

46 REP'



REPORTING OFFICER'S SERVICE (R.O.)  
ACC. NO. ....  
CLASS. ....

**Report and Recommendation**

**of**

**The Tribunal to Investigate the Conduct**

**of**

**The Hon. Mr. Justice P. N. Waki  
Judge of Appeal**

INTERNATIONAL SERVICE (R.O.)  
ACC. NO. 2014 - 274  
CLASS. K 353.46 REP.

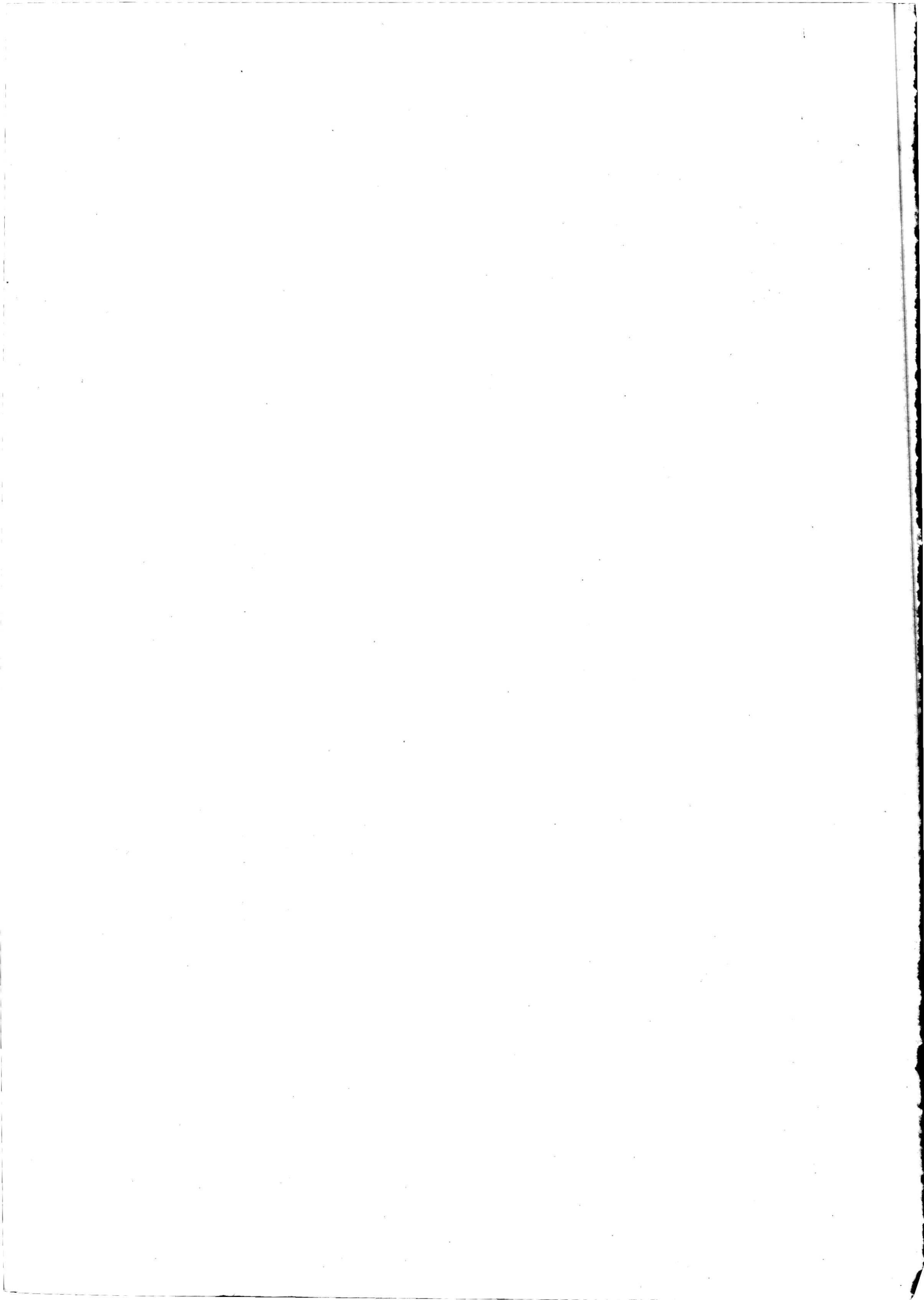
**Chairman**

**The Hon. Mr. Justice (Rtd) Akilano Molade Akiwumi**

**Presented  
to**

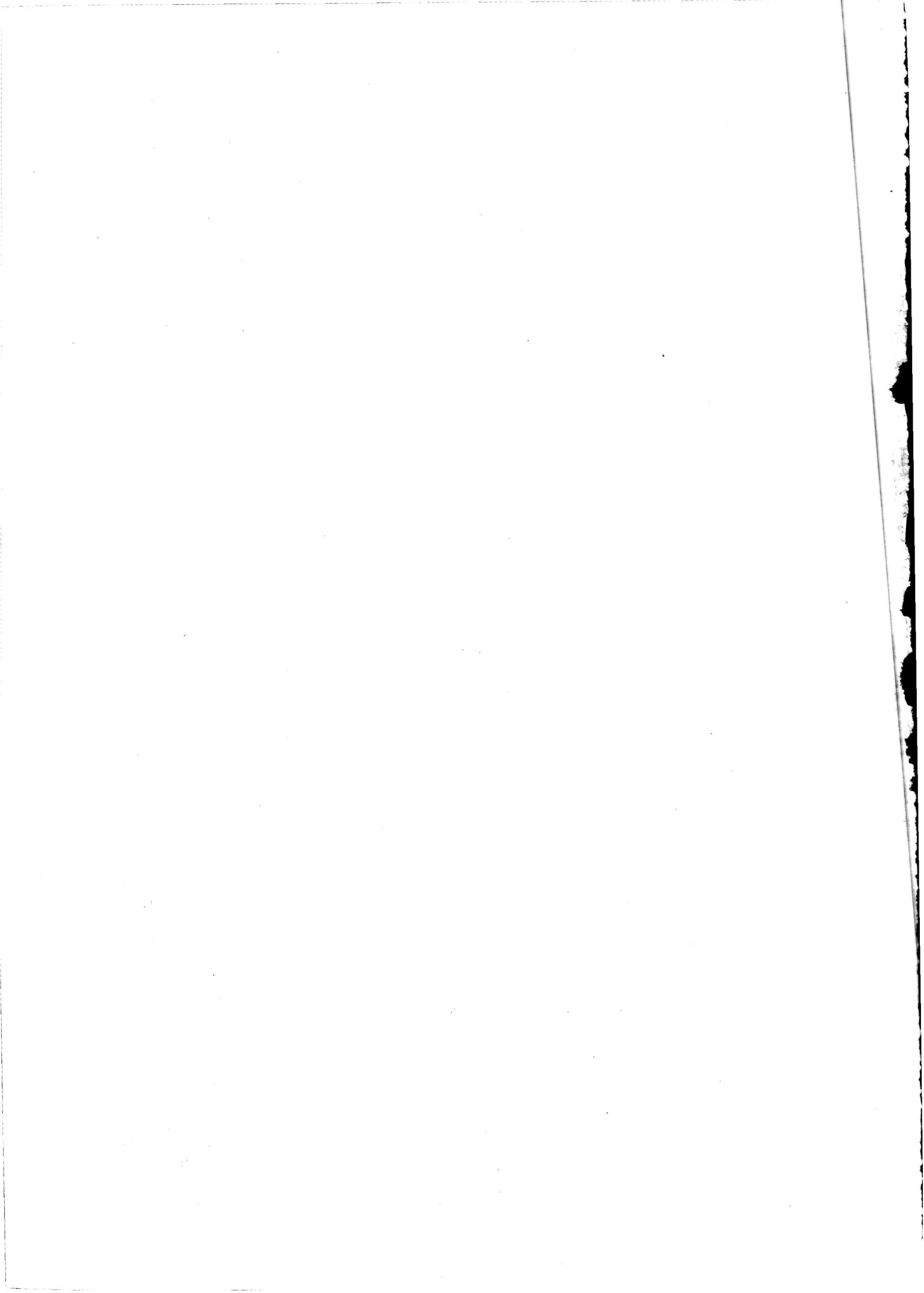
**His Excellency  
The Hon. Mwai Kibaki, C.G.H., M.P.,  
President and Commander-in-Chief of the Armed Forces  
of the  
Republic of Kenya**

**August, 2004**



# TABLE OF CONTENTS

	<b>Page</b>
Letter of Transmittal. ....	(v)
Acknowledgments. ....	(ix)
Introduction. ....	1-19
General Observations. ....	20-31
Allegations. ....	32-80
Allegation Number One. ....	32-58
Allegation Number Two. ....	32-58
Allegation Number Three. ....	59-62
Allegation Number Four. ....	32-58
Allegation Number Five. ....	63-64
Allegation Number Six. ....	65-67
Allegation Number Seven. ....	68
Allegation Number Eight. ....	69-75
Allegation Number Nine. ....	76-80
Recommendation. ....	81
<b>Appendices:</b>	
Appendix "A" -	Gazette Notice No. 8828 dated 11 <sup>th</sup> December, 2003.
Appendix "B" -	Gazette Notice No. 95 dated 6 <sup>th</sup> January, 2004.
Appendix "C" -	List of Witnesses.
Appendix "D" -	List of Exhibits.
Appendix "E" -	Relevant Proceedings of the Integrity and Anti-Corruption Committee of the Judiciary (Ringera Committee).





# TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL

## TRIBUNAL:

The Hon. Mr. Justice (Rtd) Akilano Molade Akiwumi (Chairman)  
The Hon. Mr. Justice William Shirley Deverell (Member)  
The Hon. Mr. Justice Benjamin Patrick Kubo (Member)  
Joe Wandago Okwach, Esq., SC (Member)  
Philip Nzamba Kitonga, Esq., SC (Member)  
Mrs. Margaret Nduku Nzioka (Secretary)

## SECRETARIAT:

1<sup>st</sup> Floor, Anniversary Towers,  
University Way  
P.O. Box 34135, 00100  
NAIROBI  
Tel : 254-020-313197

27<sup>th</sup> August, 2004

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

Your Excellency,

We, the Hon. Mr. Justice (Rtd) Akilano Molade Akiwumi, the Hon. Mr. Justice William Shirley Deverell, the Hon. Mr. Justice Benjamin Patrick Kubo, Joe Wandago Okwach, Esq., SC and Philip Nzamba Kitonga, Esq., SC were, in exercise of the powers conferred on Your Excellency by sections 62(5) and (6) and 64(3) of the Constitution, appointed on the 10<sup>th</sup> December, 2003 by Gazette Notice No. 8828, published in the Special Issue of the Kenya Gazette Vol. CV-No.124 of the 11<sup>th</sup> December, 2003, to be members of a Tribunal to investigate the conduct of Judges of Appeal Moijo M. ole Keiwua and P. N. Waki. The mandate of the Tribunal, whose Chairman is the Hon. Mr. Justice (Rtd) Akilano Molade Akiwumi, and as set out in the Gazette Notice, was:-

- (a) to investigate the conduct of Judges of Appeal, Moijo M. ole Keiwua and P. N. Waki, including, but not limited to, the allegations

- (b) that the said Judges of Appeal have been involved in corruption, unethical practices and absence of integrity in the performance of the functions of their office; and
- (c) to make a report and its recommendations thereon to Your Excellency expeditiously.

