constitution.

128. Art. 47 (3) Constitution.

129. Art. 50 (1) Constitution.

130. Art. 50 (2) (a) to (h) Constitution.



Other specific rights under Article 50 on the right to a fair trial are the right to remain silent and not to testify during proceedings; the right to be informed in advance of the evidence against him/ her and to have reasonable access to such evidence; the right to challenged evidence adduced; and the right to an appeal or a review of the decision by a higher body or court as prescribed by law.¹³¹

As creatures of the Constitution performing constitutionally prescribed roles, the County Assemblies and the Senate must facilitate the right to fair process and trial. Regardless of the parliamentary privileges accorded to both the Senate and County Assemblies, the constitutional rights attached to the fair process must always be respected. Courts have repeatedly held that the exercise of such privileges must be under the umbrella of constitutional principles of natural justice and fair process.¹³² The Senate, too, has held that it may inquire into whether fundamental provisions of the Constitution were adhered to. The Special Committee investigating the impeachment of the Governor of Taita Taveta stated thus:

...[t]he Senate's mandate in the impeachment process of the Governor will extend to consideration of the process undertaken at the County Assembly if the fundamental provisions of the Constitution or the law are alleged to have been violated or contravened. It is, therefore, open to either party to canvass this point before the Special Committee of the Senate or the Senate in plenary.¹³³

4.2.1 Opportunity to be Heard

An opportunity to be heard requires the County Assembly and the Senate to provide adequate notice to the Governor or deputy Governor set to be impeached to defend themselves against the charges of impeachment. This implies ample time and opportunity, as well as details of the accusation, in order to enable the Governor to prepare their defence against the allegations. The Standing Orders of the Senate provide for the right to be heard; It states that:

131. Art. 50 (2) (i) to (q) Constitution.

132. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 116.

133. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office of Honourable Granton Samboja, the Governor of Taita Taveta County' (24 October 2019), 53 para. 144.



Whenever the Constitution or any written law requires the Senate to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the Senate or the relevant Committee of the Senate considering the matter and shall be entitled to legal representation.¹³⁴

However, the meaning of “opportunity to be heard” in impeachments is also defined by essential factors such as the strict timelines for the impeachment process. Impeachments are a time-bound process, both at the County Assembly and the Senate, and what is a reasonable opportunity to be heard is defined within these strict timelines. The High Court has, thus, held that the time allocated to the Governor to defend himself or herself against the charges is to be assessed in view of the timelines, the High Court noted thus in the matter of the impeachment of the Governor of Murang’a County:

It may be necessary to interrogate further whether the time afforded to [the Governor] would adequately satisfy the requirement that opportunity be afforded to an accused person to prepare his defence. It may also be necessary to interrogate whether the time was generally adequate. However, the Court is aware of the fact that the time set for the process, even at the Senate level, appears to heap pressure on the parties.¹³⁵

Governor Sonko, in his appeal to the Supreme Court against the decision of the Court of Appeal that confirmed his impeachment, argued that his impeachment by the County Assembly and the Senate was rushed. The Supreme Court dismissed this claim by noting that the proceedings took place during COVID-19 season and in view of tight timelines set by Orders 75 and 76 of the Senate Standing Orders. The Court further observed that the procedures under these Standing Orders appeared to have been meticulously followed by the Senate.

134. The Senate (13th Parliament), ‘Standing Orders’ (23 March 2023), Standing Order No. 81.

135. *Mwangi Wa Iria & 2 others v Speaker Murang’a County Assembly & 3 others* [2015] eKLR., High Court of Kenya (Nairobi) Constitutional Petition No.. 458 of 2015, para 92.



Specifically: the motion was moved correctly; adequate notice was given to the appellant; he was aware of the allegations facing him; he was given an opportunity to defend himself, to adduce and challenge evidence; the hearing was in public; and the proceedings began and concluded without unreasonable delay. The Governor filed a 118-page written response to the allegations, together with numerous annexures in support of his case.

The Court held that the claim that the process was expedited could be answered simply with reference to Order 75 of the Senate Standing Orders as well as Order 72 of the Nairobi City County Assembly Standing Orders, both of which set the timelines within which each step must be taken. No step was taken outside those timelines. Both the Court of Appeal and the High Court were convinced that the appellant had sufficient time within which to prepare and present his response.¹³⁶

The opportunity to be heard is binding on both the County Assembly and the Senate. It must be adhered to, regardless of the fact that the Governor has another opportunity to make a defence during the impeachment hearing at the Senate. The Taita Taveta County Assembly did not provide the Governor a reasonable opportunity to defend himself against the charges. The Assembly had asked the Governor to appear before the County Assembly in the afternoon of the same day he was served with a notice. During the hearing before the Special Committee of the Senate, the County Assembly had argued that the Governor would still have an opportunity to be heard during the trial in the Senate. The Special Committee, in its considered ruling, noted that the Senate proceedings cannot be an excuse or reason to preclude a similar opportunity for the Governor at the County Assembly. Where such an opportunity is denied, the process is fatally flawed.¹³⁷ The Senate adopted the findings and recommendation of the Special Committee.

In the case of impeachment of Governor Sonko, the Governor alleged that the Senate had a predetermined mind and did not give him a fair hearing.

136. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), paras 133-135.

137. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office of Honourable Granton Samboja, the Governor of Taita Taveta County' (24 October 2019), 56 para. 143.



The Governor stated that the Senate was biased because the senators uniformly voted on all four counts. He further argued that the senators had a predetermined position on the matter based on a statement by a member of the Senate that the Senate should not waste time on the debate as a decision had already been made.

The High Court found,¹³⁸ and which was confirmed on appeal,¹³⁹ that this was a debate before the Senate in which each senator was entitled to voice their views. The Court further stated that the Senate Hansard report does not indicate that the Senators had previously met and reached a decision to impeach the Governor so as to justify the Petitioners' claim that the vote was predetermined. Since each Senator was exercising his/her quasi-judicial role as an umpire in the matter, the court could not question their decision to vote consistently and uniformly in support of or against each of the charges. In any event, even if the Governor were to be found guilty on only one charge, the result would still have been that the impeachment motion was successful.

4.2.2 The Rule Against Bias

The right to a fair hearing requires that a dispute be heard and determined by an impartial tribunal. The common law rule against bias is embodied in the maxim "nemo iudex in causa sua" rule, which translates as "no one shall be a judge in their cause." It prohibits a person from presiding over a tribunal where they have an interest in the outcome of the matter. In impeachment proceedings, the County Assembly is vested with the power to initiate impeachment proceedings against a Governor and to vote on the impeachment. The Senate, too, is vested with the power to conduct a trial in order to determine whether the charges against the Governor or deputy have been substantiated. The manner in which the County Assembly or the Senate conduct these processes has been challenged in court on the basis of the rule against bias.

138. Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly and 9 others [2021] eKLR, petition E425 OF 2020 and E014 of 2021 (consolidated) para 224.

139. Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly and 11 others [2022] KECA 405 (KLR), para 62.



Furthermore, the Senate Special Committee has also been invited to consider issues of bias during the County Assembly impeachments. The challenge to these procedures is whether the rule against bias is applicable to County Assemblies and the Senate and, further, whether the internal rules and procedures of the Senate and the County Assembly actually eliminate bias as contemplated in the rule against bias.

During the hearing of the impeachment of the Siaya Deputy Governor, the lawyer to the Deputy Governor raised a preliminary objection based on the ground that the Assembly's special committee was the prosecutor and judge in the hearing of the impeachment motion. The Senate Special Committee, in its considered ruling, noted that the function of initiating and voting on an impeachment motion against the Governor or deputy is vested in the County Assembly. The Senate Special Committee noted in its report that:

taking into consideration the provisions of the Constitution and County Governments Act, the County Assembly was within its mandate to prosecute the motion by itself and therefore cannot be said not to have been independent and impartial.¹⁴⁰

In the second impeachment of Governor Wambora of Embu County, the Governor contested in court that the mover of the motion and the Speaker of the County Assembly were the same as with the first impeachment. He argued that they were biased on the basis that they were the same persons who initiated and presided over the first impeachment. The High Court noted that the process of initiating an impeachment is clearly provided for and starts with the issuance of a notice of motion by a member of the County Assembly. Once the Speaker is satisfied that the motion is in order, the same is debated, and a vote is taken on it. Where two-thirds of the members of the County Assembly approve the motion, the matter is escalated to the Senate for investigation of the allegations.

After reviewing the proceedings of the County Assembly in the second impeachment of Governor Wambora, the High Court found there was no evidence on record to show that the Speaker manifested bias or that a bystander would have formed the opinion that he was biased.

140. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office of Honourable William Oduol, the Deputy Governor of Siaya County' (26 June 2023), 27 para. 37 part (d).



More pertinently, the Court noted that the act of the Speaker accepting the motion is what the law expects him to do. The role of the Speaker in the process is therefore statutory.

With regard to the mover of the motion being the same one for the first and second impeachments, the High Court held that there is no law barring the same motion mover from moving a similar motion the second time. Since the earlier removal had been declared invalid, section 33 (8) of the Act, which bars the reintroduction of a removal motion on the same grounds within three months, was inapplicable. The motion was, therefore, properly before the floor of the Assembly, and the mover was mandated by the law to preside over the debate of the motion.¹⁴¹

The composition of special committees of the Senate has also come under challenge on the basis of the rule against bias, and courts have made their pronouncement. In the second impeachment case of Governor Wambora, the Governor had argued in the High Court that the members of the Special Committee of the Senate for removal of the Governor in the first impeachment were the same as those that were in the first impeachment. The Governor contended that there was a likelihood of bias on the part of the Special Committee of the Senate tasked with investigating the allegations against the appellant. Specifically, the Governor argued that the same committee members had found him guilty and that the allegations made in the second process of removal were based on the same allegations that they had earlier investigated, and this could lead to bias.

In its judgment, the High Court noted the likely bias that may be implicit in having the same committee members hear an impeachment against the same grounds as those they had against the Governor in the first. However, in its assessment, the Court did not see any bias in the manner in which the Committee heard and determined the matter.

The High Court noted:

141. Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others [2015] eKLR, paras 181-183.



Although we do not find anything untoward in the filling of the Special Committee with members who had dealt with the first removal, we share the petitioners' concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advise against such a course of action in the future. The Court in Wambora 1 did indeed declare the first removal invalid. Still, that order did not disabuse the minds of the members of the Special Committee of the information gathered during the first hearing. Human beings are prone to prejudices and biases, and any independent observer may easily conclude that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter.¹⁴²

In its judgment, the Court referred to the fact that a decision of the Committee has a heavy bearing on the outcome of the impeachment decision at the Senate. In particular, the Court noted that the impeachment terminates at the Committee level, where the Committee does not find any of the grounds substantiated. This, the court noted, is the reason that the Senate should make an effort to get rid of any bias in its process; the court observed:

In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under section 33 (6) (a) of the Act, a special committee can report that particulars of any allegation against the Governor have not been substantiated, and that would be the end of the matter. The special committee, therefore, has a critical role to play in the removal proceedings. The fate of a Governor may well depend on the report of the special committee.¹⁴³

Despite what could be interpreted as implicit bias on the part of the Senate Committee as a result of the repeat composition, assessment of the procedures revealed no bias. However, the Court "strongly advised" that the Senate should bear in mind the composition of committees in order to avoid bias. The Court stated:

142. Martin Nyaga Wambora and 30 others v County Assembly of Embu and 4 others [2015] eKLR, Embu Constitutional Petition 7 and 8 of 2014 (consolidated) para 187.

143. *ibid* para 188.



Having said so, we find that no prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. We, however, agree with those opposed to this petition that the Senate has a fixed membership, save for any vacancies, during its lifetime. Where a matter is supposed to be handled by the House, then nobody should be heard to say that the matter ought to have been handled by different people, for there can only be one Senate at a time. Nothing, however, turns on this issue.¹⁴⁴

The Court of Appeal vacated the ruling of the High Court and raised the bar in terms of establishing bias in the processes of the Senate. The Court of Appeal noted that while the learned Judges of the High Court made a clear finding that there was likelihood of bias in the appointment of the same members of the committee that had earlier investigated similar allegations against the appellant, the Judges erred in overlooking the implicit bias and instead holding that there was no actual bias. The Court of Appeal noted that the test should be one of likelihood of bias, not the presence of actual or real bias.

The Court of Appeal relied on its decision in *Attorney-General v Anyang' Nyong'o and others*,¹⁴⁵ where it proffered the standard of likelihood or reasonable apprehension of bias as adequate, as opposed to actual bias. In the previous case, the Court of Appeal had stated 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 view of a reasonable, fair-minded and informed member of the public, that a Judge did not (will not) apply his mind to the case impartially [... 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...]^{146]}

144. *ibid* at 189.

145. [2007] 1 E.A. 12.

146. [2007] 1 E.A. 12.