The Gazette Notice further provided that the Tribunal shall have all the powers necessary for the proper execution of its mandate, including the power to:-

- (a) determine the times and venue of its meetings; and
- (b) to regulate its own procedure.

Mr. Mbuthi Gathenji and Mrs. Margaret Nduku Nzioka were also, in exercise of the powers conferred on Your Excellency by sections 62(5) and (6) and 64(3) of the Constitution, appointed on the 19<sup>th</sup> January, 2004 by Gazette Notice No. 377, published in the Special Issue of the Kenya Gazette Vol. CVI-No.10 of 20<sup>th</sup> January, 2004, as Counsel Assisting the Tribunal and Secretary to the Tribunal respectively.

Prior to embarking on the investigation, the Hon. Mr. Justice (Rtd) Akilano Molade Akiwumi, the Hon. Mr. Justice William Shirley Deverell, the Hon. Mr. Justice Benjamin Patrick Kubo, Mr. Joe Okwach, SC and Mr. Nzamba Kitonga, SC each made and subscribed to an oath before the Chief Justice of Kenya.

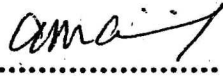
The Tribunal is the first of its kind to be established in Kenya, to investigate the conduct of Judges of Appeal. The immense national importance of the Tribunal, and the wide ranging extent and implications of its investigation, demanded the utmost patience, impartiality and meticulous inquiry on our part.

We have in accordance with sections 62(5)(b) and 64(3) of the Constitution, carried out and completed our investigation into the allegations of misconduct against the Hon. Mr. Justice P. N. Waki. The decision of the Tribunal, derived from our investigation of the facts thereof, is that Justice Waki ought not to be removed from office. The Tribunal now so recommends to Your Excellency. The consequence of this recommendation is that, in accordance with the provisions of sections 62(6) and 64(3) of the Constitution, the current suspension of the Hon. Mr. Justice Waki from exercising the functions of his office, immediately ceases to have effect.

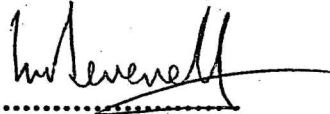
We now have the honour, Your Excellency, to submit our Report to you and to thank you for the trust that you bestowed on us.

We are,

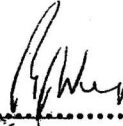
**Your Excellency's most obedient servants,**



.....  
**The Hon. Mr. Justice (Rtd) A. M. Akiwumi**



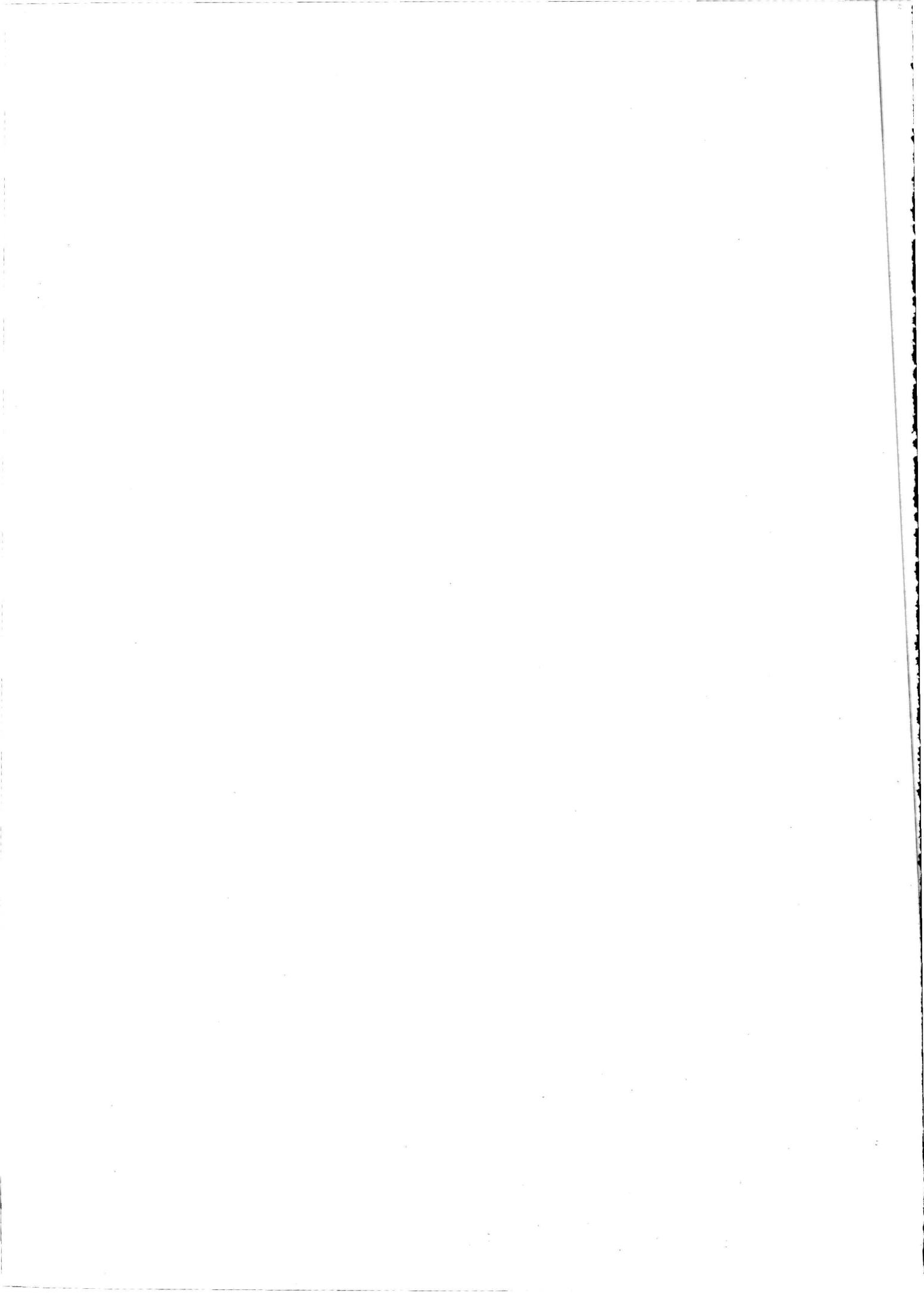
.....  
**The Hon. Mr. Justice William Shirley Deverell**



.....  
**The Hon. Mr. Justice Benjamin Patrick Kubo**



.....  
**Joe Wandago Okwach, Esq., SC**



## ACKNOWLEDGEMENTS

We would like to record our appreciation to Assisting Counsel, M. Gathenji, Esq. and to M. Kilonzo, Esq., SC, G. Oraro, Esq., K. Shah, Esq. and Miss. D. Kilonzo who represented Justice Waki, whose assistance was invaluable in our efforts to ascertain the truth. We cannot also forget those other counsel who represented some of those adversely affected by evidence given before the Tribunal, and who deserve our appreciation; they are T. Bittole, Esq., E. Shiluli, Esq., J. R. K'Owade, Esq., O. Opiyo, Esq., M. Mwilu, Esq., K. Wandugi, Esq., C. Kirundi, Esq., P. N. Mugo, Esq., R. E. Enane, Esq., P. Bowry, Esq., H. Ndubi, Esq., M. Kigano, Esq., O. Otondo, Esq., P. Janeny, Esq. and Mrs. M. Metho.

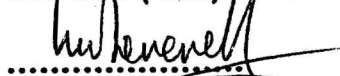
We must express our appreciation for the contribution of the Secretary to the Tribunal, Mrs. M. N. Nzioka, in the work of the Tribunal. The following deserve our gratitude for their most commendable role in our proceedings; the Hansard team for the preparation of the voluminous verbatim report of our proceedings which we have found extremely useful in the preparation of our Report.

The writing of our Report was indeed, the most difficult and exacting part of our task. This we could not have achieved without the dedicated work of our Personal Secretary, Miss. Rigiri Nkirote Gitonga, our Clerk, Stephen Ngugi of the Nairobi High Court, Civil Registry and the Administrative Staff of the Tribunal.

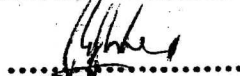
We would finally like to thank the Office of the President which placed at our disposal physical and other facilities for the use of the Tribunal.



.....  
**The Hon. Mr. Justice (Rtd) A. M. Akiwumi**



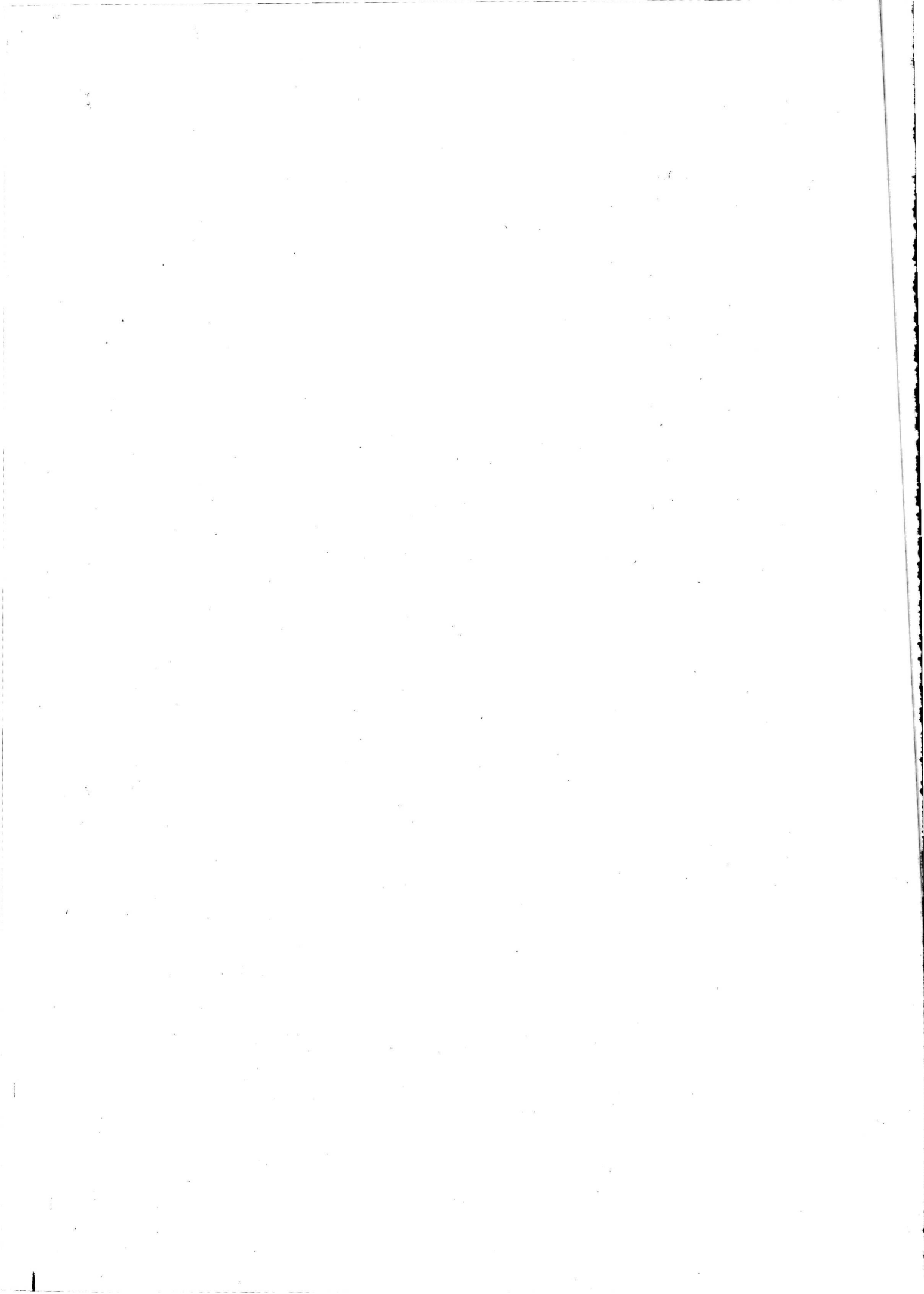
.....  
**The Hon. Mr. Justice William Shirley Deverell**



.....  
**The Hon. Mr. Justice Benjamin Patrick Kubo**



.....  
**Joe Wandago Okwach, Esq., SC**



## **INTRODUCTION**

This Report deals only with the investigation by the Tribunal into the conduct of Judge of Appeal, the Hon. Mr. Justice P. N. Waki.