On the above basis, the Court of Appeal proceeded to note that having found that a reasonable member of the public would form the impression that there was the likelihood of bias, the issue of actual prejudice was irrelevant. In its judgment, the Court gave weight to the decisions of the special committee and the bearing it had on the outcome of the case. The Court specifically noted deliberations and the motion by the Senate on the removal of the appellant were guided by the report of the Special Committee of the Senate. If the Committee that produced that report was made up of members whose impartiality was an issue, then it cannot be indeed said that there was no actual prejudice caused to the appellant.¹⁴⁷

The Court of Appeal held that there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under section 33 (6) (a) of the Act, a special committee can report that particulars of any allegation against the Governor have not been substantiated, and that would be the end of the matter. The special committee, therefore, has a critical role to play in the removal proceedings. The fate of a Governor may well depend on the report of the special committee.

The first and second impeachments of the Governor of Embu were the first to be conducted by the Senate, and there were a number of new issues that required the building of experience. This may have informed the decision to have the same members of the Senate that tried the first-ever impeachment in the Senate. In the subsequent impeachments, the Senate has tended to have new members on special committees to hear impeachments. However, the Senate has also not been confronted by a situation where it has to vote to retain the same members who have previously tried a Governor. In the second impeachment of the Meru Governor, the Senate chose to try the impeachment by plenary. Therefore, the issue of membership of the Special Committee did not arise.

The Senate, on the other hand, being a legislative organ as opposed to a court of law, has sought to limit its intervention in the internal procedures and affairs of the County Assembly, which the Senate considers as having special privileges and rights that it may not supervise.

147. Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR paras 54-57.



A number of impeachment motions that have been brought before the Senate have mainly sought to concentrate on substantive issues, such as the substantiation of grounds or charges of impeachment, as opposed to how the County Assembly arrived at its decision.

The only exception is where there are core and salient provisions of the Constitution that are binding on the County Assembly and which have been flagrantly breached by the County Assembly in the course of impeachment proceedings at the County Assembly level. In the impeachment matter of the Governor of Taita Taveta, the Special Committee stated thus:

The Senate has traditionally avoided going behind the veil of a resolution of the County Assembly to interrogate its own rules of procedure and, therefore, determine if the resolution was arrived at properly.¹⁴⁸

In the impeachment of the Governor of Murang'a County, the Special Committee further held that the mandate of the Committee is limited to interrogating the constitutionality of the Assembly's actions and not internal procedures.

The Special Committee stated:

The Special Committee is aware that its mandate is limited only to interrogating the constitutionality of the Assembly's actions. It does not extend to interrogating the debates of the Assembly and other inner workings of that devolved legislature.¹⁴⁹

In the impeachment of the Governor of Kericho County, the Special Committee of the Senate also interpreted the Senate's mandate in impeachment, which excluded the interrogation of the County Assembly that may apply in the rule against bias. In the report, the Special Committee noted that the primary mandate of the Senate is to look at the substantiation of grounds or charges and not whether procedures were adhered to.

148. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office of Honourable Granton Samboja, the Governor of Taita Taveta County' (24 October 2019), 52 para. 132.

149. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mwangi Wa Iria, the Governor of Murang'a County' (6 November 2015) 79, para 216.



As the impeachment proceedings herein are quasi-judicial, the Senate cannot question the actions of the Speaker of the County Assembly of Kericho acting in the exercise of any power conferred on or vested in the Speaker by the Standing Orders. Indeed, a legislature makes its own rules of procedure and can choose to override the same rules of procedure if the circumstances warrant the same.¹⁵⁰

In the impeachment of the Deputy Governor of Siaya, the Senate Special Committee sought to make a distinction between the mandate of the Senate to impeach and that of the review role of a court of law or an appeal to a higher court. Specifically, on the issue of internal procedures at the County Assembly, the Committee noted that it could not dwell on issues of procedure at the County Assembly to the exclusion of its core and substantive mandate of investigating the grounds or charges of impeachment. The Special Committee noted that Article 181 of the Constitution and Section 33 of the County Governments Act required the special committee to investigate whether the grounds were substantiated¹⁵¹ and not on adherence to internal procedures.

In the matter of the impeachment of Deputy Governor of Kisii, lawyers for the Deputy Governor raised a preliminary objection to the proceedings on grounds that the motion of impeachment was heard in the County Assembly beyond the prescribed timelines in the County Assembly Standing Orders. In a considered ruling, the Speaker dismissed the objection on grounds that, “this is a matter of fact requiring the adducing of evidence” adding that, “it will be best determined by hearing both parties and entertaining evidence that they have in respect thereof”¹⁵²

150. The Senate (11th Parliament), ‘Report of the Special Committee on the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County’ (3 June 2014) para. 56 at 27.

151. Mwangi Wa Iria & others v Speaker of Muranga County Assembly and others, High Court of Kenya (Nairobi) Constitutional Petition No. 458 of 2015. Quoted in The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office of Honourable William Oduol, the Deputy Governor of Siaya County’ (26 June 2023), 34-35 para.50.

152. Senate, ‘The Hansard’ Wednesday 13th March 2024, Afternoon sitting, p.4.



It is clear from the above that the Senate is unlikely to inquire into the decision-making processes of the County Assembly, especially whether there is explicit or implicit bias. Unless such bias is part of a violation of a constitutional provision, the Senate will focus on its core mandate, namely, whether the charges against the Governor were substantiated.

4.2.3 *Locus Standi*

The court has construed broad powers to challenge impeachment; anyone (regardless of interest) can challenge the constitutionality of action, including the decision to impeach an office holder. Article 258 entitles any person to institute court proceedings, claiming that the Constitution has been contravened or is threatened with infringement, and such actions may be instituted by a person acting as a member of, or in the interest of, a group or class of persons or by a person acting in the public interest.

In the impeachment matter against the Governor of Embu County, the respondents in the matter contended that the petitioners were not entitled to bring proceedings before the court. The Court held that:

The mere fact that the success of these proceedings may result in safeguarding and securing the 1st Petitioner's position as the Governor of Embu County does not disentitle them from instituting these proceedings. In our view, in the current constitutional dispensation, the Courts must resist the temptation to try and contain constitutional challenges in a straight-jacket. They must resist being rigidly chained to the past-defined situations of standing and look at the nature of the matter before them. In our view, the petitioners cannot be faulted for bringing these proceedings simply because they are perceived supporters of the 1st Petitioner. Whereas we agree with the decision in *Mumo Matemu Case* (supra), we are of the view that the mere fact that attempts were made to resolve the impasse through alternative avenues does not necessarily connote bad faith.¹⁵³

153. *Martin Nyaga Wambora and 30 others v County Assembly of Embu and 4 others* [2015] eKLR, Embu Constitutional Petition 7 and 8 of 2014, [2022] eKLR, para 110.



4.3 Roles of County Assemblies and the Senate

While the Senate plays a determining role in the outcome of the impeachment of county Governors and their deputies, the role it plays is distinct from that of the County Assembly and even courts of law that hear cases and appeals from impeachment decisions. The Senate does not have the power to commence or initiate impeachment proceedings against a Governor or deputy. The power of the Senate is only invoked or activated upon receiving a notification from the County Assembly. Upon receipt of such a vote, the Senate is expected to assess the charges or counts of impeachment and decide whether any of the charges or grounds have been substantiated. The Court of Appeal summarised the impeachment process and the role of the Senate and the County Assembly thus:

The organ vested with the mandate to move a motion for the removal of a county Governor at first instance is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential. There are three sequential steps to be followed: first is the initiation of a motion to remove the Governor by a member of the County Assembly; second, there is consideration of the motion and a resolution by two-thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor."¹⁵⁴

154. Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others [2014] at Court of Appeal at Nyeri, Civil Appeal No. 21 of 2014, para 31.



As noted in Chapter One, the decision to vest the Senate with the power to confirm impeachment charges was motivated by the need to ensure stability in county governance processes.¹⁵⁵ This decision was informed by the rampant power struggles in the former local authorities, where mayors were deposed every other day. It was felt that vesting the Senate with the power to confirm impeachments would provide a basis for an independent and objective evaluation of the charges of impeachment.¹⁵⁶ It was also felt that the Senate was the proper body to confirm the impeachments as it was constitutionally charged with the mandate of representing and protecting counties, as well as some oversight functions on matters concerning counties,¹⁵⁷ such as the overseeing of revenue collected nationally that is allocated to county governments.¹⁵⁸ Being part of the legislature, the Senate was also seen as the appropriate body since impeachment trials are traditionally left to members of the legislature.¹⁵⁹

The Senate has defined its mandate in impeachment strictly and in accordance with its statutory mandate under section 33 of the County Governments Act. As noted earlier, for instance, the Senate has stated it does not assess how decisions were arrived at in the County Assembly, except where there is a clear and flagrant breach of binding constitutional provisions or any other law applicable. The Senate has also defined the nature of its role and distinguished it from the courts or the County Assembly. In the impeachment of Governor Anne Waiguru of Kirinyaga County, the Special Committee noted thus on the nature of its duty in impeachments:

The Committee's operational context is adversarial rather than inquisitorial in its orientation and can rely on such evidence, including witnesses, as presented or as appearing before it. Where documents are referred but not produced, or promised but not availed, the Committee has no recourse other than to rely on what is availed.¹⁶⁰

155. Musalia Mudavadi, Deputy Prime Minister and Minister of Local Government (National Assembly Hansard, 21 February 2012).

156. *ibid.*

157. *ibid.*

158. *ibid.*

159. *ibid.*

160. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Ann Waiguru Mumbi, the Governor of Kirinyaga County' (26 June 2020) 82, para 228.



The High Court has also considered the nature and extent of the role of the Senate in the impeachment of Governors and Deputy Governors. In the judgment, the Court characterised the Senate as an “impeachment court”. It noted that it was in the Senate's scope of role extends to checking whether a County Assembly adhered to the Constitution and applicable laws.

The High Court stated:

I take cognisance of the fact that the Senate is, indeed, what I may call the Impeachment Court. The Senate is expected to not only investigate the nexus of the allegations to the [the Governor]. The Senate must also interrogate the entire process as it scurried through the County Assembly. I have also seen no law that restrains the Senate from returning a verdict that the process was not concluded as detailed under the Constitution or any other law for that matter. Pray that the Senate rises to the occasion and is practical and realistic in its investigations.¹⁶¹

In the impeachment matter of Governor Wambora, the High Court noted thus on the nature of Senate powers regarding impeachment motions that come before it:

Our understanding of section 33 (4) of the Act is that the Special Committee must investigate the matter. Investigate is defined in the Black's Law Dictionary 9th Edition as a systematic inquiry into something. Investigating here shall include the Committee satisfying itself that the Resolution presented to it was arrived at after due process was followed at the County Assembly. We agree with the Attorney General's submission that the design of section 33 is meant to ensure that the process regarding impeachment is self-correcting. So that any errors that may have occurred at the County Assembly level may be detected by the Special Committee of the Senate while performing its investigative role. For instance, in our present case, had the Senate investigated the manner in which the resolution forwarded to the Speaker of the County Assembly had been arrived at, it would have been discovered that it was passed in disobedience of court orders.

161. *Mwangi Wa Iria and 2 others v Speaker Murang'a County Assembly and 3 others* [2015] eKLR., High Court of Kenya (Nairobi) Constitutional Petition No.. 458 of 2015, para 92.



It was, therefore, not correct for the Special Committee to say that it would not look into what had transpired at the County Assembly.¹⁶²

Further, in the same case, the Court held that where the Senate finds that the resolution is not properly before it, then it is not obliged to admit it. Besides, the timelines stipulated by section 33 (2) start running from the date the resolution is admitted for further action.¹⁶³

However, the Senate has had a more conservative approach than preferred by the courts. The Senate Special Committee that investigated the impeachment of Governor Granton Samboja of Taita Taveta confirmed that beyond analysing and assessing the substantiation of grounds for impeachment, the Senate is also conscious of the duty to uphold constitutional provision, including by a County Assembly, which is a state organ. The Special Committee observed thus:

The Special Committee is, however, conscious of the provisions of Article 3 (1) of the Constitution, which states that “every person must respect, uphold, and defend this Constitution.” Neither the national legislature nor a County Assembly can, by resolution, override the express provisions of the Constitution. Thus, so long as there is no clear violation of the Constitution by the County Assembly of Taita Taveta, the Special Committee cannot question the lawfulness of the proceedings before the County Assembly vis-à-vis its standing orders and rules of procedure. However, it is incumbent upon the special committee to determine if there was any violation of the Constitution once such allegation is brought before it.¹⁶⁴

However, as observed earlier in the section dealing with the rule against bias, the Senate has noted it will not go as far as interrogating compliance with internal rules or looking at processes through which decisions were arrived at by a County Assembly during impeachment.