Our appointment as members of the Tribunal to investigate the conduct of Judge of Appeal, the Hon. Mr. Justice P. N. Waki, which is contained in Gazette Notice No. 8828 dated the 11<sup>th</sup> December, 2003, and the appointment of Mbuthi Gathenji and Margaret Nduku Nzioka as Counsel to Assist the Tribunal and Secretary to the Tribunal, respectively, and contained in Gazette Notice No. 377 dated the 20<sup>th</sup> January, 2004, are reproduced as Appendix "A" of this Report.

In exercise of the power conferred upon the Tribunal to regulate its own procedure, the Tribunal made its Rules of Procedure, which are reproduced in Appendix "B" of this Report.

Before the Tribunal began its hearings, Senior Counsel, Philip Nzamba Kitonga who is a member of the Tribunal, was also appointed by the President to be the Vice-Chairman of the Goldenberg Judicial Commission of Inquiry. He was not, however, replaced as a member of the Tribunal. He was therefore, hardly able to sit in the hearings of the Tribunal and so, could not take part in the preparation of this Report. Therefore, taking into account the inability for one reason or another, of a member of the Tribunal to take part in a hearing of the Tribunal, the Rules of Procedure of the Tribunal, provided that a minimum quorum for a hearing of the Tribunal shall be the Chairman and any two members of the Tribunal.

Further, in order to enable the affected Judge of Appeal to be made reasonably aware of the allegations made against him, the Rules of Procedure of the Tribunal provided:-

- (a) that the subject of the investigation or any person adversely affected or implicated in the investigations shall have the right to be present during the proceedings that relate to him or her and may choose to be represented by counsel and shall have the right to cross-examine witnesses who give evidence against him or her either by himself or herself or by counsel; and

- (b) that the Counsel assisting the Tribunal shall draw up a list of the allegations against each subject of the investigation, together with a summary of the evidence in support of the allegations and shall serve the document containing the allegations and the summary of the evidence on the subject of the investigation, at least fourteen (14) days before the date of the hearing.

In its investigation into the conduct of Judge of Appeal, the Hon. Mr. Justice P. N. Waki, the Tribunal sat and heard evidence virtually continuously from the 9<sup>th</sup> February, 2004, to the 2<sup>nd</sup> August, 2004. The Tribunal heard a total of forty witnesses whose names are listed in Appendix "C" of this Report and received in evidence a total of ninety three exhibits which are listed in Appendix "D" of this Report.

The relevant sections of the Constitution regarding the removal of a Judge of the Court of Appeal from office, are as follows:-

"62 (4) A judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed under subsection (5) and the tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or for misbehaviour.

(5) If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated, then -

(a) the President shall appoint a tribunal which shall consist of a chairman and four other members selected by the President from among persons -

- (i) who hold or have held the office of judge of the High Court or judge of appeal; or

- (ii) who are qualified to be appointed as judges of the High Court under section 61 (3); or
  - (iii) upon whom the President has conferred the rank of Senior Counsel under section 17 of the Advocates Act; and
- (b) the tribunal shall inquire into the matter and report on the facts thereof to the President and recommend whether that judge ought to be removed under this section.

(6) Where the question of removing a judge from office has been referred to a tribunal under this section, the President, acting in accordance with the advice of the Chief Justice, may suspend the judge from exercising the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with the advice of Chief Justice, and shall in any case cease to have effect if the tribunal recommend to the President that the judge ought not to be removed from office.

...

64 (3) The foregoing provisions of this Part shall apply in respect of the judges of appeal as they apply to puisne judges.”.

In accordance with the Rules of Procedure of the Tribunal, Counsel Assisting the Tribunal, whom we shall hereinafter, refer to as Assisting Counsel, drew a list of the allegations against Justice Waki together with a summary of evidence in support of the allegations which were properly served on Justice Waki. The allegations and the summary of evidence as drawn up by Assisting Counsel and served on Justice Waki, which in some cases overlap and which constitute the subject matter of our investigation are:-

#### **“LIST OF ALLEGATIONS**

TO: HON. JUSTICE PHILIP NYAMU WAKI  
C/O KAREN  
KAREN ROAD, NAIROBI

WHEREAS HIS EXCELLENCY THE PRESIDENT AND COMMANDER IN CHIEF OF THE ARMED FORCES OF THE REPUBLIC OF KENYA has appointed the Tribunal to investigate your conduct as per the mandate of the Tribunal set out and published in the Gazette Notice Number 8828 of 2003;

PURSUANT TO RULE 8(2) of the RULES OF PROCEDURE OF THE TRIBUNAL TO INVESTIGATE THE JUDGES OF APPEAL Published in the Gazette Notice Number 95 of 6 January 2004 the COUNSEL ASSISTING THE TRIBUNAL HEREBY draws and lay before the Tribunal the list of allegations here below, against you, HONOURABLE MR. JUSTICE PHILLIP NYAMU WAKI, the subject of the investigation and inquiry under S.62(5) and S.64(3) of the Constitution of Kenya(2001).

**1. ALLEGATION NUMBER ONE**

**(a) STATEMENT OF MISBEHAVIOUR.**

That the Hon. Justice Philip Nyamu Waki failed to exercise his judicial functions as a puisne judge independently; in

- (i) Assessment of relevant facts
- (ii) And/or in accordance with conscientious understanding of the law
- (iii) And/or free from extraneous influences

**(b) PARTICULARS OF MISBEHAVIOUR**

That between the 30<sup>th</sup> day of April 2002 and 21<sup>st</sup> March 2003 heard in his Chambers two

interlocutory applications dated 14<sup>th</sup> March 2002 and 26/3/2002 filed in the: **Nairobi High Court Civil Case No. 1473 of 1997 KHURSHID AHMED BUTT -VS-**

- (1) **BAKTASH AKASHA**
- (2) **KARIMA IBRAHIM ABDALLA AKASHA**
- (3) **HAYATI IBRAHIM ABDALLA AKASHA**
- (4) **FATUMA IBRAHIM ABDALLA AKASHA**
- (5) **NURDIN IBRAHIM AKASHA**
- (6) **KAMALDIN IBRAHIM ABDALLA AKASHA**
- (7) **HASSAN IBRAHIM ABDALLA AKASHA**
- (8) **NURI IBRAHIM ABDALLA AKASHA**
- (9) **FIESAL IBRAHIM ABDALLA AKASHA**
- (10) **ABDALLA IBRAHIM AKASHA**
- (11) **IBRAHIM ABDALLA AKASHA**
- (12) **NARGIS IBRAHIM ABDALLA AKASHA**
- (13) **ATYA IBRAHIM ABDALLA AKASHA**
- (14) **NAJIMA IBRAHIM ABDALLA AKASHA**
- (15) **KARIMA IBRAHIM ABDALLA AKASHA**
- (16) **DURZIA IBRAHIM ABDALLA AKASHA**
- (17) **HAYATI IBRAHIM AKASHA**
- (18) **WARDA IBRAHIM ABDALLA AKASHA**

(Sued in their capacities as beneficiaries to the estate of the late **ABDALLA IBRAHIM AKASHA**.)

- The complainant was MR. KHURSHID AHMED BUTT the Plaintiff and Respondent in both the applications for setting aside an interlocutory judgment entered *ex parte* in his favour by the Deputy Registrar HON. MR. C. K. NJAI on the 5<sup>th</sup> December 2001.
- That he heard the evidence forming the basis of the said application from applicants and two process servers. The issue concerned the service of summons on the applicants.

- That on cross-examination of the applicants it was apparent that the 4<sup>th</sup> Defendant/Applicant was unreliable and disowned her affidavit in support of her application. That in his ruling granting the application and setting aside the judgment ignored to evaluate or properly evaluate the evidence adduced by the Respondent. The complainant alleged that he exhibited partiality and bias against him.
- The complainant alleged that the reason for the partiality and bias was because he had personal knowledge and close association with MR. BAKTASH AKASHA, the first Defendant and his family.
- The complainant alleged that during the hearing of this matter he (the subject) personally had an *ex parte* consultation with one MR. NURDIN IBRAHIM ABDALLA AKASHA the fifth Defendant/Applicant in his Chambers.
- The complainant further alleged that he (the subject) was influenced by prior complaints of corruption and impropriety made by the complainant against him while he was a judge in Mombasa.

**(C) SUMMARY OF EVIDENCE**

The main witnesses are the advocates of the complainants MR. M. A. KHAN and MR. SATISH GAUTAMA who conducted the defence of the application to set aside. The evidence of MR. M. A. KHAN is that he was surprised by the ruling dated 21/3/2003 as it failed to assess or

evaluate the evidence of the applicants especially lack of affidavit and the credibility of the witnesses.

The Counsel Assisting the Tribunal shall produce before the Tribunal the pleadings, the proceedings and the ruling with respect to both applications dated 26/3/2002 and 14/3/2002. The Advocate for the respondent shall testify on the assessment of facts by your Lordship and the ruling.

The two Process Servers shall also testify on the manner in which they were cross-examined by both the Counsels and the court.

It is the case of the Complainant that during the hearing of the application one of the defendants/applicants entered into your Chambers and consulted with you *ex parte* in the absence of his counsel. This is based on eyewitness evidence of the complainant.

The Counsel Assisting the Tribunal shall lay before the Tribunal the relevant law on service of summons and the precedents on setting aside *ex parte* judgment. Other evidence to be adduced before the Tribunal will be the rules of evidence especially burden of proof and admissibility.

The Process Servers who shall testify on the service of summons are Mr. Alfred Owino Ouma and Mr. Evan Ngaira. They have experience in service of summons within the jurisdiction of the High Court.

## **2. ALLEGATION NUMBER TWO**

### **(a) STATEMENT OF MISBEHAVIOUR**

That he failed to disqualify himself from participating in the proceedings in the **Nairobi High Court Civil Case No. 1473 of 1997 KHURSHID AHMED BUTT -VS- BAKTASH AKASHA AND 17 OTHERS** whereas he knew or had reason to believe he was unable to decide impartially or in which a reasonable, fair minded and informed person would believe that he would be unable to decide impartially.

### **(b) PARTICULARS OF MISBEHAVIOUR**

The complainant in this matter is MR. KHURSHID AHMED BUTT. He alleges that he (the subject) was personally known, friendly, had intimate social and personal relationship with the family of MR. BAKTASH AKASHA the 1<sup>st</sup> Defendant in the **Nairobi High Court Civil Case No. 1473 of 1997 KHURSHID AHMED BUTT - VS- BAKTASH AKASHA AND 17 OTHERS**

- (i) That he visited MR. BAKTASH AKASHA'S house in Mombasa between 17/7/02 and 15/10/2002.
- (ii) That MR. BAKTASH AKASHA was the Defendant No. 1 in the **High Court Civil Case No. 1473 of 1997**.
- (iii) That the said BAKTASH AKASHA had a house next to VOYAGER (SILVER BEACH HOTEL, MOMBASA)
- (iv) That sometimes in December 2002 he (the subject) was picked by a motor vehicle belonging to the family of the late MR. ABDALLA AKASHA and driven to his house.
- (v) That on 27/2/2003 MR. NURDIN IBRAHIM AKASHA was seen by the

complainant coming from his Chambers in the Nairobi Law Courts.

- (vi) That MR. NURDIN IBRAHIM AKASHA was the Defendant Number five in the same suit and applicant in the application dated 26/3/2002 for interlocutory orders of setting aside judgment against him.
- (vii) That prior to his (the subject) transfer from Mombasa, he associated himself and was a close friend of, *inter alia*, the following individuals
  - (a) MR. SAMMY KATHIKI
  - (b) MR. YUSUF DATTOO
  - (c) MR. L. J. MAGHNANI
  - (d) MR. SUNNY NAWAB
  - (e) MR. AMJAD MELEK
  - (f) MR. KANYI ADVOCATE
- (viii) That the said individuals were close friends of MR. BAKTASH AKASHA and his family.
- (ix) That prior to the hearing of the interlocutory application dated 26/3/2002 and 14/3/2002, he knew or had reason to believe that a complaint of corruption had been made by the complainant against him (the subject) and other judges sitting in Mombasa. The said complaints were contained in letters and written memorandums circulated to among others the Chief Justice, the Attorney General and the Anti Corruption Unit in Nairobi and Mombasa.

**(c) SUMMARY OF EVIDENCE**

Evidence shall be adduced to show that having regard to your prior knowledge of the person of

the plaintiff by virtue of his cases you had heard in Mombasa, and your undue familiarity with the Akasha family it was mandatory and incumbent upon you on your own motion to disqualify yourself from hearing any matter falling under **High Court Civil Case No. 1473 of 1997.**

The witnesses who shall testify will include among others:-

1. Mr. Khurshid Ahmed Butt
2. Mr. Mohamed Ahmed Khan
3. Mr. William Ouko, Registrar
4. Mr. Benjamin Mwangi, Executive Officer Mombasa
5. Mr. Sammy Kathiki
6. Mr. Yusuf Datoo
7. Mr. Sunny Nawab

Mr. Khurshid Ahmed Butt shall testify that you had previously handled his cases in Mombasa, and that he had complained about corruption in the Judiciary and Police Department. He filed this case in Nairobi to avoid it being heard in Mombasa by the Judges there including yourself. But you were transferred to Nairobi and proceeded to hear two interlocutory applications in the matter whereby you promptly set aside the judgments that were in favour of the plaintiff. Further, during the pendency of the hearings, you visited one Baktash Akasha in Mombasa as well as hosted Nurdin Ibrahim Akasha in your Chambers in Nairobi.

The Executive Officer Mombasa Law Courts shall testify that while in Mombasa you handled cases involving the plaintiff.

Mr. William Ouko the registrar will testify on the method of allocation of cases to Judges, and the method and discretion of a Judge to disqualify himself.

Mr. Mohamed Khan Advocate shall testify that the plaintiff had complained to him about your previous bias against him and your close association with the Akasha family.

Further evidence shall be adduced to show that you were unduly familiar with Mr. Sammy Kathiki, Mr. Yusuf Dato, Mr. L. J. Maghnani, Mr. Sunny Nawab, Mr. Kanyi Advocate (former magistrate), Amjad Melek, all who were associated with the Akasha and/or his business ventures.

### **3. ALLEGATION NUMBER THREE**

#### **(a) STATEMENT OF MISBEHAVIOUR**

That as a judge of the High Court he failed to disqualify himself from participating in proceedings in which he was unable to decide impartially or in which a reasonable fair minded and informed person might believe that he (the subject) as a judge would be unable to decide the matter impartially.

#### **(b) PARTICULARS OF MISBEHAVIOUR**

That on the 17<sup>th</sup> June 1998 he heard a civil suit in **Mombasa High Court Civil Case No. 158 of 1996 KHURSHID AHMED BUTT -VS- PEGASUS TEA LIMITED.** In this matter the advocate appearing for the Defendant was a person intimate and associated with his family. The said advocate MRS. PAMELA TUTUI made an application at his invitation for her costs and

he obliged and adjourned the matter. That he showed hostility and partiality. That he (the subject) failed to accord the complainant reasonable time to call his lawyer Mr. Madzayo.

In her evidence she does confirm three incidents in which she met him outside the jurisdiction of the court. She confirms she attended at least two social events in his house. She confirms that he consulted on a private matter concerning his own household at the instance of his spouse.

**(c) SUMMARY OF EVIDENCE**

The Complaint arises from Mombasa High Court. The Complainant MR. KHURSHID AHMED BUTT states that he was a party to the suit. He was the Plaintiff and Mr. Madzayo advocates were on record for him. The Defendant was represented by Mrs. Pamela Tutui. The suit was listed for hearing on 17/6/98 before yourself and when called for hearing the advocate for the Plaintiff was absent. That without any inquiries you proceeded to request gratuitously what the advocate for the Defendant wanted. You then granted her the costs for the day in the sum of Kshs.1,000/- and ordered the plaintiff to pay court adjournment fees. You also gave a substantive order that interest shall not be paid in the Plaintiff's claim.

The evidence in the possession of the Assisting Counsel is that there was a personal relationship between yourself, your family and the advocate Mrs. Pamela Tutui. That she was a close friend to your wife and used to visit your house and likewise you visited her in her firm's Chambers.

The evidence of the complainant is that on the material day you were hostile and intolerant with him. You showed a bias in her favour and against him

#### **4. ALLEGATION NUMBER FOUR**

##### **(a) STATEMENT OF MISBEHAVIOUR**

That while a judge of the High Court of Kenya he performed his judicial duties with favourism, bias and prejudice

##### **(b) PARTICULARS OF MISBEHAVIOUR**

That he proceeded to hear the High Court case No. 1473 of 1997 KHURSHID AHMED BUTT - VS- BAKTASH AKASHA & 17 OTHERS and gave a favourable judgment to the applicants despite the facts and circumstances. The Complainant alleges that his association with the family of AKASHA was the reason for granting the orders for setting aside the judgment entered in their favour.

##### **(c) SUMMARY OF EVIDENCE**

The evidence of favouritism, bias and prejudice is based on your friendship and/or close relationship with the Akasha Family. The complainant Mr. Khurshid Ahmed Butt in his evidence states you visited the house of Akasha before, during and after hearing of this case HCCC No. 1473 of 1997 Khurshid Ahmed Butt -vs- Baktash Akasha and 17 others. He alleges he saw you about 3 times visiting the said premises and or in company of the members of Akasha family. The exercise of discretion in favour of the Akasha in the said case is subject of comments by the counsels

appearing for the complainant as stated in the evidence in support of allegation number one. The Counsel Assisting the Tribunal shall call the Advocate who is a senior member of the bar Mr. M. A. Khan on this issue. The summary of his evidence is that the evidence in support of the application for setting aside was insufficient to justify the orders granted. The standard of the decision is below that of an experienced judge of your calibre. He takes issue with the directions given by you that he would be limited to ten minutes during the hearing of the application. The complainant's evidence is that the previous complaints against your lordship was a factor militating against him.

He also takes issue that indeed you were aware of the house of Akasha at the time of hearing of the application. The description given by process servers and cross-examination by your Lordship were matters not only within your knowledge but which you could have taken judicial notice.

## **5. ALLEGATION NUMBER FIVE**

### **(a) STATEMENT OF MISBEHAVIOUR**

That, while a judge of the High Court of Kenya in the Republic of Kenya that he conducted himself in a way and manner inconsistent with the dignity of the judicial office.

### **(b) PARTICULARS OF MISBEHAVIOUR**

That he associated himself with and kept close company of persons and individuals who were members of drug trafficking cartel.

**(c) SUMMARY OF EVIDENCE**

The evidence in support of this includes the evidence in support of allegation number one, six and seven.

**6. ALLEGATION NUMBER SIX**

**(a) STATEMENT OF MISBEHAVIOUR**

That while a judge of the High Court at Mombasa he kept, maintained a close personal association with individuals who were members of the legal profession and ordinarily practised in the Mombasa High Court. That the said association gave rise to the suspicion and/or appearance of favourism or partiality.

**(b) PARTICULARS OF MISBEHAVIOUR**

That while a judge of the High Court of Kenya based in Mombasa he had and maintained a close personal and social relationship with, among others:-

1. Mrs. Pamela Tutui
2. L. Maghnani

**(c) SUMMARY OF EVIDENCE**

The evidence of the relationship between yourself and Mrs. Pamela Tutui is given above with respect to an allegation number (3) three. She admits that besides being a friend she was advocate practising in Mombasa within the jurisdiction of your court. She was admitted in 1983 and at the time of your posting in Mombasa she was familiar with your family.

The Counsel Assisting the Tribunal shall lay before the Tribunal evidence of her admission and practice in Mombasa at the material time.

With respect to L. Maghnani the Counsel Assisting the Tribunal shall lay evidence before the Tribunal that he was an advocate practicing in Mombasa. That he was a member of Nyali Golf Club. That you socialized with him in the Golf Courses within and outside the club premises. That he was the advocate for Akasha family who were also your close friends.

The evidence shall be adduced from among others the following witnesses:-

- a) The Complainant, Mr. Khurshid Ahmed Butt
- b) The Manager of the Golf Club, Mr. Musa Odada Muga
- c) Mr. Samuel John Kathiki
- d) The Registrar of the High Court, Mr. William Ouko
- e) The Secretary, Law Society of Kenya

## **7. ALLEGATION NUMBER SEVEN**

### **(a) STATEMENT OF MISBEHAVIOUR**

That as a judge of the High Court of Kenya he failed to exhibit and promote high standards of judicial conduct in order to reinforce public confidence, which is fundamental to the maintenance of judicial independence.

### **(b) PARTICULARS OF MISBEHAVIOUR**

That, while in Mombasa and Nairobi High Court he:-

- (i) Kept company and associated himself with persons and individuals who were known publicly to be involved in drug trafficking. He visited the Akasha family and their associates.
- (ii) He associated himself with members of the bar practising in your jurisdiction, among others Mrs. Pamela Tutui and L. Maghnani as stated in allegation number six
- (iii) He allowed a party to the suit and witness to enter his Chambers while hearing a case in the absence of the party or his advocates.