162. Martin Nyaga Wambora and 4 others v Speaker of the Senate and 6 others 2014 eKLR, Petition 3 of 2014, para 236.

163. *ibid* paras 236-238.

164. The Senate, ‘The Report of the Special Committee on the Proposed Removal from Office of Honourable Granton Samboja, the Governor of Taita Taveta County’ (24 October 2019), para 133.



During the impeachment of Governor Clifford Waititu Babayao of Kiambu County, the Governor raised a number of issues related to procedures at the County Assembly. First, the Governor contended that the County Assembly took 17 days to deliberate and dispose of the impeachment motion as opposed to the 14 days that are prescribed in the County Assembly Standing Orders.¹⁶⁵

Secondly, Governor Babayao noted that his lawyers were not given a chance to give a defence to the impeachment charges before the County Assembly despite being present at the chamber during the hearing of the impeachment motion.¹⁶⁶ Thirdly, the Governor stated that only 57 members of the County Assembly were present for the vote in support of the motion, yet standing orders require two-thirds (62 out of 92 members).¹⁶⁷

The Senate, however, did not consider these internal processes as the plenary took a vote to confirm the substantive impeachment grounds against Governor Babayao. However, it is also critical to note that the impeachment confirmation took the plenary route, and there was no considered ruling by the Senate, as is usually the case with committee reports.

On the contrary, the courts have ruled that in line with their duty to assess the lawfulness of the actions of the legislature, they can interrogate the processes and procedures undertaken by the County Assembly in arriving at their decision. In the High Court case concerning the impeachment of Governor Sonko, the Governor contended that the vote to impeach him by the County Assembly was invalid as there was no quorum in the Assembly. In its defence, the County Assembly noted that the vote was taken remotely by electronic means as the Assembly had passed regulations allowing such voting during the COVID-19 Pandemic.¹⁶⁸

165. Senate, 'The Hansard', Tuesday, 21 January 2020, Special Sitting, p10774-10775.

166. *ibid* 10774-10775.

167. *ibid* 10775.

168. Mike Sonko Mbuvi Gideon Kioko & another v Clerk, Nairobi City County Assembly & 9 others [2021] eKLR, para 70.



The Governor alleged that there was interference with the transmission of results through the hacking of the electronic voting system. However, the Court noted that the Governor had not submitted any expert evidence to demonstrate interference with the voting system.¹⁶⁹

It is, thus, clear that where there is evidence of a breach of rules and procedures at the County Assembly, the courts will, unlike the Senate, readily interrogate the procedures at the County Assembly and issue orders necessary to remedy such breach.

4.4 Judicial Intervention in Impeachment

While the impeachment of Governors and Deputy Governors is a role that is exclusively vested in the legislative branch of government at the county and national levels, through the County Assembly and the Senate, respectively, it is a constitutional process. In turn, the Judiciary is vested with vast powers to safeguard the Constitution and constitutional processes. First, the Judiciary, and specifically the High Court, has unlimited original jurisdiction in criminal and civil matters¹⁷⁰ and the power and jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of, this Constitution; any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.¹⁷¹ Furthermore, the High Court has jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed on, or threatened.¹⁷²

In other jurisdictions where impeachments are provided for, the Constitution explicitly ousters the role of courts in supervising or reviewing the legislative organs concerned with impeachment. For instance, in the Philippines, the national Constitution provides that:

169. *ibid.*

170. The Constitution, Art. 165 (3) (a).

171. *ibid* Art. 165 (2) (d), (ii) and (iii).

172. *ibid* Art. 165 (2) (b).



The Senate shall have the sole power to try and decide cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.¹⁷³

In the African region, the Constitution of the Federal Republic of Nigeria 1999 establishes a federal system of government comprising the federal government and 36 states that comprise the Nigerian federation.

The Constitution provides that the impeachment of a Governor or deputy Governor shall be commenced by a notice in writing signed by one-third of members of the House of Assembly of a state. Suppose the House of Assembly passes the motion by a two-thirds majority. In that case, the Chief Judge of the state is required to appoint an independent panel to investigate the grounds for impeachment. Where the panel finds that the grounds are not proved, the matter shall terminate. Where the panel reports that the grounds are proved, the House of Assembly shall vote on the report. Where the findings are supported by three-thirds of the House of Assembly, the Governor or deputy shall cease to hold office. section 188 (10) of the Constitution provides that “[n]o proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.” As such, in Nigeria, impeachment proceedings are not subject to any court interventions, as the Constitution expressly prohibits them.

In the past, Kenyan courts have, in the course of exercising their supervisory function, issued orders halting impeachment processes at the County Assembly or the Senate. In some instances, the County Assemblies and the Senate, citing parliamentary privilege and immunity, have ignored court orders and proceeded with the impeachment process. In such instances, the Senate or County Assembly usually flag parliamentary immunity and privileges, as well as the statutory deadlines that are inflexible.

173. The Constitution of the Philippines 1987, Art. XI, s 6.



The Supreme Court and other superior courts have gradually developed jurisprudence seeking a balance between the legitimate role of courts in impeachment processes, the separation of powers between the legislature and the judiciary, and the usually limited statutory timelines that underpin the impeachment process in the County Assembly and the Senate. The Senate, too, has, through the rulings of the Speaker, pronounced itself on the effect of ongoing litigation, court orders on the impeachment process, and the separation of powers principles as they apply to the impeachment of Governors and Deputy Governors.

4.4.1 Parliamentary Immunities and Privileges

In the numerous court cases that have been filed against the impeachment of Governors and Deputy Governors, the County Assemblies and the Senate have, in many cases, pleaded the defence of parliamentary privilege and immunity. County Assemblies and the Senate have argued that parliamentary procedures and decision-making are not subject to judicial review or scrutiny. However, courts, while acknowledging the existence of the principles of parliamentary immunity and non-interference between arms of government, have explained that not all decisions of the legislature are excluded from judicial scrutiny.

In the matter of the impeachment of the Governor of Embu County, the Court of Appeal held that the courts cannot sanitise an illegal process of impeachment to protect parliamentary privilege. The Court appreciated that privileges, immunities and powers such as those provided for by the National Assembly (Powers and Privileges) Act are essential for the proper governance and protection of Parliament because parliament needs them for the control of its internal procedures and complete freedom of expression in their deliberations inside the National Assembly. It was also undisputed that the resolution to impeach Governor Wambora was made within the proceedings of the Senate.

However, should the Senate violate the Constitution and the law in the course of its proceedings, it falls upon the Judiciary to say so and pronounce such a violation. The Court cannot ignore any breaches of the Constitution in favour of parliamentary privilege. The Constitution is the supreme law of the land, and it binds all persons and all state organs at both levels of government.



The Court of Appeal added:

We are also alive to the provisions of section 29 of the National Assembly (Powers and Privileges) Act, which ousts the Jurisdiction of this court in regard to acts of the Speaker and officers of the National Assembly. The question, therefore, is whether this Court has the power to inquire into the constitutionality of the actions of the Members of Senate and Speaker and other officers of the National Assembly.

The said provision states that:

Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker of such officer or by or under this Act or the Standing Orders.¹⁷⁴

The Court of Appeal cited, with approval, the holding of the High Court in *Njenga Mwangi and Another v The Truth Justice and Reconciliation Commission and 4 Others*¹⁷⁵ where the Court stated thus regarding section 29 of the National Assembly (Powers and Privileges) Act:

I am also in agreement that under section 29 of the National Assembly (Powers and Privileges) Act, courts cannot exercise jurisdiction with respect to the acts of the Speaker and other officers of the National Assembly. Still, I am sure that under Article 165 (3) (d) of the Constitution, this court can enquire into any unconstitutional actions on its part.¹⁷⁶

It is, therefore, essential to remember that even though the Senate has the power to impeach a Governor, it must function within the limits prescribed by the Constitution. The Supreme Court of Zimbabwe, while considering the extent to which Courts can interfere with parliamentary privilege, has stated in one case that “the House of Assembly has stepped beyond what its statutes and the Constitution permit it to do. It cannot, therefore, seek refuge in illegality. The Courts must, in cases such as this, take one step to resolve the dispute.”¹⁷⁷

174. The National Assembly (Powers and Privileges) Act, s 29.

175. Petition No. 286 of 2013.

176. *Njenga Mwangi and Another v Truth, Justice and Reconciliation Commission and 4 Others* [2013] eKLR, para 16.

177. *The Smith v Mutasa and Another* (3) ZLR 183 (SC) 1989 (3) at 208B



The courts, thus, have jurisdiction to determine whether the impeachment of the Governor was done in accordance with the Constitution and the law for the simple reason that the Constitution requires the Courts to ensure that all organs of government act within the law. It is the duty of the Court under Article 159 (2) (e) of the Constitution to ensure that the purpose and principles of the Constitution are protected and promoted.¹⁷⁸

In the matter of the impeachment of the Governor of Embu County, the Supreme Court reiterated its earlier decision¹⁷⁹ that Standing Orders by no means rest at the direct level of the Constitution, or indeed, the statute law. The Court noted that while Standing Orders certainly guide the “constitutional functioning of the legislature”, the Court can still consider their constitutionality or otherwise. The Court had stated in the earlier decision that:

It is clear to us that it would be illogical to contend that [though] the Constitution recognises the Standing Orders, this Court, which has the mandate to interpret the Constitution itself authoritatively, is precluded from considering their constitutionality merely because the Standing Orders are an element in the ‘internal procedures’ of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body with the processes prescribed for the passing of legislation.¹⁸⁰

However, the Supreme Court still cautioned that standing orders may not necessarily be in breach of the law, especially where such standing orders “may be said to coalesce in the constitutional scheme of legislative functions properly, and thus, to constitute an organic framework for the legislative agency’s operations, on the basis of all available information.”¹⁸¹ Courts have also gradually exercised caution with regard to judicial intervention in ongoing impeachment processes. The courts will rarely intervene to halt or suspend a continuing impeachment unless there are extreme or flagrant breaches warranting such intervention; this issue is covered in more detail in the next section.

178. Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others [2014] eKLR, paras 212-218.

179. Speaker of the Senate & Another v Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR.

180. Justus Kariuki Mate and another v Martin Nyaga Wambora and another [2017] eKLR, para 59.

181. Justus Kariuki Mate & Another v Martin Nyaga Wambora & another [2017] eKLR, para 93.



4.4.2 Nature of the Judiciary's Supervisory Role

As noted in the earlier section, the courts must intervene where the County Assembly or the Senate operate outside the constitutional confines. In the matter of impeachment of Governor Wambora, the Court of Appeal held that the Court has a supervisory role to play in the process of the removal of a Governor. The Court emphasised that courts must check the constitutionality and legality of anything done by Parliament (National Assembly and Senate) and the County Assemblies. The Court must zealously and firmly guard this power, for to do otherwise would amount to subverting the Constitution by abdicating a clear constitutional responsibility. The Supreme Court confirmed this in the matter of impeachment of Governor Mike Sonko, where the Court stated that:

[I]n the exercise of these wide political powers, both the County Assembly and the Senate cannot act outside the confines of the Constitution and the law. For to do so would invariably invite the court's intervention.¹⁸²

In the impeachment matter of Martin Nyaga Wambora, the Court held that a reading of Article 165 (6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is, among other things, supervisory to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. Suppose the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal.

In that case, it cannot be said that the court has no jurisdiction to address the grievance arising from that place.¹⁸³ In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine whether the County Assembly or Senate violated any procedural law in arriving at their decision.

182. *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR), para 113.

183. See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, para 61.



We are of the view that Article 181 of the Constitution, as well as section 33 of the County Governments Act, can neither be interpreted as clauses that oust the supervisory jurisdiction of the High Court nor limit the power of the High Court to interpret Article 181 nor be construed as provisions that prohibit the right of a citizen to access a court of law where there is an allegation of infringement of a constitutional right to hold a public office under Article 38 (3) (c) of the Constitution.

Furthermore, while the courts acknowledge that the process of removal of a Governor from office is both constitutional and political, neither the political question doctrine nor the concept of separation of powers can operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or any law is consistent with or in contravention of the Constitution.¹⁸⁴

Similarly, in the matter of the impeachment of the Governor of Embu County, the Court of Appeal stated that:

We hold the view that the powers exercisable by this Court are powers of review, and such powers can only check compliance with the Constitution, the law, the rules of natural justice and the rationality of impugned decisions. Where the decision of the impeaching organs is contrary to common logic, then this Court can quash such a decision for being unreasonable.¹⁸⁵

The Court of Appeal, in the same decision, associated itself with the words of Souter J, in his concurring opinion, where he observes that although removal proceedings should be left to the Senate:

One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss or upon a summary determination that an officer of the United States was “a bad guy”...

184. Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR, paras 53 and 62.

185. Wambora 1 CoA, para 241 of the Wambora.



judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority and the consequent impact on the Republic so great as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.¹⁸⁶

The Court of Appeal held that the conduct of the County Assemblies and the Senate should only raise the antenna of the Court if they do something perverse to normal conduct to the extent of perplexing and agitating the mind of the ordinary man going about his business in Gikomba market in Nairobi.