(c) **SUMMARY OF EVIDENCE**

That besides the evidence to be adduced with respect to the other six allegations the counsel assisting the tribunal shall adduce the following evidence

- (i) The personal observation of the complainant MR. KHURSHID AHMED BUTT as an ordinary man resident within the jurisdiction of your court
- (ii) The evidence of your friendship and association with the 'AKASHA'. This family was at all material times reputed for drug trafficking. Such evidence is contained in the admission in court of by one Nurdin Ibrahim Akasha while under cross-examination by Mr. Satish Gautama the advocate for the complainant.
- (iii) Evidence of the arrest and prosecution of the members of the family was a matter of public notoriety. The said evidence is

corroborated by the court proceedings, judgments and the reports in the media.

- (iv) The evidence of association with members of the bar practising within your jurisdiction shall be adduced by among others the complainant.

**WHEREFORE THE COUNSEL ASSISTING THE TRIBUNAL** has the honour to lay the said allegations before the Tribunal for investigation, inquiry, report and recommendations whether you ought to be removed from office as a judge in accordance with its Terms of Reference and the Constitution of Kenya

Dated this 20<sup>th</sup> day of January 2004.”.

Apart from the foregoing Allegations and their related Statements of Misbehaviour, Particulars of Misbehaviour and Summaries of Evidence, which had, in compliance with the Rules of Procedure of the Tribunal, been served on Justice Waki, the Tribunal, however, permitted Assisting Counsel, without serving Justice Waki in advance, with the relevant documents, to lead evidence on two other allegations of misbehaviour against Justice Waki, which were somewhat related to those already served on him. The first of these other allegations, was that Justice Waki accepted a monetary bribe from Mr. C. Kirundi an Advocate in a matter that was before him, namely **High Court Civil Case No. 495 of 1989 Juliane Ulrike Stamm v Tiwi Beach Hotel Ltd.** The second of these other allegations, was that Baktash Akasha through Justice Waki, bribed Chief Magistrate Boaz Olao with four million shillings in a criminal case before him in which Baktash Akasha and Mohamed Ghani Taib, among others, were being prosecuted for drug trafficking.

The summary of evidence in the first of these other matters, which we will call Allegation Number Eight, is that advocate Chege Kirundi gave his court clerk, Ephantus Muhoro, who had been sent to Mombasa to fix a hearing date for the hearing of the matter, an envelope full of one thousand shillings currency notes which, Muhoro as he said, he had been instructed by Chege Kirundi, to do, gave on the 10th December, 1998, to Justice Waki in his Chambers.

The summary of evidence in the second of these other matters, which we will call Allegation Number Nine, is that between 11:00 am and 12 noon on the 27th May, 2000, Baktash Akasha in the company of Ghani Taib and at the Kentmere Club near Limuru, gave to Boaz Olao through Justice Waki, four million shillings to induce him, *inter alia*, to grant bail to Baktash Akasha and Ghani Taib in the criminal case involving them and which he was hearing.

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## GENERAL OBSERVATIONS

There are some important observations which we would like to make before dealing with the specific allegations of judicial misconduct made against Justice Waki.

The genesis of the Tribunal's investigation, as is well known, is derived from the Report of the Integrity and Anti-Corruption Committee of the Judiciary appointed by the Chief Justice on the 19<sup>th</sup> March, 2003, to, in brief, investigate allegations of corruption in the Judiciary and to recommend disciplinary or other curative measures. The Committee is popularly referred to after the name of its Chairman, the then Judge of the High Court, the Hon. Mr. Justice A.G. Ringera, as the Ringera Committee. The Report of this Committee which is also known as the Ringera Report, was presented to the Chief Justice on the 30th September, 2003. The relevant excerpts of the proceedings of the Ringera Committee which are contained in Appendix "E" of this Report and the Ringera Report relating to Justice Waki, were presented to the Tribunal by Assisting Counsel, and we would like at this stage, to make some comments on them.

It is noteworthy, that the only verbal complaint of judicial misconduct made to the Ringera Committee against Justice Waki by the sole complainant or "Informant" as referred to in the Ringera Report, Khurshid Ahmed Butt, was about Justice Waki's improper association with the Akasha family, whilst hearing a case, **High Court Civil Case No. 1473 of 1997 Khurshid Ahmed Butt vs Baktash Akasha and 17 Others** in which members of the Akasha family had been sued by Khurshid Butt.

It was not unexpected, having regard to the mandate of the Ringera Committee, that Khurshid Butt's verbal complaint, was not heard on oath, neither was Justice Waki given the opportunity to question Khurshid Butt or to put his side of the story to the Ringera Committee. The brief finding of the Ringera Committee based solely on what Khurshid Butt had said to it, is as follows:-

"We received a complaint against the Honourable Judge before he was elevated to the Court of Appeal. The same complaint was received by us again on 22<sup>nd</sup> August, 2002 from the Honourable Chief Justice after the Honourable Attorney-General had forwarded it to him. The gist of the complaint was that while

in Mombasa, Justice Waki was closely associated to the "Akasha Family" - who our Informant referred to as known 'drug barons'. In the complaint to us, the informant told us that Justice Waki used to socialize with the Akashas even when they had cases going on before him. The Informant reported that he had seen Justice Waki visit the Akashas' house on three occasions and still proceeded to hear their case namely HCCC 1473/1997 where they were litigants and gave orders in their favour. We found the complaint credible. It amounts to unethical conduct/judicial misbehaviour."

Since the Ringera Committee was appointed on the 19th March, 2003, it could not have, as claimed in its Report, received from the Chief Justice on the 22<sup>nd</sup> August, 2002, a complaint about Justice Waki which had been forwarded to him by the Attorney - General. It cannot also be, as claimed in the Ringera Report, that Khurshid Butt's verbal complaint against Justice Waki made to the Ringera Committee prior to, and on, the 23<sup>rd</sup> April, 2003, and which was before Justice Waki's elevation to the Court of Appeal on the 22<sup>nd</sup> May, 2003, was the same as that contained in the letter from the Attorney - General which the Chief Justice had forwarded to the Ringera Committee.

When Khurshid Butt first appeared before the Ringera Committee and as its proceedings show, he made as was his name calling trade mark, wild, unsubstantiated, wide ranging accusations not only, against Justice Waki, which was unrelated to his socializing with the drug barons when hearing cases involving them, but also, against other Judicial Officers. As for the then Chief Justice, Bernard Chunga, and the Attorney - General, Amos Wako, Khurshid Butt claimed that the educational expenses of their children were being paid by the drug baron, Ibrahim Akasha. When Khurshid Butt appeared before the Ringera Committee for the second time on the 23<sup>rd</sup> April, 2003, he made a misleading complaint about Justice Waki which the Ringera Committee found credible. Khurshid Butt told the Ringera Committee that whilst undertaking construction work at Abdalla Akasha's Nyali house in Mombasa, he saw Justice Waki who frequently came there to wine and dine with the Akashas. The impression created by Khurshid Butt's complaint to the Ringera Committee, was that Justice Waki was already then a Judge of the High Court at the time he wine and dined with the Akashas. But the real position, according to Khurshid Butt's own evidence before the Tribunal, was that he only worked at the Akashas's Nyali house in 1994, which was long before Justice Waki, who was appointed a High Court Judge on the 31<sup>st</sup> October, 1995, was posted to

Mombasa in January 1996. If Khurshid Butt had revealed this real state of affairs to the Ringera Committee, it would most likely not have made the finding that it did. Khurshid Butt's very brief statement to the Ringera Committee, which does not even allude to the critical issue that Justice Waki wine and dined with the Akasha family whilst hearing applications to set aside *ex parte* judgments obtained in the High Court Civil Case No. 1473 of 1997, is as follows:-

**"I did construction work at the Akashas's house in Nyali where I was brutally assaulted. Waki J. was a regular visitor there. Akasha said that he could do anything he wanted as he had the courts in his pockets.**

**I saw Waki J. at least 3 times. I do not know the exact story. They drank and ate in the house. I reported the matter to the Anti-Corruption Department and then a list of people I found to be corrupt.** (Underlining made by the Ringera Committee) This is the list. I made the statement and a junior officer was called to record a letter of complaint. B. Chunga - Deputy Public Prosecutor. He stage managed the prosecution of the case. This was him and Kidula".

Even though Khurshid Butt did not say so to the Ringera Committee, and this is worth repeating, the Ringera Committee nevertheless, went on to find credible, as already stated, that Justice Waki was guilty of judicial misbehaviour in that whilst socializing with the Akasha, family he gave a ruling in their favour in the High Court Civil Case No. 1473 of 1997.

Although the Ringera Report was submitted to the Chief Justice on the 30<sup>th</sup> September, 2003, it is obvious that the Ringera Committee must have accepted Khurshid Butt's statement as reflected in its Report, as being credible at the time it was made to it by Khurshid Butt on the 23<sup>rd</sup> April, 2003. Thereafter, Justice Waki was promoted to be a Judge of the Court of Appeal and sworn in as such, on the 4<sup>th</sup> June, 2003. The most unexpected thing then happened. On the 6<sup>th</sup> June, 2003, Justice Ringera who had on the 23<sup>rd</sup> April, 2003, heard Khurshid Butt's verbal accusatory complaint against Justice Waki and which he must have found credible at the time he heard it, did this. He wrote the following congratulatory letter to Justice Waki:-

"Dear Philip,

RE: CONGRATULATIONS

Very warm and hearty congratulations on your elevation to the appellate bench.

Your commitment to the rule of law and an undoubted disposition to hard work, which you have consistently exhibited on the High Court bench, should stand you in good stead on the higher bench.

I wish you a distinguished career in your new position.

Yours sincerely,

A. G. RINGERA."

The foregoing inconsistencies, including those arising out of Khurshid Butt's statement to the Ringera Committee, raised issues which the Tribunal wanted Justice Ringera to clarify. For unacceptable excuses, Justice Ringera refused to obey the Tribunal's summons to appear before it for this purpose.

And now to the letter which the Attorney - General had forwarded to the Chief Justice and which was passed on to the Ringera Committee. This letter could only be a copy of Khurshid Butt's letter of the 21<sup>st</sup> March, 2003, addressed to the Chairman of the Integrity and Anti-corruption Committee together with its annexes which include the "list" and "letter of complaint" referred to in Khurshid Butt's above statement to the Ringera Committee, and copied, incredibly, to the President of the Republic of Kenya, and then to the Chief Justice, the Minister for Justice and Constitutional Affairs and the Permanent Secretary of the Office of the President. Khurshid Butt confirmed to the Tribunal that he had personally delivered to the Chief Justice his copy of this letter as well as another of the same date and contents which he had addressed to the Chief Justice. This, however, has not been denied. The gist of the complaint contained in these letters, in which Khurshid Butt described himself as a "Victim of Torture, Injustice and Corruption by the Judiciary, Bar and the Bench" and which was headed: Re Corruption in Judiciary - Complaint Against Mr. Phillip Waki, The Judge, High Court of Kenya, Nairobi Originally Mombasa, was not as stated by Khurshid Butt to the Ringera Committee, that whilst stationed in Mombasa, Justice Waki was:-

“a regular visitor” to the Akasha house where,  
“They drank and ate in the house.”.

These letters were written significantly, on the day that Justice Waki gave his ruling in High Court Civil Case No. 1473 of 1997, in favour of the Akasha family. The letters merely mention Justice Waki in passing, and without any reference to his improper socializing with the Akasha family or as being one of the Judges who were “directly and indirectly involved in corruption”. The other members of the Judiciary being the then Chief Justice, Bernard Chunga, Justices S.O. Oguk and Andrew Hayanga, Commissioner of the Assize Mrs Pamela Tutui and Chief Magistrates Mrs. Uniter Kidula and P.N. Mugo Esq. The Attorney - General himself, was not spared either, being accused by Khurshid Butt as one of the agents of the Akasha family. The letters went on to allege that:-

“The Kenya Police, the Kenya Intelligence, counter Intelligence Customs, Immigration, and the Army including all arms of the then Kenya Government colluded and played the ball.”.

A copy of Khurshid Butt’s letter of the 21<sup>st</sup> March, 2003, and the annexes thereto, and copied to the Permanent Secretary, Office of the President, were by a letter dated the 12<sup>th</sup> May, 2003, from the Office of the President, forwarded to the Attorney - General which, not surprisingly, only requested him to “study the matter and take necessary action as it touches on court in one way or another” and to “kindly expedite”. On his part, the Attorney - General on the 11<sup>th</sup> June, 2003, forwarded a photocopy of Khurshid Butt’s letter and the annexes thereto, to the Chief Justice to deal “with as appropriate”. Khurshid Butt’s correspondence did not seem to have been taken seriously. The Annexes to Khurshid Butt’s letters also included a copy of the “list” and the “letter of complaint” mentioned in his statement to the Ringera Committee. In the list dated the 16<sup>th</sup> September, 2002, Khurshid Butt had given the names of four members of the Attorney - General’s Chambers including the Attorney - General himself, eight members of the Judiciary including Justice Waki as “currently handling the matter”, and senior police officers. Concerning this list, which Khurshid Butt had referred to as “a copy of handwritten summary of my statement to Mr. Mohammed Amin of ACPU”, Khurshid Butt went on to endorse rather maliciously, that Amin had deliberately not recorded his full statement and had forced him to “divert” his “complaint about the JUDICIARY and the then Chief Justice and their henchmen”. On the same day, Khurshid Butt made his lengthy letter of complaint recorded by an officer of the Anti - Corruption Police Unit, to the Head of the Anti-Corruption Police Unit. This letter of complaint is headed widely as: Request for Investigation by ACPU

Complaints Against the Akasha Family, the Attorney General's Chambers, The Judiciary, The Kenya Revenue Authority and The Kenya Police and CID Officers AT THEN (TIME - 1994). The only reference that Khurshid Butt made in this letter of complaint about the High Court Civil Case No. 1473 of 1997, was not that Justice Waki was closely associated with the Akasha family when he heard that matter, but that he, Khurshid Butt:-

“would also like to complain about the delay of a Civil Suit No.1473 of 1997 which I had filed claiming Kshs.6.5 million from the Akasha family. The cases here take six years to be completed by the Courts and this has caused me to suffer irreparable financial loss and mental torture and a lot of Health Problems .....

Justice Waki began hearing the matter on the 17<sup>th</sup> July, 2002, and gave his ruling against Khurshid Butt on the 21<sup>st</sup> March, 2003, which was indeed, the same day that in reaction to this ruling, Khurshid Butt wrote his famous letters to the Chairman of the Integrity and Anti - Corruption Committee and the Chief Justice, but in which, he made no mention of Justice Waki's wining and dining with the Akasha family at their house in Nyali and still heard the case in Nairobi. The subsequent verbal complaint to the Ringera Committee by Khurshid Butt, that Justice Waki wined and dined with the Akasha family at their Mombasa, Nyali house, while hearing their case and giving the impression that the case was heard in Mombasa and not in Nairobi, as was the case, smacks of an afterthought. Another afterthought, Khurshid Butt did not also tell the Ringera Committee as he should have, if it were true, that on the 15<sup>th</sup> December, 2002, he saw Justice Waki who was still stationed in Nairobi picked up from Nakumatt, a shopping mall in Mombasa, and driven to the Akasha Nyali house.

Another letter annexed to Khurshid Butt's letter of the 21st March, 2003, is the one he had written earlier to the Minister for Justice and Constitutional Affairs, dated the 29<sup>th</sup> January, 2003. In this letter headed: Complaint by K.A. Butt Against Judicial and Government Officers Arising From Assault Causing Grievous Bodily Harm, Khurshid Butt, in his usual name calling obsession, named five members of the Attorney - General's Chambers including the Attorney - General himself, six members of the Judiciary including Chief Justice, Bernard Chunga, and Justices Oguk, Hayanga and Waki, and ten members of the Kenya Police including William Kivuvani - the Head of Intelligence, Arap Too - Head of the CID and William Langat - Deputy Commissioner of Police, as persons who “ jointly and severally became partisan to misuse and abuse of office obstruction of justice, conspiracy to defeat justice by those in

authority". With reference to the High Court Civil Case No.1473 of 1997, all that Khurshid Butt wrote, and he made no reference to Justice Waki's improper socializing with the Akasha family, was this:-

"Whilst I have filed High Court Civil Case No.1473 of 1997 against the Akashas for redress of wrongs committed by them against me I am constrained to bring to your notice that the past 9 years have not been a rewarding experience purely on account of the shortcomings of Civil and Judicial Officers, the details of which are readily available on call."

It is quite clear that the finding of the Ringera Committee that the gist of the complaint contained in Khurshid Butt's letter of the 21<sup>st</sup> March, 2003, and the annexes thereto, forwarded to the Ringera Committee by the Chief Justice, is the same as that contained in the verbal complaint made to it by Khurshid Butt on the 23<sup>rd</sup> April, 2003, is incorrect.

Even though Khurshid Butt confirmed to the Tribunal in his evidence on oath, that he had delivered his letter of the 21<sup>st</sup> March, 2003, and the annexes thereto, to the Chief Justice, and this has not been denied, Justice Waki had nonetheless, as provided by sections 61 (2) and 64 (4) of the Constitution, been appointed a Judge of the Court of Appeal by the President of the Republic of Kenya in accordance with the advice of the Judicial Service Commission, the Chairman of which, is the Chief Justice himself. According to the then Secretary of the Judicial Service Commission, now Justice W. Ouko, Khurshid Butt's complaint against Justice Waki was not brought to the attention of the Judicial Service Commission when it considered the promotion of Justice Waki as a Judge of the Court Appeal. In his evidence before the Tribunal, Justice Ouko further remarked that Justice Waki's promotion was remarkable, having regard to the fact that he was promoted ahead of nineteen other High Court Judges who were senior to him. The obvious implication of all this, is that Khurshid Butt's complaint received by the Chief Justice could be said to have been dismissed with the contempt it deserved.

The issue whether the rules of natural justice were complied with in the process of the representation being made to the President to establish a tribunal to investigate the allegation of misconduct against Justice Waki, was raised before the Tribunal. The Tribunal is not

entitled to make a judicial decision on the matter and we will only draw attention to the relevant circumstances and existing law as we see it.

The Ringera Report itself, in its paragraph 6:1:1, noted that:-

“In the premises, we have decided to include in this report only those members of the Judiciary in respect of whom we found the allegation of corruption, misbehaviour, or want of judicial ethics credible.”.

The Ringera Report also contains the following paragraphs:-

“6:2:1 Due to the sensitivity of the matter under inquiry and the fact that the officers affected have not had the advantage of being confronted with the ‘evidence’ against them and are entitled to the due process of the criminal law and/or the appropriate disciplinary process, we think it is inappropriate to include names of those officers in this main report. We have decided to disclose the names of the officers and the allegations and a summary of the evidence against them together with our findings thereon in a separate schedule to this report which is not for dissemination to the public.

...

6:3:1 For the Judicial Officers implicated in Judicial corruption, misbehaviour, and want of ethics and whose names are in Part A of the schedule, we recommend that the Chief Justice recommends immediate prosecution and/or initiates administrative disciplinary action as appropriate in the circumstances unless the Officers concerned voluntarily relinquish their Judicial offices.”.

By the foregoing paragraphs of its Report, the Ringera Committee acknowledged that though it had not applied the rules of natural justice before coming to the conclusions it had arrived at, the affected judicial officers should not be denied the right of being heard, in the case of judges, before tribunals are established to investigate allegations of misconduct made against them. It was not surprising that, whilst

Justice Waki was a Judge of the High Court, the Chief Justice at a meeting with the Judges of the High Court assured them that those that would be adversely named in the Ringera Report, would be given an opportunity to answer the allegations made against them before further action would be taken. But what has not been denied, is that the Chief Justice, without giving in this case, Justice Waki, the opportunity to answer the allegation made against him as contained in the Ringera Report, represented to the President in accordance with sections 62 (5) and 64 (3) of the Constitution, that the question of removing Justice Waki as a Judge of the Court of Appeal, should be investigated.

Although no procedure is laid down in the Constitution regarding the making of such a representation to the President, should the Chief Justice in the process of satisfying himself whether he should make such a representation, not first seek the response of the affected Judge to the complaint of misconduct? The rules of natural justice in our view, demands that, that should have been done.

The procedure for the removal of a Judge from office is now well settled by the decision of the Privy Council in the well known case of ***Rees and others v Crane (1994) 1 All ER***. This case dealt with the role of the Judicial and Legal Service Commission of Trinidad and Tobago with respect to the removal of Judges from office. This role in effect, is the same as that of the Chief Justice of Kenya to make representation to the President that the removal of a Judge from office for misbehaviour, should be investigated by a Tribunal. The Privy Council held, in respect of the role of the Trinidad and Tobago Commission, that:-

“The Commission was not intended simply to be a conduit by which complaints are passed on by way of representation to the President, being effectively the equivalent of impeachment proceedings ... Given the seriousness of the charges against the respondent, including misbehaviour, the publicity surrounding the respondent’s suspension and the appointment of the tribunal of inquiry, and the damage to the respondent’s reputation and position as a judge, the respondent had not been treated fairly and ought to have been given the opportunity to reply to the charges before the representation was made to the President so that suspicion and

damage to his reputation would be avoided if he rebutted the charges.”.

The holding in this case was subsequently affirmed in the Guyana case of **Barnwell v Attorney General [1994] 3 Law Reports of the Commonwealth** in which a further elaboration of the rationale or necessity for avoiding making a premature representation leading to the suspension of a Judge, was given by Chief Justice Bishop in the following terms:-

“Disclosure that a judge has been suspended from office has a prime news element that is universal. The public, within the particular state or territory from which the announcement emanated and beyond, becomes interested in receiving the details: some are curious, others concerned. However, the common reason underlying both types of interest lies in the fact that the official act of suspending a judge is a rare occurrence. Society attributes honour, if not veneration, learning, if not wisdom, together with detachment, probity, prestige and power to the office of judge; and it may be that incumbents are regarded as imbued with an aura, similar to that of a ‘priestly caste’. So great are the social expectations and obligations that bear on that responsible position, the role and functions related to it. In the circumstances, it is not unreasonable to propose that suspension of a judge engenders disgrace and dishonour of him; and even if eventually he should be cleared of the allegation made against him, the social stigma caused by the suspension is never wholly eradicated.”.