In the matter of impeachment of Governor Mike Sonko, the Supreme Court cited the United States Supreme Court's example of where the court may intervene even in the context where impeachment powers are the preserve of the Senate. The US Supreme Court stated:

if the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply a "bad guy" ... judicial interference might well be appropriated. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.¹⁸⁷

After analysing the decisions of the High Court and the Court of Appeal in the matter of impeachment of Governor Mike Sonko, the Supreme Court held that the two courts came to a common conclusion that Articles 47 and 50 of the Constitution (on the right to a fair trial) were adhered to by both the County Assembly and the Senate; that the process was, in the circumstances, expeditious, lawful and procedurally fair. It held that it could not substitute itself into the two courts and assume their roles by re-analysing the evidence afresh for the third time.

186. *Nixon v United States*, 506 U. S. 224 (1993)

187. *ibid*, quoted in *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR), para 113.



The Supreme Court held that it could only disturb the concurrent factual conclusions if those conclusions were based on no evidence or not supported by the facts or evidence on record or that the conclusions were ‘so perverse,’ or so illegal, that no reasonable court would have arrived at the same.

The four charges against the appellant were, no doubt, weighty, but they were not vague. They contained detailed particulars of the alleged violations of the Constitution and the law, specifying with precision the provisions of the Constitution and the law that were alleged to have been contravened.¹⁸⁸

In the matter of Governor Wambora, the Court of Appeal noted that in the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution, the High Court has a specific constitutional jurisdiction under Article 165 (3) (d) (ii) and (iii) of the Constitution. These paragraphs vest upon the High Court’s jurisdiction to hear any question on whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution and to hear and determine any matter relating to constitutional powers of state organs in respect of county government. It is not contestable that the removal of a Governor from office is a thing done under the authority of the Constitution, and the High Court must determine if such removal is inconsistent with or in contravention of the Constitution.¹⁸⁹ The Court added that where it is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution. For instance, the Court noted that it was incumbent upon it to determine whether a Governor can bear vicarious personal liability for acts and omissions of the county governments and that there was no such ouster of jurisdiction of the court to determine the matter under section 33 of the County Governments Act.¹⁹⁰

However, the Court of Appeal also added that courts cannot take over the roles clearly reposed in the other arms of government by the Constitution as that would amount to an overthrow of the Constitution under the pretext of exercising supervisory powers.

188. *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR), para 152.

189. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] eKLR, para 53.

190. *ibid* para 52-53.



This is within the context of exercise by such state organs of its mandate within the Constitution and the law. A delicate balance must indeed be struck in order to attain harmonious and smooth operation of the engine of governance. The Court must not severely restrict the constitutional mandates of the other state organs to the extent that those organs cannot execute their work. Such restrictions may result in the Constitution looking like a green and beautiful tree that bears no fruit.

Inherent power to impeach vests in the County Assembly and the Senate. Courts have held that the constitutional function of impeachment of Governors and their deputies is a role that is vested in the County Assemblies and that the judiciary has no role to play in the impeachment process except as far as the Constitution permits. The Supreme Court has held that when the County Assembly is exercising its statutory mandate under section 33 of the County Governments Act in and pursuant to the constitutional power under Article 181, it is for that Assembly, and not for the Court, to ascertain that the legal threshold is satisfied whilst conducting its quasi-judicial inquiry. The Supreme Court further made it clear that the role of the court cannot precede the County Assembly's inquiry role. The Supreme Court further stated that the role of the court is not essentially to conduct a merit review of the Assembly's actions.

There is no denying that the statutory timelines for the impeachment process require an impeccably efficient process in order to comply with the law. This has been noted by several special committees selected to investigate the impeachment of Governors and deputies at the Senate. In the first impeachment of Governor Kawira Mwangaza of Meru, the Special Committee observed that the impeachment process provided for in Article 181 (2) of the Constitution is one requiring utmost judiciousness and circumspection. A ten-day period from the reporting of charges for the investigation or hearing, the analysis of evidence, decision, and report-writing and presentation to the Senate and its deliberations is inadequate. The Committee notes that the Impeachment Procedure Bill, which lapsed in the previous parliament, should be fast-tracked as it addresses some of the concerns.¹⁹¹

191. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru' (30 December 2022) 80.



When the Speaker of the Senate receives the report, they may convene a special committee of the Senate to deliberate on the issues raised within seven days. The said special committee must make findings on whether the County Assembly substantiated the allegations against the Governor within ten days. If the Special Committee finds that the allegations against the Governor have been substantiated, the Senate shall convene and vote for or against the removal of the Governor.

In *Martin Wambora*, the Court noted that in all the sequential steps identified above, courts have been vested with jurisdiction to neither initiate a motion, consider a resolution, nor hear the charges levied against the Governor. This position is in tandem with the core function test and the concept of separation of powers.¹⁹² In *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another*,¹⁹³ this Court signalled that it would be reluctant to question parliamentary procedures as long as they did not breach the Constitution and that the doctrine of separation of powers restricts the mandate of the courts to decide on matters of individual rights and fundamental freedoms and not to enquire into how the County Assembly and Senate perform duties in which they alone have discretion or to review the merit of the decision by the County Assembly and Senate to impeach a Governor.¹⁹⁴

On whether courts can intervene in impeachment proceedings, the Court of Appeal in *Governor Wambora's impeachment* held that the courts have to be careful before they intervene in matters that are properly in the domain of other state organs. The judges noted that the courts can only intervene where constitutional issues are raised. The Court of Appeal endorsed the decision of the Supreme Court of India in the case *State of Rajasthan and Others v Union of India and Others*,¹⁹⁵ where the apex court of India stated that:

....it is true that if a question brought before the Court is purely a political question not involving the determination of any legal or constitutional right or obligation, the Court will not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities.

But merely because a question has a political complexion, that by itself

192. *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR, para 32.

193. SC Petition No. 32 of 2014; [2017] eKLR.

194. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 112.

195. *State of Rajasthan and Ors v Union of India and Others* AIR 1977 SC 1361.



is no ground for why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power, and no constitutional question can, therefore, fail to be political. A constitution is a matter of purest politics, a structure of power and as pointed out by Charles Black in *Perspectives in Constitutional Law*, “constitutional law symbolises an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law....”¹⁹⁶

Even where a court intervenes in impeachment proceedings, the power of the court is to review the proceedings and grounds in accordance with the constitutional framework and not because the court could have employed better or different procedures. The Court of Appeal endorsed its earlier decision on the powers of review of legislation passed by parliament, where the Court of Appeal had stated that:

We [also] reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example, the courts, would have conducted it differently. It must be accepted that the institutional environment is controlling the manner in which an organ disposes of its issues.¹⁹⁷

196. *ibid.*

197. *Trusted Society of Human Rights Alliance v The AG and 2 others* Petition Number 229 of 2012.



4.4.3 Discretion of County Assemblies and Senate in impeachment procedures

The Supreme Court of Kenya, in the matter of the impeachment of Governor Mike Sonko, observed that the Constitution commits to both the County Assembly and the Senate the exclusive power to remove the Governor subject only to procedural requirements set out in the County Governments Act and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges.¹⁹⁸ From this, the Supreme Court concluded that it seems only fair to state that both institutions, through their Standing Orders, are at liberty to determine the procedures for receipt and consideration of evidence necessary to satisfy the duty to conduct an impeachment hearing.

The Supreme Court emphasised that in considering applications to review decisions of the other branches of Government, “courts should strive to achieve a balance between their role as guardians of the Constitution and of the rule of law, including an obligation to respect what Parliament is constitutionally required to fulfil”.¹⁹⁹ In other words, where the Constitution requires Parliament to determine a matter in the first place as part of its constitutional mandate, Parliament will have the discretion and power to regulate its affairs and the courts will be slow to interfere with the exercise of that discretion.

Furthermore, the Court of Appeal took note of the statutory deadlines in the different stages of the impeachment process. Quoting a past decision of the Court of Appeal on the effect of statutory timelines in electoral petitions, the court noted that the timelines provided in impeachment are of the same kind and effect. In the election case, the Court had stated:

These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously.²⁰⁰

198. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), paras 109 and 110.

199. *ibid*, para 111.

200. *Ferdinand Waititu v Independent Electoral and Boundaries Commission (IEBC) & Others*, Civil Appeal (Nairobi) No. 137 of 2013.



The Supreme Court, in the Governor Wambora matter, affirmed the above position regarding statutory deadlines in impeachment where it held that:

All the indications, from the stand of the Superior Courts, are that expressly prescribed constitutional timeframes are binding on the governance processes in place. Even though the specific examples are drawn only from the Constitution's scheme of electoral justice, they nonetheless bear a broader signal regarding time, as it must direct the various agencies of the State.²⁰¹

4.4.4 The Extent of the Supervisory Power of the Courts

As earlier stated, the court's supervisory jurisdiction over the impeachment is meant to ensure that the County Assembly and the Senate have conducted the impeachment in compliance with the Constitution. Where the procedure is not satisfactory, the courts can issue appropriate orders to remedy the process. However, does this role extend to review of the substantive evidence submitted to the court's satisfaction of that the thresholds under Article 181 were met?

It was observed in Chapter 3 of the Digest that what amounts to a gross violation or act that falls within the threshold is dependent on each case. Does the court have the power to review whether the threshold of the ground was attained? The Court of Appeal stated thus:

In our view, in addition to the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution, the High Court has a specific constitutional jurisdiction under Article 165 (3) (d) (ii) and (iii) of the Constitution. These paragraphs vest upon the High Court's jurisdiction to hear any question on whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of this Constitution and to hear and determine any matter relating to constitutional powers of state organs in respect of county government. It is not contestable that the removal of a Governor from office is a thing done under the authority of the Constitution, and the High Court must determine if such removal is inconsistent with or in contravention of the Constitution.²⁰²

201. Justus Kariuki Mate & another v Martin Nyaga Wambora and another [2017] eKLR, para 90.

202. Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others [2014] Nyeri Civil Appeal No 21 of 2014, para 52.



It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution. ...²⁰³

Thus, in determining the petition before it, the Court of Appeal was emphatic that the High Court had to go beyond its supervisory mandate by invoking its constitutional mandate to determine whether the removal of the appellant was done in accordance with the Constitution and in particular whether the facts laid before the Senate in support of the allegations made against the appellant had met the threshold in Article 181 of the Constitution that lays down the grounds upon which a Governor can be removed. The Court of Appeal further noted that:

It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution. For example, was the 4th appellant an employee of the 1st appellant or the County Government" Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government" We are of the view that Article 181 and section 33 of the County Governments Act are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by Article 165 (3) (d) (ii) and (iii) of the Constitution. Though the process of removal of a Governor from office is both constitutional and political, the political question doctrine cannot operate to oust the jurisdiction vested in the High Court to interpret the Constitution or to determine the question of anything said to be done under the authority of the Constitution or any law is consistent with or in contravention of the Constitution.²⁰⁴

In a later judgment of the High Court (the second impeachment of Governor Wambora), the High Court was conscious of the direction of the Court of Appeal with regard to the scope of the High Court's review powers. The High Court stated:

203. *ibid*, para 53.

204. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] Nyeri Civil Appeal No 21 of 2014, para 53.



In Wambora 1 Appeal (*supra*), the Court of Appeal was of the opinion that this Court has to interrogate the facts in order to determine whether there was a nexus between the Governor and the alleged gross violations. That would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention. However, in this case, we were not supplied with material which would enable us to conduct an interrogation, and there is the danger of the Court speculating as to whether what led to the removal of the Governor met the threshold. For example, the evidence, which was tabled before the investigation's committees, was not availed to this Court. In addition, evidence such as that which was availed to the Senate and which is referred to in the Hansard was not availed before the Court. This is the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold. We now consider whether there was a nexus between the [the Governor] and the alleged gross violation of the Constitution and the relevant laws. The summary of the findings of the Special Committee of the Senate is found on page 68 of the Report...²⁰⁵

Upon perusing the report of the Special Committee, the High Court noted that the Senate analysed the evidence put forward in regard to each allegation and also properly directed itself in regard to the standard of proof. The High Court concluded that "From the preceding, it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion"²⁰⁶ The High Court also evaluated and assessed how the Senate found the nexus between the offences that formed the grounds for impeachment and the Senator and also went further to assess the information that the Senate relied on and found no reason to interfere with the findings of the Senate.²⁰⁷

The Court stated that it understood its power to consider the reasonableness of the Senate decision. It stated that after a review of the report of the special committee, it did not find anything that would invite the review powers of the court.²⁰⁸

205. *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* [2015] eKLR, Embu Constitutional Petition No 7 and 8 of 2014 (consolidated) para 247-249.

206. *ibid* para 258.