We are the first Tribunal of its kind, to be appointed in Kenya to investigate the removal from office of Judges of the Court of Appeal. Since the Tribunal is only required under section 63 (5) (b) of the Constitution, to “inquire into the matter and report on the facts thereof to the President ...”, and not to determine any legal issues, we will content ourselves in merely saying that relevant applicable rules of natural justice, should not be ignored.

The role of the Tribunal is not analogous to that of a police officer to charge a defendant in a criminal process. Under sections 62(4) and 64(3) of the Constitution, the President is obliged to act in accordance with the recommendation of the Tribunal. This important role conferred on the Tribunal requires the Tribunal to determine what standard of proof it will adopt in determining whether the allegations made against an affected Judge, has been established or not. In determining this, we take into account the need to protect Judges from incredible accusations without protecting Judges who have been corrupt.

The function of the Tribunal is to preserve a delicate balance between, on the one hand, not allowing the Judge who has misbehaved to continue being a Judge and, on the other hand, making it too easy for a Judge to be dismissed on trumped up allegations thereby, undermining that most precious and fundamental feature of the Constitution - the independence of the Judiciary.

The independence of the Judiciary which is well enshrined in the Constitution as well as in the Constitutions and appropriate constitutional jurisprudence of other Commonwealth countries, is derived from two seminal principles; the separation of powers; and the rule of law. For these reasons, the position of Judges in Kenya, who are not treated as civil servants, and whose emoluments are protected by being charged on the Consolidated Fund, have been specifically safeguarded by the Constitution. What must not also be forgotten is that adjudication is not merely mechanical; it also involves the exercise of judgment and discretion by a Judge. Except in the clearest cases of misbehaviour, the power of removal of Judges from office, would represent a wholly unacceptable degree of executive interference. And so to interfere with a Judge's decision merely because he or she has in the exercise of his or her discretion, passed a sentence or taken a decision with which the Chief Justice, the Attorney - General, public opinion or the affected party may disagree, would be a most serious breach of the principle of judicial independence.

In our view, the allegation of misconduct must not only, be fully substantiated, but must also, be one of sufficient gravity to justify the removal of a Judge.

After the conclusion of evidence before the Tribunal, Assisting Counsel and counsel for Justice Waki made written and oral

submissions which the Tribunal took into consideration in assessing the evidence given before it and in making the recommendation contained in this Report.

# **ALLEGATIONS**

## **Allegation Number One, Allegation Number Two and Allegation Number Four**

It is evident that all the allegations of misbehaviour made against Justice Waki in Allegations Numbers One, Two and Four of this Report, arise from Justice Waki hearing and determination of the applications to set aside the *ex-parte* judgments obtained by Khurshid Butt in **HCCC No. 1473 of 1997 Khurshid Ahmed Butt vs. Baktash Akasha and 17 Others**. For this reason we will examine, analyze and assess evidence given on the three allegations together.

### **Allegation Number One**

The Statement of Misbehaviour made against Justice Waki is:-

#### **STATEMENT OF MISBEHAVIOUR.**

That the Hon. Justice Philip Nyamu Waki failed to exercise his judicial functions as a puisne judge independently; in

- (i) Assessment of relevant facts
- (ii) And/or in accordance with conscientious understanding of the law
- (iii) And/or free from extraneous influences

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 4-7 of this Report.

### **Allegation Number Two**

The Statement of Misbehaviour made against Justice Waki is:-

#### **STATEMENT OF MISBEHAVIOUR**

That he failed to disqualify himself from participating in the proceedings in the **Nairobi High Court Civil Case No. 1473 of 1997 KHURSHID AHMED BUTT -VS- BAKTASH**

**AKASHA AND 17 OTHERS** whereas he knew or had reason to believe he was unable to decide impartially or in which a reasonable, fair minded and informed person would believe that he would be unable to decide impartially.

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 9-11 of this Report

**Allegation Number Four**

The Statement of Misbehaviour made against Justice Waki is:-

**STATEMENT OF MISBEHAVIOUR**

That while a judge of the High Court of Kenya he performed his judicial duties with favourism, bias and prejudice

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 13-14 of this Report.

The allegations against Justice Waki as contained in Allegations Numbers One, Two and Four can in summary be enumerated as follows:-

In his conduct during the hearing of **HCCC No. 1473 of 1997, Khurshid Ahmed Butt vs Baktash Akasha and 17 Others** (hereinafter referred to as HCCC No. 1473 of 1997)-

1. *He failed to exercise his judicial functions as a Puisne Judge independently.*
2. *He exhibited partiality and bias against the complainant, Khurshid Butt.*
3. *He should have, because of his alleged close association with Baktash Akasha and private consultation in his Chambers with Nurdin Akasha, one of the Defendants*

*in HCCC No. 1473 of 1997, disqualified himself from hearing the proceedings.*

- 4. He could not have acted, or be seen to have acted impartially, independently and without bias when hearing the matter in Nairobi since prior to his transfer from Mombasa to Nairobi, he had an intimate, social and personal relationship with the family of Baktash Akasha, and whom he had visited during the pendency of the hearing of the matter, and was also a close friend of Sammy Kithiki, Yusuf Dato, L. Maghnani, Sunny Nawab, Amjad Melek and Mr. Kanyi Advocate, who were all also close friends of Baktash Akasha and his family.*
- 5. He was influenced by prior complaints of corruption and impropriety made against him whilst a Judge in Mombasa by Khurshid Butt and therefore gave a ruling in the matter in favour of the Akashas and against Khurshid Butt.*

The High Court file relating to HCCC No. 1473 of 1997 was placed before the Tribunal. That record shows that on the 24<sup>th</sup> June, 1994, when Khurshid Butt went to the late Abdalla Akasha's residence in Nyali to demand payment for services he had rendered and the cost of materials supplied in connection with the extension and other work that he had done to Abdalla Akasha's house, Abdalla Akasha and his sons detained Khurshid Butt and viciously assaulted him. Arising from that detention and assault, Kaplan & Stratton Advocates, on instructions of Khurshid Butt, filed this suit on the 17<sup>th</sup> June, 1997. In the plaint, Khurshid Butt claimed the sum of Shs. 4,165,883.80 being the balance of money due for goods and services supplied under a construction contract, as well as general damages for his detention and assault by the Akashas on the 24<sup>th</sup> June, 1994. The suit was originally brought against Abdalla Akasha and his son Baktash Akasha.

This plaint was amended on the 18<sup>th</sup> May, 2001, firstly to plead the conviction of Baktash Akasha, on the 2<sup>nd</sup> February, 2001, for the assault on Khurshid Butt. Secondly, and as by this time Abdalla Ibrahim Akasha had died, the amended plaint introduced all the members of the deceased's family, seventeen of them, who were described as beneficiaries of his estate. Following the filing of the amended plaint, an interlocutory judgment was, on the 4<sup>th</sup> December, 2001, entered against Karima, Fatuma and Hassan Akasha. Similarly, on the 4<sup>th</sup> February,

2002, an interlocutory judgment was entered against Nurdin, Kamaldin and Atya Abdalla for failure to enter appearance upon service of process. On the 28<sup>th</sup> March, 2002, through her advocate Kanyi & Company, Fatuma filed an application to set aside the ex-parte interlocutory judgments. Similarly, on the 26<sup>th</sup> March, 2002, through their advocates Githinji & Company, Nurdin, Kamaldin and Atya Akasha also applied to set aside the ex-parte interlocutory judgment entered against them.

Advocate, M. A. Khan, led by Satish Gautama, appeared for Khurshid Butt at the hearing of these two applications which were heard together by Justice Waki. The main issue was whether the Defendants/Applicants had been served with summonses and counsel for the parties examined the process servers. Legal submissions were then heard and on the 21<sup>st</sup> March, 2003, Justice Waki delivered his ruling allowing the applications thereby setting aside the ex-parte interlocutory judgments and permitting the Defendants/Applicants to file their defenses within 14 days thereof. M. A. Khan then applied for leave to appeal and for copies of the ruling and proceedings, which were granted.

In his evidence before the Tribunal, M. A. Khan, who, led by Senior Counsel Satish Gautama, had appeared for Khurshid Butt in the two applications heard by Justice Waki, said that during the entire hearing of the applications, they were treated with utmost courtesy by Justice Waki. Even though on occasions it was quite evident that Justice Waki was pressed for time to hear them, he nevertheless, always allowed them to continue the hearing as long as possible and at no time did Justice Waki show any sign of hostility or bias. Indeed no issue of bias was raised by him against the Judge during the entire period. He does recall, however, that Khurshid Butt at one stage asked him to ask Justice Waki to disqualify himself on the ground that he believed Justice Waki was known to the Akashas. He had declined to do so because Khurshid Butt was not able to provide him with any sufficient information or tangible evidence that Justice Waki had any such association with the Akashas. In his opinion, Justice Waki was a very good and distinguished Judge and he had no complaints whatsoever about how Justice Waki conducted the hearing of the applications. Justice Waki did not show any bias or hostility against Khurshid Butt in his conduct of the proceedings. Though it surprised him subsequently, when he had obtained a copy of Justice Waki's ruling, that the Judge had made no reference to the affidavit in support of one of the two applications, the genuineness of which was denied at the hearing by the deponent, Hayat Akasha, he felt that the Judge had considered all other crucial issues. He therefore advised his client not to pursue an appeal but to pursue the hearing and determination of the main case. M. A. Khan then added that he was indeed, pleased when he learnt of Justice Waki's elevation to the

Court of Appeal. Later, he did not, though he had accompanied Khurshid Butt to the Ringera Committee hearing, make any complaint against Justice Waki to the Committee.

Satish Gautama also told the Tribunal that during the hearing of the applications, Justice Waki treated him with utmost courtesy. Given the limitation of time, the Judge gave him the opportunity to present his client's case satisfactorily and showed no hostility or bias against Khurshid Butt. Satish Gautama said that during the hearing of the applications, Khurshid Butt, whom he has known for many many years, drew his attention to general complaints about the perceived influence of the Akasha family over the Judiciary and the corruption in the Judiciary. Khurshid Butt, who he sympathized with for having suffered greatly at the hands of the Akashas, did not, however, specifically give him any material or information to show that Justice Waki was biased or compromised in any way. Moreover, he was never asked to make any application for Justice Waki to disqualify himself on any ground. Khurshid Butt, in his view, was obsessed with the mistreatment he had suffered under the hands of the Akashas in 1994.

When shown Justice Waki's ruling, Satish Gautama said that he regarded it as an excellent ruling of a distinguished Judge. He said that he also advised Khurshid Butt against filing any appeal against the ruling, but rather to pursue the trial and the determination of the main suit itself. He was never asked by Khurshid Butt to go to the Ringera Committee with him and did not know about the Ringera Report until the establishment of this Tribunal.

Resulting from his brutal and sadistic attack at Abdalla Akasha's residence, Khurshid Butt said he suffered and continues to suffer from injuries which have been pleaded in his plaint in HCCC No. 1473 of 1997, and as set out in the Medical Report of Dr. S. M. Mwinzi which we have referred to in the General Observations. We observed that this assault on him in June, 1994, has so occupied Khurshid Butt's mind that he believes he is the only one who knows the whole truth about it and every step that he has taken thereafter. It has made him become obsessively self-righteous.

Khurshid Butt's evidence relating to the alleged visits of Justice Waki to the Akashas' houses and how he came to know Justice Waki, fall into two categories: the incidents that occurred in 1994 and those that occurred in 2002.