207. *ibid* paras 99-103, and para 143; paras 258-260.

208. *ibid* para 259.



The High Court summarised its role thus:

In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected the Report of the Special Committee on the removal of the 1st Petitioner to scrutiny, and we have found the same to be satisfactory. We find no reason to disturb the decision of the Senate. Whether or not we agree with it is another thing altogether.²⁰⁹

The Court of Appeal noted that the High Court only exercised its supervisory jurisdiction by reviewing the exercise of the Senate's powers as far as the report of the Special Committee was concerned. The High Court failed to discharge the constitutional mandate that required it to go beyond mere review and determine whether the charges levelled against the appellant had met the threshold of Article 181 of the Constitution. Article 165 (3) (d) (iii) of the Constitution gives the High Court jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of any matter relating to constitutional powers or state organs in respect of County Governments and any matter relating to the constitutional levels relating to the constitutional relationships between the levels of Government.

The Court of Appeal (in the Wambora 2 Case) further corrected the High Court by stating that it (The High Court) put a caveat to the exercise of its constitutional mandate by stating that it did not have the facts that it could interrogate to enable it to determine the issue of nexus and threshold with regard to the exercise of the Senate's power in the removal of the appellant as Governor. In undertaking the process of removal of the appellant as Governor of Embu County, the 1st and 2nd respondents and the Senate were exercising constitutional and statutory powers. A question has arisen regarding the exercise of those powers; the High Court was obligated to determine whether what was done was consistent with the Constitution.

In that regard, it was material that the nexus and threshold regarding the allegations upon which the appellant was being impeached be established. The evidentiary burden was upon the County Assembly, which was not disputed.

209. *ibid* para 260.



It caused the motion for the removal of the appellant to be debated in the County Assembly, and its resolution was carried to the Senate. The Court of Appeal also noted that the burden was also upon the Senate that passed the resolution for removal to satisfy the Court that there was a nexus and threshold to meet the constitutional standard required for the removal of the appellant as County Governor.

The Court of Appeal further observed that this is information that was primarily within the knowledge of the County Assembly and the Senate. The Court of Appeal differed from the High Court. It stated that the judges not only misdirected themselves in regard to the burden of proof but also failed to discharge its constitutional mandate of determining whether a nexus between the appellant's governance function and the impugned procurement process was established such as to meet the threshold of Article 181 of the Constitution. The court, therefore, concurred with the submissions made by the appellant and the cross-appellant that the learned judges failed to discharge their constitutional powers and also failed to apply the precedent set in *Nyeri Civil Appeal No 21 of 2014*.²¹⁰

4.4.5 Use of Judicial Process to Frustrate Impeachment

While the courts have readily asserted their role to supervise the impeachment role played by the County Assembly and the Senate, they have also become increasingly wary about the use of litigation to delay or frustrate a legitimate process, a phenomenon that the courts have described as “parking” appeals.²¹¹

In the matter of impeachment of Governor Sonko, the Court stated :

Parties employ all delay tactics in the book in order to avoid the consequences of the lustration provisions in Chapter Six of the Constitution that disqualify an individual from holding a State or public office since such disqualification is dependent on all possibilities of appeal or review of the relevant sentence or decision being exhausted.²¹²

210. *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* [2014] eKLR.

211. See *David Njilithia Mberia v Republic*, Nairobi Criminal Application No. E011 of 2021, quoted in *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 136.

212. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 136.



The Supreme Court observed that this trend has the effect of subverting the constitutional principles of the administration of justice under Article 159 of the Constitution, which states that: “justice shall not be delayed,” “justice shall be administered without undue regard to procedural technicalities, and that “the purpose and principles of this Constitution shall be protected and promoted.”²¹³

The Supreme Court further held that courts cannot sit back and helplessly watch as deliberate acts of the parties are subverting these constitutional and national values and principles. Parties who are appealing or applying for review of decisions that make them ineligible for public or state office pursuant to Chapter Six of the Constitution have a singular obligation to prosecute such cases diligently. Justice must be done and must also be seen to be done. This must be the overriding objective of every party, counsel and the court.²¹⁴

4.4.6 The Sub Judice Rule

The Senate and County Assemblies, too, have also been faced with questions of sub-judice, which basically refers to the rule of not discussing matters that are actively before the courts of law. In the impeachment of Governor Sonko, an objection was raised on the basis that the impeachment matter was before the courts of law. In answer to this, the Speaker ruled that sub judice is not an absolute rule and is not binding on the Senate. The Speaker noted: On the objection based on sub-judice, it is essential to note the following three things–

- (1) Sub-judice is a rule of the Senate itself for its convenience;
- (2) It is also a rule requiring evidence for it to be invoked; and
- (3) It is not an absolute rule as Standing Order No. 98 (5) of the Senate Standing Orders provides that notwithstanding that Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee and following the precedents. It is pretty clear that the competence and jurisdiction of the Senate to hear a proposed removal from office is a constitutional mandate of the Senate independent of the mandate of the Judiciary or any other organ.²¹⁵

213. The Constitution, Art. 159 (a), (d) and (e).

214. *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR), para 137-139.

215. Quoted in *Mike Sonko Mbuvi Gideon Kioko & another v Clerk, Nairobi City County Assembly & 9 others* [2014] eKLR.



4.4.7 Conservatory Court Orders in Impeachments

While courts have issued conservatory orders in ongoing impeachment processes at the County Assembly and the Senate, the courts became increasingly conscious of the statutory deadlines that underpin the impeachment process. The courts have thus generally circumscribed the issuance of conservatory orders. The courts have sought to make a distinction between the conditions necessary for the issuance of conservatory orders in respect of impeachments and other private disputes, and in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji and two others*, the guiding principles before the grant of conservatory orders were highlighted. The principle is that the public interest must be considered before grant of a conservatory order, the Supreme Court stated:

conservancy orders' bear a more decided public-law connotation, for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case or 'high probability of success' in the supplicant's case for orders of stay. Consequently, conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.²¹⁶

Thus, it was held that where a conservancy order is sought against a public agency like a legislative assembly that is mandated to conduct certain functions in the ordinary course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should consider the need to allow for their ordered functioning in the public interest. The High Court, in the impeachment matter of Governor Wambora of Embu County, appreciated that the petition raised weighty issues. No interlocutory order in this case could be issued unless the Court had the benefit of all the arguments by all the parties on the merits.

216. SCORK Petition No. 2 of 2013, para 86.



The Court cautioned further that the matter began through a process enshrined under the Constitution by virtue of Article 181 and Section 33 of the County Government Act, 2012, and is now before the Senate. It is, therefore, established law that the court will only issue conservatory orders in exceptional circumstances and will be mindful of the mandate of other constitutional organs in the exercise of their constitutional mandate.²¹⁷

The Courts have, on several occasions, noted that even when issuing interlocutory injunctions, they must be mindful of the doctrine of separation of powers. While such refinements in the reserved governmental mandates had not elicited a focussed assessment at the High Court, *ex parte* conservatory Orders were made, the effect being to hamstring the due performance of the constitutional mandate of the County Assembly. Notwithstanding the conventional judicial perception of ultimacy in judicial Orders, a question remains: what is the tenability of such Orders that directly abrogate the discharge of commanded legislative-agency process.

From the facts of this case, it is clear that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under the Constitution, is essential as a scheme for circumventing conflict and crisis in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson signal that the judicial organ must practice the most excellent care in determining the merits of each case.²¹⁸

Even in situations where courts have issued conservatory orders, the courts themselves have recognised that they have no mandate to interfere with the removal process, save where the process is deemed to be highly flawed and the rights of the affected party are breached. The court is more concerned about the manner in which those powers were exercised. In the first days of the impeachment of Governor Wambora, the High Court carefully evaluated and stated the reasons for the conservatory orders. Justice Githua noted this when she issued conservatory orders against the County Assembly:

217. *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu and 3 Others* [2014] eKLR para 62-65.

218. *Justus Kariuki Mate and another v Martin Nyaga Wambora and another* [2017] eKLR, para 83-84.



I have noted the prayer sought in the application. In my view, it would not be appropriate for this court to grant the conservatory orders sought to restrain the 1st to 3rd respondents from holding any proceedings aimed at removing the applicant from office under Article 181 of the Constitution of Kenya since it is their rightful mandate but in view of the complaint that the removal proceedings are set to be started without informing the applicant the grounds upon which the contemplated impeachment proceedings are premised, in the interests of justice, I hereby grant the conservatory orders restraining the 1st, 2nd and 3rd respondents from holding such impeachment proceedings without having first served the applicant with a notice containing the specific grounds/charges upon which his impeachment was being proposed and without giving him an opportunity to be heard.²¹⁹

From the above, the Court, playing its supervisory role, was concerned about the threatened breach of the Governor's rights and issued conditions that were to be complied with by the County Assembly (to issue notice to the Governor) before the continuation of the impeachment process.

The Supreme Court has, as discussed earlier, waded into the area of issuance of conservatory orders and has laid down the law and the principles to be adhered to by courts when issuing conservatory orders in impeachments. First, the Supreme Court, the High Court and the Court of Appeal underscored the inflexible nature of the timelines that run with impeachment and noted that the courts should exercise caution before disrupting such a time-bound process whose timelines are cast in stone.²²⁰

The Court of Appeal has interpreted the holding of the Supreme Court above as binding on it. In the impeachment matter of Governor Kawira Mwangaza of Meru County, where the County Assembly sought to impeach her the second time, the High Court declined an application to certify the Governor's application as urgent.²²¹

219. Quoted in *Martin Nyaga Wambora v Speaker County Assembly of Embu and 5 others* [2014] eKLR, 2022 at 5.

220. *Kioko v Clerk, Nairobi City County Assembly and 11 others* [2022] KECA 405 (KLR).; *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 134.

221. *Kawira Mwangaza v County Assembly of Meru and 2 others*, High Court of Kenya (Meru) Constitutional Petition No. E019 of 2023.



The Governor applied to the court of appeal to have the decision of the High Court revised on the grounds that she had raised constitutional issues that arose from the impeachment process and which the courts ought to consider during the ongoing impeachment.

The Court of Appeal dismissed the application on the grounds that the matter appealed against had not even commenced (the Governor appealed against the decision of the High Court of Meru that declined to certify the application as urgent). More significantly, the Court agreed with the preliminary objection by the County Assembly that it had no jurisdiction to issue conservatory orders in a time-bound constitutional or statutory process. In its decision, the Court of Appeal referred to the Supreme Court decision that circumscribed the space for courts to issue conservatory orders in impeachment processes that have strict statutory timelines. The Court of Appeal stated

The Supreme Court further held that constitutionally provided timelines within which certain acts must be done were not amenable to intervention by the court process, especially where a constitutional body like the County Assembly is conducting its legislative mandate. We, therefore, agreed with the respondents that that preliminary objection is valid. The Court cannot, in the first instance, intervene in the impeachment of [the Governor]. This is because of the strict timelines provided by the law. The Supreme Court decision of *Justus Kariuki Mate & Another v Martin Nyaga Wambora and another*²²² is binding on this court. The preliminary objection is, therefore, upheld. This court lacks jurisdiction, in the first instance, to consider the merits of the applicant's application, which sought conservatory orders before the impeachment process has run its constitutional and legal course.²²³

The Court of Appeal also considered Governor Kawira's prayer that she would be excluded from justice if the Court did not reverse the decision of the High Court not to certify her application as urgent. In its ruling, the Court of Appeal considered the different stages of the impeachment process and the opportunities available to evaluate the entire process. The Court observed that Governor Kawira had such an opportunity at the County Assembly, the Senate, and ultimately the courts if her impeachment were to be confirmed at the Senate.

222. [2017] eKLR.

223. *Kawira Mwangaza v County Assembly of Meru and 2 others*, Civil Appeal (Nyeri) No. E093 of 2023, para 21.



The Court stated:

We have considered with anxiety the submission made by [the Governor] to the effect that she would be shut out from the seat of justice if this court were to uphold the preliminary objection. The applicant is, in effect, saying that she is being denied the right to be heard and to ventilate her allegation that her constitutional rights have been breached by the manner in which the impeachment is being prosecuted. We observe that the applicant's right to be heard and to defend herself from the allegations made against her in the impeachment debate at the County Assembly in Meru is provided under the standing orders of the County Assembly. If she is impeached, she will have another opportunity to prosecute her case before the Senate during the impeachment motion. Even after the Senate makes its decision, the applicant still has the avenue of petitioning the court for appropriate relief if the decisions were to go against her. We are, therefore, of the considered view that the applicant's right to be heard will not be circumscribed.²²⁴

4.4.8 Effect of Non-compliance with Court Orders

While the courts have gradually exercised restraint in the issuance of conservatory orders in ongoing impeachment processes, judges have frowned at disobedience of court orders by the County Assemblies or the Senate. In the matter of impeachment of Governor Wambora, the Speaker of the Senate, even after being served with ex parte orders, did not appear in court. The Court noted that the Speaker, after receiving the orders, had three options. First, either appear in Court before the Judge has ordered by the court and seek to vary, set aside or discharge the Court orders already in place, stopping any deliberations on the impeachment of the 1st Petitioner. The Speaker could also have chosen to comply with the Court orders by not convening the Senate, or lastly, revoke the Gazette Notice No. 627 issued by the Speaker, convening the Senate and dated 31st January 2014.

224. *Kawira Mwangaza v County Assembly of Meru and 2 others*, Civil Appeal (Nyeri) No. E093 of 2023, para 22.



However, the Speaker of the Senate allowed the special sitting of the Senate to proceed on 4 February 2014. Following the deliberations on the motion, the Senate resolved to establish a Special Committee comprising 11 members to investigate the Proposed Removal from the Office of the Governor and Deputy Governor of Embu County and report to the Senate within ten days. The Court noted that the Committee addressed itself to the court orders before conducting the investigation and hearing of the impeachment. The Court quoted part of the Senate special committee report that stated:

The Committee observed that the High Court had issued conservatory orders restraining.....The question before the Committee, therefore, was, What is the effect of that court order on the Senate and the Special Committee?" The Committee resolved that it would defer its thoughts on the matter and hear the parties on the matter if it would arise and, therefore, reserved its findings on the matter to the conclusion of the hearing of the evidence by the Parties.²²⁵

The Court thus concluded that the Senate was aware of the Court orders and, indeed, deliberated on those orders and chose not to obey them. Instead, the Court commenced its proceedings and concluded that the Senate acted in violation of court orders. The Court went on to state that disobedience of court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identifies the rule of law as one of the national values and principles of governance. Article 3 of the Constitution is clear that every person must respect and defend the Constitution. The Court concluded that any person who disobeys a court order also violates the Constitution.

The Court cited with approval the decision of the High Court in *Judicial Service Commission v The Speaker of the National Assembly & Another* ²²⁶ where the court stated that:

Respect of Court orders, however disagreeable one may find them, is a cardinal tenet of the rule of law, and where a person feels that a particular order is irregular, the option is not to disobey it with impunity but to apply to have the same set-aside.

225. [2013] eKLR.

226. *ibid.*



When the decision to disobey particular court orders is left to the whims of the parties, public disorder and chaos are likely to reign supreme, yet under the preamble of our constitution, we do recognise the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, Social Justice and the rule of law.

The Court further cited Article 159 (1), which states that Judicial authority in Kenya is derived from the people and vests in and is exercised by the courts and tribunals established under the Constitution. Courts of law speak through their Court orders, and it follows that those orders must be obeyed. The Court referred to the Court of Appeal's past decision, where it pronounced itself on the importance of abiding by court orders. The Court of Appeal had stated that "[a] flagrant disobedience of a court order, if allowed to go unchecked, will result in the onset of an erosion of Judicial authority."²²⁷

The court held that it could not emphasise the fact that court orders, once issued, must be obeyed by those against whom they are directed unless or until they are either discharged or set aside. More so because once a court order is issued, it binds all and sundry, the mighty and the lowly, equally, and the County Assembly and the Senate are no exception. The court noted that the developing trend where parties to litigation appeared to be choosing which court orders to obey or disobey had to be halted in order to enhance public confidence in the rule of law.²²⁸ The court also observed that a deputy Governor could not benefit from an impeachment process that was held in disregard of court orders.

4.5 Double Jeopardy

In some of the impeachments that have reached the Senate for hearing and confirmation of charges, the Governors have challenged the impeachment hearings on the basis of the principle of double jeopardy. The principle of double jeopardy basically prohibits the trial of the same person for an offence that has already been tried.

227. *Commercial Bank of Africa Ltd v Ndirangu* (1990-1994) EA 70 (CAK).

228. *Martin Nyaga Wambora and 4 others v Speaker of the Senate and 6 others* [2014] eKLR paras 289-295.



In the Constitution, the principle of double jeopardy is provided for under Article 50 on the principles of fair trial. It states that every accused person has the right “not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.”²²⁹ The Governors have, thus, sought to rely on this principle as a challenge to impeachment proceedings against them.

In the impeachment of the Deputy Governor of Siaya, the Governor argued at the Senate that the issues and supporting material that formed part of his impeachment were the same as those that were before the General Oversight Committee of the County Assembly. Hence, he suffered double jeopardy. The Special Committee ruled that:

The hearing before the General Oversight Committee was not a trial but a forum for the deputy Governor to shed light on the allegations he made through the public utterances. The committee further observed that the General Oversight Committee and the special committee on impeachment had two different mandates under the standing orders and the Constitution, respectively.

The Committee concluded that the deputy Governor had, therefore, not faced any trial before the committee, and this was not double jeopardy.²³⁰

In the second impeachment of Governor Wambora of Embu County, the Governor contended that he was being impeached for the second time on the same grounds as the first impeachment and, therefore, claimed the impeachment process was null. However, the Senate noted that the earlier impeachment proceedings were declared null by the courts. Therefore, there was no impeachment, properly speaking. The County Governments Act also provides that the same motion on the exact charges may be re-introduced against the Governor where the Senate does not find the charges substantiated.

229. The Constitution, Art. 50 (2) (o).

230. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office of Honourable William Oduol, the Deputy Governor of Siaya County' (26 June 2023), 31 para and 37 para 45.



4.6 Procedures before the Senate and the County Assembly

Once the motion of impeachment is tabled in the County Assembly or the Senate, the respective chambers have different options that they can pursue in debating the impeachment motions. In the case of the County Assembly, section 33 of the County Governments Act is silent on the manner in which the assembly should proceed with or conduct an impeachment. It contains general provisions on the moving of the motion for impeachment, the numbers required to pass the motion, and the timelines. It expressly does not state the procedure that a County Assembly should employ.

In the impeachment matter of Governor Paul Chepkwony of Kericho County, the Governor raised a challenge that a committee of the assembly did not process his impeachment motion. He relied on Standing Order 63 of the Interim County Assembly Standing Orders, which stated as follows:

- (1) Whenever the Constitution, any written law or these Standing Orders-
 - a. requires the County Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the County Assembly considering the matter and shall be entitled to legal representation;
 - b. requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the County Assembly shall hear the person-
 - i. At the date and time to be determined by the Speaker;
 - ii. For a duration of not more (than) two hours or such further time as the Speaker may, in each case, determine and
 - iii. In such other manner and order as the Speaker shall, in each case, determine.
- (2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion.²³¹

231. County Assembly of Kericho, 'Interim County Assembly Standing Orders'



The Governor, relying on the above provision of the Standing Orders, contended before the Special Committee that the County Assembly needed to establish a special committee first before considering and voting on the motion by the plenary. The Special Committee of the Senate disagreed; the Committee observed that:

A proper reading of the Standing Order does not support this position. The Committee observed that the procedure for removal of a Governor is set out in Standing Order 60 and was followed. Standing Order 63 deals with the removal of a member of the County Executive Committee.²³²

The Special Committee, thus, concluded that there was no specific requirement that a County Assembly should set up a special committee to inquire into the impeachment charges of a Governor before the entire County Assembly debates and takes a vote to impeach or not. In the case of the Senate, the County Governments Act provides that the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.²³³ This means that the Senate, like County Assemblies, is not obligated under the law to establish a special committee to investigate the grounds for impeachment.

In the case of the impeachment of Governor Mike Sonko, the Governor contended in court that the Senate had not given reasons for his impeachment and that the Senate had not availed a report on the impeachment to him.

The Court noted stated thus regarding this particular issue:

On the complaint that no reasons were given for the impeachment and that no Senate report was availed to [the Governor], we find that the Senate's Hansard report contains the entire impeachment proceedings, which include the reasons for the impeachment. In our considered view, the decision by the senators to proceed by way of plenary is lawful as provided under section 33 (3) (b) of the County Governments Act and Senate Standing Order 75, which gives the Senate discretion to proceed through plenary or special committee.

232. The Senate (11th Parliament), 'Report of the Special Committee on the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County' (3 June 2014) 25 para 51.

233. s 33 (3) (b), County Governments Act, 2012.



We note that where the Senate proceeds through plenary, there is no provision for the preparation of a report. It is only where the Senate proceeds by way of a Special Committee that the Committee's report is presented to the plenary.²³⁴

Therefore, there is no requirement that a special committee be established, either at the County Assembly or the Senate, to conduct a hearing or investigation into the grounds for impeachment against a Governor.

4.6.1 Committee vis-à-vis Plenary Proceedings

Should the Senate or County Assembly opt for a plenary route or a special committee when considering impeachment motions? The law does not provide for any specific procedure. As a result, the County Assembly and the Senate are not bound to follow any route when considering impeachment. The courts have, however, advised that given the seriousness of the proceedings, the route of a special committee provides an opportunity to inquire into issues and give a considered ruling and findings. The High Court, in the case concerning the impeachment of Governor Mike Sonko, stated thus:

Although it does not fall within our remit to direct the legislature on how to perform its functions, we are of the considered view that impeachment of a Governor is a serious undertaking as the result can lead to the removal of a popularly elected Governor. For this reason, we recommend that it will be desirable that future impeachments proceed through the committee route as opposed to the plenary. We say so because when the special committee is appointed, it has ten days to deliberate on the matter, thus giving many opportunities to the parties to prepare their cases adequately. The committee gives the perception that each member is actually engaged in the process as opposed to the plenary, which can be perceived to be a mob lynching process. This view is vindicated by the Senate Hansard, which shows that there were several interventions by the senators, thereby eating into the time set aside for the parties to present their cases.²³⁵

234. Mike Sonko Mbuvi Gideon Kioko and another v Clerk, Nairobi City County Assembly and 9 others [2021] eKLR, para 225.

235. Mike Sonko Mbuvi Gideon Kioko and another v Clerk, Nairobi City County Assembly and 9 others [2021] eKLR, para 226.



Trial by Committee gives the Senate (through the eleven members) an opportunity (not necessarily more time) to review the usually voluminous documents from the Governor's team and the County Assembly team. Because of the fewer members, the committee is able to prod and follow up on specific questions, a chance that is not readily available in plenary.²³⁶ While both the plenary and the special committee are meant to be a trial session, the plenary is arguably not able to reach the depths of systematic analysis and evaluation of evidence and issues that the special committee is able to undertake.²³⁷

The plenary report also ensures that there is a considered ruling on each of the issues and grounds for impeachment. Furthermore, special committees can better facilitate the hearing of expert witnesses, especially where the impeachment relates to technical matters.²³⁸ However, the plenary, too, has its distinct advantages. First, plenary impeachment hearings attract a lot of public interest, and there is evidently more transparency in the manner in which issues are processed and decisions are made.²³⁹ The public is able to listen to the contributions of members and the nature of the evidence adduced.²⁴⁰

Furthermore, all senators are able to participate in the impeachment process, observe the character and demeanour of witnesses and listen to arguments of the parties, as opposed to relying on the report of the committee, which the members have minimal time to read and make up their mind on where to vote.²⁴¹

Ultimately, and as observed by the courts, the decision on which route to follow entirely depends on the House. During the impeachment motion of Governor Babayao of Kiambu County, the then-Senate Majority Leader, while moving the motion in support of a special committee, stated thus:

236. Interview with staff and members of the Senate.

237. *ibid.*

238. *ibid.*

239. *ibid.*

240. *ibid.*

241. *ibid.*



As a House that relies on its Committees to transact its business, the SBC concluded that the House is better advised and guided through a committee process. Secondly, looking at the listing of charges and the preliminary statements from the parties that were before us, having all 67 Senators asking questions on those matters would mean that we would need more than ten days. We might also need more than four hearing sessions to deal with the issues that are involved. The Senate should benefit from its tradition. Of the eight or so impeachments that we have dealt with, only one impeachment that involved Governor Gachagua was done in the Plenary. Even then, we had to do it expeditiously because he had been brought straight from the hospital bed to the Chamber of this House. Everyone here was panicking about whether spending a more extended time would jeopardise the health of the Governor.²⁴²

On this occasion, the Senate voted to defeat the motion to establish a special committee to investigate the impeachment of the Governor of Kiambu. The plenary debates showed that senators felt that the denial of a chance to vote on the impeachment of the Governor (where the committee finds that grounds have not been substantiated) denied them their role as representatives of the people in such a crucial process.²⁴³

4.6.2 Preliminary Applications

Impeachment proceedings, whether by special committee or plenary in the Senate, are usually characterised by tight timelines. The Senate usually has a fixed period of ten days to return a confirmation of impeachment or to decide that the grounds have not been substantiated. This creates a lot of pressure on the plenary or the committees. In the past impeachments, the processing of preliminary applications by parties to the impeachment at the Senate has become the subject of considered rulings, either by the Speaker or chairperson of the special committee or by courts of law where such issues eventually find their way to court through appeal.

242. Senate, 'The Hansard', Tuesday, 21 January 2020, Special Sitting 10729.

243. See, for instance, submissions of Senator (Prof.) Samson Onger, Senate 'The Hansard', Tuesday, 21 January 2020 Special Sitting, 40-41.



Typically, the applications have revolved around requests to submit additional evidence, to call witnesses, and objections based on procedures that were followed at the County Assembly, among other issues. The Senate Standing Orders provide that “any preliminary question or issue raised by the County Assembly or by the Governor shall be argued for not more than thirty minutes unless the Speaker of the Senate [or the special committee] otherwise directs.”²⁴⁴

In the impeachment case concerning Governor Sonko, the Governor claimed that during the impeachment proceedings, the Speaker of the Senate declined to entertain his Preliminary Objection, after which the Senate sat in plenary, deliberated on the charges levelled against him and voted to impeach him.²⁴⁵ The Speaker had ruled that due to the strict timelines, his objections could be subsumed into his substantive responses, which would have saved the time scheduled for the hearing of the motion. The Speaker had made a considered ruling on his preliminary objection and stated as follows:

On the procedural and substantive questions raised, it is clear to me that these are matters requiring evidence in order to prove and for which the other side has an opportunity of rebuttal with evidence.

The Senate can only make a fair determination, having heard the evidence on both sides. This is the essence of this investigation—the investigation before the Senate is both a procedural and substantive matter. To that extent and following precedence, it is clear to me, and I so rule, that pursuant to Rule 29 of the Fifth Schedule of the Senate Standing Orders, any preliminary objection, both procedural and substantive, should be appropriately subsumed in the evidence of either party and presented at the time allocated to that party.²⁴⁶ The High Court noted that considering the manner in which the Speaker handled the applications before the Senate, he adequately dealt with the preliminary objection. A contrary finding would have meant that the Senate would not have proceeded with the impeachment until all the cases filed by the Governor were heard and determined.

244. sections 16 Part 1, and s 14 Part 2 of the Third Schedule to the Standing Orders of the Senate.

245. Mike Sonko Mbuvi Gideon Kioko & another v Clerk, Nairobi City County Assembly and 9 others [2021] eKLR (HC) para 218.

246. Quoted in Mike Sonko Mbuvi Gideon Kioko & another v Clerk, Nairobi City County Assembly and 9 others [2021] eKLR (HC).



The High Court noted that the Senate exercised its constitutional mandate in dealing with the impeachment, which was subject to stringent timelines. The decision by the Speaker cannot be said to have violated the Governor's right to a fair hearing because what the Speaker did was to subsume the Preliminary Objection in the main hearing.

Governor Sonko had also raised a preliminary objection to impeachment proceedings by raising the issue of sub judice. The Speaker, in a reasoned ruling, directed that the objection be brought as part of the evidence to be presented during the proceedings in the plenary. Specifically, in answer to the question of sub judice, the Speaker ruled that sub judice is not an absolute rule; that Standing Order No 98 (5) of the Senate Standing Orders provides that, notwithstanding that Standing Order, "the Speaker may allow reference to any matter before the Senate or a Committee of the Senate"; that the competence and jurisdiction of the Senate to hear and determine the question of removal of a Governor from office is a constitutional mandate vested in the Senate independent of the Judiciary or any other organ.

The Supreme Court, in the Mike Sonko case, affirmed the Court of Appeal's treatment of the objection. It held that the Senate Speaker could not, in the least, be accused of having failed and ignored altogether to consider the appellant's Preliminary Objection when he, in fact, allowed the appellant's counsel to submit on the objection at length, adjourned the sitting to consider the arguments before rendering the ruling. He properly directed his mind to the relevant procedural laws and judiciously exercised his discretion.

In the Wajir Governor impeachment case, the County Assembly applied to have an affidavit submitted as evidence to the Senate be removed from the record as it was submitted late. The Committee, in its response, observed that it held that it would uphold information relevant to oversight over procedural requirements. It allowed the inclusion of additional evidence filed out of time and rejected the expunging of an affidavit on the basis that it contained crucial information.²⁴⁷

247. Senate, 'Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mohamed Abdi Mohamud, the Governor of Wajir County' (17 May 2021) 25, para 47.



In the matter of impeachment of the Deputy Governor of Kisii County, considered in plenary, the County Assembly made a preliminary objection that certain parts of the evidence filed by the Deputy Governor were irrelevant to the proceedings. In turn, the Deputy Governor's team also made preliminary objection to have certain parts of the records to be expunged on grounds that they introduced new evidence in the Senate hearing. In a considered ruling, the Speaker of the Senate held that the Senate was competent enough to decide of the relevance of documents submitted to it.²⁴⁸

4.6.3 Verification of Impeachment Motion at the County Assembly

Among the procedural issues that have come up for determination is the manner of verification of support for the impeachment motion at the County Assembly. While the Senate is reluctant to wade into procedures of verification of the motion, these issues have found their way to courts of law and pronouncements made. In the Sonko impeachment case, the Governor had argued that there was no evidence of affirmation of members who were listed as supporting the motion.

The County Assembly, on the other hand, argued that the verification envisaged by this County Assembly Standing Orders is when each of the more than two-thirds of the MCAs append their signatures to the Motion. In particular, for this case, they did so on a document headed: "SIGNATURES IN SUPPORT OF A MOTION FOR THE REMOVAL OF Governor BY IMPEACHMENT"; they did so with the full knowledge of its purpose and specifically to verify the correctness of its contents. The source of the "verification forms," according to the Standing Order, is the Clerk of the Assembly.

The Assembly itself confirmed having supplied the document in question to MCAs. The Supreme Court held that the Court of Appeal correctly construed the meaning of "verification" in the context of the above Standing Order. The use of the above document has not been shown to have occasioned an injustice or caused any prejudice to the appellant. If the intention were to have members who were in support of the impeachment motion swear affidavits or make other statements on oath to authenticate the Motion, the County Assembly would have, in promulgating the Standing Order, expressly made that provision.

248. Senate, 'The Hansard' Wednesday 13th March 2024, Afternoon sitting, p.4.



The Supreme Court concluded from those factors that the Motion for the removal from office of Governor Nairobi County was duly verified in accordance with Order 67 (1) of the Nairobi City County Assembly Standing Orders and that the verification is not in the form of an affidavit or any other forms of deposition.²⁴⁹

4.7 Conclusion

It has been noted that section 33 of the County Governments Act 2012, which provides for the procedure of impeachments, has, in some instances, been noted to be too general and missing critical aspects that underpin the impeachment process. However, courts have also noted that there are constitutional and statutory provisions that generally bind the County Assembly and the Senate and which they need to adhere to during impeachment. These include aspects such as fair process during impeachment, which the County Assembly and the Senate must facilitate. County Assemblies and the Senate have, as a result, adjusted their procedures and rules in a manner that enhances fair process in their impeachment processes.

Furthermore, while courts have maintained their unfettered constitutional authority to intervene in impeachment processes, they, too, have gradually adjusted their approach to intervention in impeachments. The courts have noted the importance of allowing constitutionally or statutorily ordained timelines to run their entire course and have, on a number of later instances, refused to issue conservatory orders where such orders are disruptive of the constitutional function of the Senate or County Assemblies. The above developments have had the effect of settling the law and practice on the procedures applicable to the impeachment processes.

249. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 142-143.



CHAPTER 5:

PUBLIC PARTICIPATION IN IMPEACHMENT



CHAPTER 5: PUBLIC PARTICIPATION IN IMPEACHMENT

5.1 Introduction

Public accountability of institutions of governance through public participation is a core principle of the Constitution of Kenya 2010. The founding provisions of the Constitution recognise the people as the source of all sovereignty and power, which is then donated to various institutions. The Constitution provides that state power can be exercised either through elected representatives and public officials or directly through the people. In this regard, both the County Assemblies and the Senate are required to facilitate and give effect to the principle of public participation in impeachment processes. Specifically, the Constitution provides that "Parliament shall openly conduct its business, and its sittings and those of its committees shall be open to the public."²⁵⁰ The Constitution further notes that "Parliament shall facilitate public participation and involvement in the legislative and other business of parliament and its committees".²⁵¹ Similar provisions regarding County Assemblies are repeated in the Constitution.²⁵²

Furthermore, the general constitutional framework is oriented towards people-led democratic governance processes with participation as a core feature of all public decision-making processes. These provisions exist directly or indirectly in several provisions of the Constitution, which include Articles 10, 27, 33, 35 and 119 of the Constitution.²⁵³

In his concurring opinion on the Matter of National Land Commission Advisory,²⁵⁴ Chief Justice Willy Mutunga emphasised the importance of the constitutional principle in the current constitutional order in the following words:

250. The Constitution, Art. 118 (1) (a).

251. *ibid* Art. 118 (2).

252. *ibid* Art. 196 (1) (a) and (b).

253. *Ndegwa (suing on his own behalf, in the public interest and on behalf of other bar owners' in Nyandarua County) v Nyandarua County Assembly & another* [2021] KEHC 299 (KLR).

254. Opinion Reference No. 2 of 2014, para 320.



Public participation is a significant pillar and bedrock of our democracy and good governance....so that the citizens have a significant voice and impact on the equitable distribution of political power and resources, and the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable.²⁵⁵

With specific regard to the impeachment of Governors and Deputy Governors, the operative provision of the law (section 33 of the County Governments Act) does not provide, in an explicit manner, the way in which public participation should be facilitated during the process of impeachment. This has, in turn, left the County Assemblies, the Senate, and the courts to determine, if at all, the extent to which the principle of public consultation is applicable to the impeachment process.

Specifically, Governors and their deputies have challenged their impeachment on the basis that their impeachment did not incorporate public participation. In contrast, others have noted that the public participation exercise that was undertaken by the County Assembly did not meet the threshold required in the Constitution. Other court petitions have attacked the constitutionality of section 33 of the County Governments Act for omitting the principle of public participation in the steps of the impeachment process.

In the impeachment process, the County Assembly has the power to initiate impeachment proceedings against a Governor or deputy Governor. Suppose the required numbers pass the impeachment motion in accordance with the relevant provisions of the law. In that case, the Senate is required to confirm the charges by stating that the charges are substantiated. In doing so, both chambers are required to incorporate public participation in their decision-making processes.

This chapter provides the jurisprudence that has emerged from the Senate and the courts on the principle of public participation as applicable to the impeachment process, as well as the relevant jurisprudence on the meaning of public participation as recognised in the Constitution.

255. Per Chief Justice Willy Mutunga (Concurring): In the Matter of the National Land Commission, Advisory Opinion Reference No. 2 of 2014.



5.2 The Constitutional Principle of Public Participation

Public participation in governance is an internationally recognised concept. This concept is reflected in international human rights instruments. The Universal Declaration of Human Rights of 1948 proclaims in Article 21 that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. The International Covenant on Civil and Political Rights (ICCPR) affirms in Article 25 that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c. To have access, on general terms of equality, to public service in his country.

The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of the Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions, and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community, as the people must take part in political affairs.

The High Court, in the first impeachment case of Governor Wambora, relied on South African case law on the nature of the right to public participation. The court endorsed the Constitutional Court of South Africa's statement on political participation, where the apex court in South Africa stated that:

The right to political participation is a fundamental human right which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs and a more specific right to vote and to be electedSignificantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs,



This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25 (b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25 (a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.²⁵⁶

The Court of Appeal in the matter of the impeachment of Governor Mike Sonko agreed with the dicta in the South African case that:

According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participates in the legislative process.²⁵⁷

The High Court, in the Wambora 1 decision, endorsed the words of Ngcobo, J of the Constitutional Court of South Africa, on the intersection between participatory and representative democracy.²⁵⁸ Justice Ngcobo stated:

...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story but also from our sense that participation is necessary to preserve human dignity and self-respect.²⁵⁹

The High Court, in the first impeachment of Governor Wambora, noted that the form or structure of public participation depends on many factors and can change with the context; the court cited the words of Justice Albie Sachs of the Constitutional Court of South Africa, where the judge stated:

256. *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11.

257. *ibid.*

258. *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 2.

259. *ibid.*



The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.²⁶⁰

In another case, the South African Constitutional Court has endorsed the above view on public participation, mainly emphasising that discretion should be given to governments at various levels to design their public participation in a manner that suits their context. The widely cited decision of the Constitutional Court of South Africa,²⁶¹ while referring to the national and provincial parliaments, stated that:

Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes.²⁶²

With regard to county governments, the County Governments Act establishes the modalities and platforms for citizen participation. It provides that the county government shall facilitate the establishment of structures for citizen participation, including:

- a. information communication technology-based platforms;
- b. town hall meetings;
- c. budget preparation and validation fora;
- d. notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;
- e. development project sites;
- f. avenues for the participation of peoples' representatives, including but not limited to members of the National Assembly and Senate; or establishment of citizen fora at county and decentralised units.²⁶³

Finally, the burden of proof lies with the public bodies to demonstrate there was public participation.

260. Minister of Health v New Clicks South Africa (Pty) Ltd [2005] ZACC.

261. Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11.

262. *ibid.*

263. The County Governments Act, s 91.



5.3 Constitutionality of Section 33 of the County Governments Act

Section 33 of the County Governments Act, where the impeachment procedure is provided for, does not make direct reference to public participation in the stages of impeachment laid out under the section. This laid a basis for the challenge of the constitutionality of section 33 by Governor Mike Sonko. In the Court of Appeal, Governor Sonko contended that section 33 of the County Government Act does not provide an inclusive and participatory process such that their (the public's) right to public participation, as provided for under various articles of the Constitution,²⁶⁴ had been violated.

The Court of Appeal took the view that the above interpretation is a narrow approach in respect of the scope of unconstitutionality of the section notwithstanding and that the section should be interrogated in a broad sense as to whether it is unconstitutional in any event as against the cited provisions of the Constitution.

The purpose of section 33 of the Act is to give effect to Article 181 of the Constitution, whose purpose is to foster the accountable exercise of power through, among other things, the removal of unfit public officials whom the people have elected to govern at the county level. The power of self-governance and participation of the people provided for by Article 174 (c) of the Constitution must be read together with Article 1 to the effect that people may also indirectly exercise sovereignty. They do this by electing their representatives at the county level, who make decisions on their behalf. To this extent, the mandate of impeachment has been placed on the people's representatives. Thus, the textual approach to interpreting the Constitution asks the question: where does the power of impeachment lie?" The answer is that it lies with the County Assembly and the Senate.

Governor Sonko and the other petitioners in the matter had also contended that section 33 had denied the people their sovereign power of the people to participate in the removal of their popularly elected Governor, which contention was denied. The Court of Appeal resolved this issue by juxtaposing section 33 with the relevant clauses of the Constitution on people's sovereignty.

264. The Constitution, Arts. 1, 2 (1) and (2), 10, 118 (1) (b), 174 (a), (c), 196 (1) (b) and 259 vis-à-vis s The County Governments Act, s 33.



Article 1 (2) state that sovereign power belongs to the people and may be exercised either directly or indirectly. Article 1 (3) (a) is to the effect that the people's sovereign power is delegated to, among other state organs, the "legislative assemblies in the county governments". Further, under Article 38 of the Constitution, the people exercise their sovereignty directly through the political right to vote by electing their representatives through a secret ballot.

The Court of Appeal concluded that reading these provisions together, there can be no doubt that the elected representatives exercise sovereignty on behalf of the people through the principle of delegation of power to state organs. In this case, the delegation is to the legislative assembly in the county government. There is nowhere in the law where there is any requirement for a popular exercise of the political right to vote in respect of the removal of a Governor.

The Court found that section 33 is not in any way inconsistent with Article 1 of the Constitution. When they chose to invoke section 33 and to debate the motion on the impeachment of the Governor, and when the Senate followed suit, neither the Embu County Assembly members nor the Senate were acting in contravention of the Constitution, as section 33 is not unconstitutional to that extent.

5.4 Public Participation in the Context of Impeachment

In the impeachment matter of Governor Martin Wambora, the High Court, after acknowledging that the right to public participation is based on the democratic idea of popular sovereignty as provided for in the Constitution, stated as follows with regards to public participation in the impeachment process:

194. Article 196 (1) (b) of the Constitution forbids a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution does not expressly task the County Assembly with the role of removal of a Governor, Article 181 (2) of the Constitution empowers Parliament to enact legislation providing for the procedure of removal of a county Governor on the grounds specified under the said Article. Pursuant to the said provision, Parliament enacted the County Governments Act, and in section 33, the procedure for removal of a Governor is to be initiated in the County Assembly.



Accordingly, the removal of a Governor is one of the businesses statutorily assigned to the County Assembly. In our view, the question is not whether the public ought to participate in the process of the removal of a Governor but to what extent should that participation go. In our view, some level of public participation must be injected into the process in order to appreciate the fact that the County elects a Governor and in order to avoid situations where an otherwise popular Governor is removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies.²⁶⁵

The High Court continued to note that the County Assembly must avail the voters an opportunity to be heard regarding the removal of the elected Governor or deputy. The judges were emphatic that voters must have a channel for airing their views on the removal of the Governor from office. The learned judges stated:

In our view, an opportunity must be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision is arrived at either way. To completely lock out the voters from being heard on such vital matters as the removal of their Governor would be contrary to the spirit of Article 1 (2) of the Constitution. Whereas it may not be possible for every person in the County to be heard on the issue, those who wish to put across their views on the impeachment ought to be allowed to do so, though the ultimate decision rests with the County Assembly.²⁶⁶

Applying their mind to the concrete impeachment process at the County Assembly level, the judges noted that the appropriate stage at which public participation should be actively facilitated is after the tabling of the motion of impeachment. However, unlike legislative business, where there is more time for public participation, the court acknowledged the time pressure that is heaped on the County Assembly by statutory deadlines to complete the impeachment process at the County Assembly.

265. *ibid* para 196.

266. *ibid* para 200.



The judges observed:

In our view, public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk, which notification, in our view, is the mandate of the Assembly. This is when the removal process crystallises. However, the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders is limited. It is, therefore, not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of legislation.²⁶⁷

In view of the tight timelines during the impeachment process, the High Court held that public participation would consider the limited time and assess what is reasonable in the circumstances. The High Court stated:

In deciding whether the County Assembly complied with its duty to facilitate public participation, the Court will consider what the County Assembly has done. In this case, the question will be whether what the County Assembly has done is reasonable in all the circumstances. The factors that would determine reasonableness would include the nature of the business conducted by the County Assembly and whether there are timelines to be met as set by the law. This will be the ultimate determination of the method of facilitating public participation.²⁶⁸

In its conclusion regarding the issue of public participation, the learned judges of the High Court considered the affidavit evidence submitted by the parties. The Governor and other appellants had asserted in the supporting affidavit that the removal of the appellant was a business of the County Assembly in which the appellants and cross-appellants had a right to participate directly and that their exclusion infringed this right. On the other hand, the respondents had asserted through their replying affidavit that there was public participation in the removal process as the committee and plenary proceedings of the Assembly were open to the public and that the County Assembly had established public contact offices in the County Assembly wards through which notices of its business were disseminated to the public. The appellants, therefore, had the opportunity to participate in the removal process.

267. *ibid* para 203.

268. *Martin Nyaga Wambora v County Assembly of Embu and 37 others* [2015] EKLK, para 43.



The Court noted that the statements of the County Assembly in the affidavits were not contradicted by any further affidavits by the Governor and the other appellants. The High Court concluded thus:

We have considered the period provided within which public participation may be conducted and the statutory structures for citizen participation, as well as the mode of notification formulated by the County Assembly. According to the respondents, these included the establishment of public contact offices in each of the County Assembly Wards and the recruitment of Ward staff to facilitate public participation. They also contended that the County Assembly, through the office of the Clerk, disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. From the averments by the parties before the Court, we are not satisfied that the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings has been proved. We are unable to stretch the averments in the supporting affidavit set out hereinabove to mean that the respondent's infrastructure stated in paragraph 32 of the replying affidavit was not adhered to in this case. It must be emphasised that in matters such as this, evidence is contained in the affidavit rather than in submissions.²⁶⁹

The Court of Appeal was of a contrary view to the High Court regarding the latter's findings on public participation during the County Assembly session. The Court of Appeal noted that the High Court had correctly observed that the timelines in the Standing Orders ²⁷⁰ provided a stricture that prevented public participation.²⁷¹ The Court of Appeal noted that the law places an obligation on the County Assembly to facilitate public participation. The Governor and the other appellants had claimed that their right to participation had been infringed upon, and the burden was on the County Assembly to demonstrate compliance with the required thresholds. The Court of Appeal noted that only general averments were made on the structures to facilitate public participation without any specific and relevant details on how this was facilitated.²⁷²

269. Martin Nyaga Wambora v County Assembly of Embu and 37 others [2015] EKLK, para 43.

270. Standing Order 61 of the Embu County Assembly.

271. Martin Nyaga Wambora v County Assembly of Embu and 37 others [2015] EKLK, para 40.

272. *ibid*.



The court added that it was misleading to conclude that there was public participation simply because proceedings in the assembly were open to the public, as there is no opportunity for a member of the public to participate. The Court of Appeal added that:

The Court of Appeal added that:

While I am mindful of the fact that what was before the County Assembly was not a legislative process, the removal of the Governor was not just any other business of the County Assembly but a matter in which the electorate in the County Assembly was deeply interested, the electorate has directly elected the Governor. The matter was weighty and of great interest to the people of Embu, whose only opportunity to participate effectively in the removal process was from the time of communication of the motion to the Speaker of the County Assembly to the time the motion was debated in the County Assembly.²⁷³

The Court of Appeal concluded that having found that the period provided for in the County Assembly rules was not sufficient to facilitate public participation and there was no evidence submitted of dissemination of information relevant to the removal of the Governor, the High Court ought to have concluded that the appellants were not afforded an opportunity to participate in the impeachment process.²⁷⁴

The Supreme Court has had to consider public participation in impeachment proceedings. In the matter of impeachment of Governor Mike Sonko, the Governor had argued that the lower courts erred by failing to hold that there was no public participation in the impeachment process. The Supreme Court stated that to completely lock out the electorate from being heard in a matter as important as the removal of their Governor would be against the spirit of Article 1 (2) of the Constitution.

273. *Martin Nyaga Wambora v County Assembly of Embu and 37 others* [2015] EKLK, para 43.

274. *ibid* para 46.



However, the court added that whether there was public participation or not will depend on evidence adduced to support the same. In the current case, the High Court and the Court of Appeal both found that there was sufficient public participation, and the Supreme Court saw no reason to disturb such a finding. The Supreme Court held that the people participated directly and also exercised their power through their elected representatives at both national and county levels to uphold and defend Chapter Six of the Constitution.²⁷⁵

During the impeachment of Governor Mwangaza of Meru, the Governor contested her impeachment at the County Assembly by stating that there was insufficient public participation. The Governor stated that she was elected to office by over 209,148 voters in Meru County. Consequently, a public participation exercise involving a paltry 1,000 constituents was inadequate for the purposes of the impeachment motion.²⁷⁶

The Governor argued that the public participation exercise was done on short notice and within 24 hours before the motion was debated. She further stated that there was no meaningful public participation as the proponents conducted a predetermined and box-ticking public participation process, where any dissenting voice and anyone against her impeachment at the public hearing gatherings was roughed up and chased away. She also stated that the public was not informed of the grounds for impeachment, nor was the public participation done in a way to give voters of Meru a chance to express their views. She further testified that the public participation exercise conducted by the MCAs was marred with violence, harassment, bribery and intimidation.²⁷⁷

Further, the then-embattled Governor referred to the Meru County Public Participation Act of 2014 and concluded that the public participation exercise for the impeachment was conducted contrary to the principles and expectations of the law.²⁷⁸

275. *Sonko v County Assembly of Nairobi City and 11 others* [2022] KESC 76 (KLR), para 158.

276. The Senate, 'The Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Hon. Kawira Mwangaza, the Governor of Meru' (30 December 2022) 63.

277. *ibid* 64.

278. *ibid* 64.

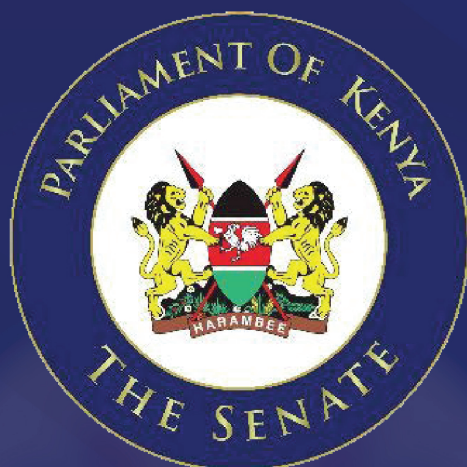


In its observations, the Special Committee noted that the documents that were submitted as evidence of public participation appeared to have been generated from a central place as opposed to being evidence of genuine public views. However, the Special Committee never made any comment on the threshold of public participation and whether it affected the process of impeachment.

5.5 Conclusion

Public participation and accountability in governance processes, including impeachments, are requirements of the Constitution of Kenya 2010. As noted in the chapter, both the County Assemblies and the Senate are required to facilitate public participation in all their processes, including impeachment. However, courts have also taken note of the limited timelines within which the impeachment process is supposed to be conducted and concluded. The courts have, thus, observed that public participation processes should be mainstreamed within the existing timeframes. However, the courts have also expressed reservations about the quality of public participation in the impeachment process and whether the same meets the intended constitutional threshold.





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