Khurshid Butt testified that he, for the first time in his life, which was on the 17<sup>th</sup> June, 1998, met Justice Waki when the Judge dealt with the **HCCC No. 158 of 1996 Khurshid A. Butt v Pegasus Tea Ltd** case in Mombasa, and in which he, Khurshid Butt, was the Plaintiff (see Allegation Number Three of this Report). This in our view, in the circumstances, can only mean that this was the first time that Khurshid Butt ever saw Justice Waki. Khurshid Butt said he was so unhappy with the way Justice Waki handled the matter that he even went to Justice Waki's rural home to investigate him thoroughly. Under cross-examination, and also illustrating the unreliability of his evidence, Khurshid Butt declined to give any details of when, where and with whom he spoke during his investigation of Justice Waki. This, in our view, and we doubt if it is true, is a manifestation of Khurshid Butt's paranoid obsession that Justice Waki will never give him a fair and just hearing. Apart from the medical report and other documents referred to in the General Observations of this Report concerning the mental stability of Khurshid Butt, Abdalla Mohamed Shatri was called to give evidence before the Tribunal to bolster Khurshid Butt's allegation of assault by the Akasha family. Abdalla Shatri had, previously, during the criminal trial of Baktash Akasha for assaulting Khurshid Butt, given similar evidence. He, however, in his evidence before the Tribunal, said that Khurshid Butt was affected "both mentally and physically" by the assault and agreed that Khurshid Butt had become "a different person" as a result of the assault.

Khurshid Butt went on to say that in May or June, 1994, whilst he was undertaking construction work at the residence of Abdalla Akasha, he saw a man there whom he did not know. He was told, when he asked, by one of his workmen and also the servants of Abdalla Akasha, that, that was Justice Waki. He was later to amplify this by saying that it was Kamaldin Akasha who identified Justice Waki to him at that time, and had told Khurshid Butt that Justice Waki was also their neighbour at Whispers Estate, Nairobi.

Khurshid Butt's evidence on the alleged visits by Justice Waki during 1994 to Abdalla Akasha's residence, is spurious. Khurshid Butt's evidence that he first saw in his life, Justice Waki when he heard the application in the **HCCC No. 158 of 1998 Khurshid A. Butt v Pegasus Tea Ltd** case on the 17<sup>th</sup> June, 1998, clearly contradicts his assertion that he saw Justice Waki three times in 1994, at Abdalla Akasha's residence. Apart from that, Justice Waki had not as is uncontroverted, been appointed a Judge in 1994. Furthermore, having told the Tribunal that it was his workmen and the Akasha servants who told him that it was Justice Waki that he had seen at the house, Khurshid Butt at one time, said that it was Najima and the other Abdalla

Akasha's daughters, who told his servants about Justice Waki visiting their house, and at another time, that it was Kamaldin, one of Abdalla Akasha's sons, who told him this. He could neither give the dates when the visits were made nor any other information.

Khurshid Butt told the Tribunal that in about February, 1997, whilst in Nairobi attending the Criminal Proceedings in which Baktash Akasha was charged with assaulting him, he saw a newspaper report about Justice Waki being appointed a High Court Judge. He was in the company of an Inspector Waweru and because he had never heard of Justice Waki before, he asked Inspector Waweru who Waki was. He was informed that Justice Waki had previously been practicing as an advocate in Nairobi. This is wholly inconsistent with Khurshid Butt's allegation that he had seen Justice Waki in the Akashas' house in 1994.

Yet at another time, Khurshid Butt claimed that when Justice Waki was posted to Mombasa, he, Khurshid Butt, rather unusually, went to see Samuel John Kithiki to ask him about Justice Waki as he knew nothing about him. When pressed in cross-examination as to why he went to make this inquiry from Kithiki, his reply was, "in my opinion they are (*Kithiki and the Judge*) in a criminal world.". Khurshid Butt claimed that Justice Waki used to embezzle clients' funds. But Khurshid Butt would neither give, concerning this grave allegation that he made, the date or the person who gave him the information, or the clients whose funds were alleged to have been embezzled, or any details where such complaints were reported or registered. Another instance of Khurshid Butt's wild and silly allegations against Justice Waki, was that before Justice Waki became a Judge, Khurshid Butt said he had visited L. Maghnani's office, where he saw a letter on the desk from Waki's law firm. He had no further details about that letter or the transaction.

We are persuaded that Khurshid Butt saw Justice Waki for the first time in his life on the 17<sup>th</sup> June, 1998, in Mombasa. However, his complaints, if any, against Justice Waki could only have arisen after the 21<sup>st</sup> of March, 2002, when Justice Waki delivered the ruling setting aside the *ex-parte* judgments and which angered Khurshid Butt making him rage with fury and which gave rise to his letters of complaint against Justice Waki and others referred to in the General Observations in this Report. All these letters only referred to delay in the delivery of justice and not to the Judge's association with the Akashas or with the Akasha drug trafficking or other cartel.

Besides, no evidence was ever led about any transaction of any nature between the Akashas and Justice Waki when he was an advocate.

The next set of visits which Khurshid Butt alleged Justice Waki made to Baktash Akasha's residence, occurred in 2002, when Justice Waki had already been transferred to Nairobi. Again, in his testimony Khurshid Butt said that it was Najima Akasha who told him of the visits and that they were three visits. However, the two visits which he claimed he could testify about, are as follows: The first visit was on the 31<sup>st</sup> July, 2002. Again, Khurshid Butt said that Najima had informed him about that visit. On that day, between 5:30 and 6:30 pm, Khurshid Butt said that he had and parked his car by the junction leading into the cul-de-sac, and reading his newspaper, when he saw Baktash Akasha drive a car, with Justice Waki in it, into the cul-de-sac. Khurshid Butt said that he then drove away. Secondly, on the 15<sup>th</sup> December, 2002, which was during the long weekend after the Jamhuri Day holiday, he was, between 5:00 and 6:00 pm that day, sitting in front of Book First, a book store in the Nakumatt shopping mall along Malindi Road in Mombasa, when Justice Waki was brought there in a car. He could not identify the car or the driver. Justice Waki then joined several people sitting at a table and a few minutes later, a Toyota Lexus car came and stopped where they were. He could not identify the driver or the registration number of the car which had tinted windows. Justice Waki got into the car and was driven off. Khurshid Butt then got into his own car and followed the car in which Justice Waki was being driven, up to the junction leading into the cul-de-sac next to the Voyager Hotel near where Baktash Akasha lived. That is all he saw. It should be noted that all this is alleged to have happened, when the two applications to set aside the *ex parte* judgments in HCCC No. 1473 of 1997 were part heard by Justice Waki in Nairobi.

Various letters to the editors of local newspapers were drawn to our attention. These letters were written by Khurshid Butt and it was suggested that through these letters, Justice Waki, knew or ought to have known that there had been allegations of corruption made against him whilst in Mombasa and against the judiciary in Mombasa, in general.

The only Letter to the Editor that Justice Waki acknowledged having read, was that written by Advocate, John Mburu, and which was published in the Daily Nation of Monday the 9<sup>th</sup> July, 2001. This had accused the judiciary at Mombasa of corruption. Upon Justice Waki protesting to John Mburu about this letter, John Mburu, on the 13<sup>th</sup> July, 2001, wrote a letter to Justice Waki in which he said:-

"The said article referred to some courts. Nowhere in the same have you been mentioned. For the record, I would like to state categorically that I along with a bulk of advocates practicing in Mombasa have a lot of respect for you. Indeed, your performance as a Judge is exemplary. The said article did not therefore refer to you at all."

Other than John Mburu's Letter to the Editor, there was no evidence adduced of any complaints that may have been directed at Justice Waki whilst in Mombasa.

In the letter of the 14<sup>th</sup> April, 2003, referred to in the General Observations of this Report, Khurshid Butt had asked his advocates, M. A. Khan and Satish Gautama, to accompany him to the sitting of the Ringera Committee on the 28<sup>th</sup> April, 2003. As already noted, though M. A. Khan complied, he did not make any complaints against Justice Waki. Satish Gautama did not go to the sitting. In fact, he told the Tribunal that he was not aware of this letter. Indeed, in their evidence before the Tribunal, both advocates praised the integrity, courtesy and fairness with which Justice Waki dealt with the applications in HCCC No. 1473 of 1997, and which clearly demolishes the accusations contained in Khurshid Butt's letter of the 14<sup>th</sup> April, 2003. In this scandalous letter, Khurshid Butt for the first time, made the following specific but baseless complaints against Justice Waki:-

1. *The Judge made several adjournments and literally wasted the time with inordinate delays.*
2. *The Judge was biased, hostile and shouted for no obvious justified reasons, and he shouted like a mad man.*
3. *I confirm the Judge was compromised prior to the hearing of this long and prolonged matter.*
4. *The Judge was short or ill tempered and deliberately arrogantly shouted and abused his office all along the hearing and the submissions.*
5. *The Judge belongs to the evil of axis (sic) of corrupt judges within the Judiciary including, the disgraced former Chief Justice who was appointed irregularly if not criminally and corruptly.*

6. *The judgment delivered by the Judge is corrupt, who misdirected himself in the performance of his judicial duties.*

Again on the 1<sup>st</sup> November, 2003, in response to a newspaper advertisement in the Daily Nation of the 31<sup>st</sup> October, 2003, Khurshid Butt wrote to the Committee of the Law Society of Kenya which had invited members of the public who may have complaints against any judge or judicial officer, to forward them to the Committee. With this letter, Khurshid Butt did not only, enclose copies of his various letters of complaints already referred to in this Report, but also, interestingly, stated the following in paragraph 4 of that letter:-

“Mr. Philip Waki, the corrupt Judge, on 21<sup>st</sup> March, 2003. Copy of this letter has been sent to the powers that be under confidential cover but has not been released to him as yet, which would be done as and when the time is right.”.

In relation to Justice Waki, Khurshid Butt's complaint was that Justice Waki conspired to defeat the course of justice. He alleged that the handwritten court proceedings in HCCC No. 1473 of 1997, were misleading and corrupt, and meant to obstruct and delay justice and to involve him in more expenses. What he also stated in that letter which was clearly incorrect, was that M. A. Khan had personally attended the Ringera Committee to complain. M. A. Khan had testified quite categorically before the Tribunal, that he had made no such complaint before the Ringera Committee. As already indicated, the Chairman of the Law Society of Kenya dismissed Khurshid Butt's complaint which was also, ignored by the Sub-Committee of the Law Society of Kenya.

Khurshid Butt, in his examination in chief before the Tribunal, narrated his experience before Justice Waki during the hearing of the applications to set aside the *ex-parte* interlocutory judgments obtained in HCCC No. 1473 of 1997. The pertinent sequence of his evidence were as follows:-

**“Mr. Mbuti Gathenji** – Now would you tell us when the hearing was going on did you have an occasion when you saw Nurdin Akasha emerging from Justice Waki's Chambers?

**Khurshid Butt** – My Lord, all along when these proceedings were going on, I would like to be straight forward, I was visiting Anti-Corruption Unit, I went to the Commissioner of Police,

Nyaseda's office, I went to the Attorney-General's office -

... On that day, because I suspected what was going on around and I had the experience of it, I used to go one hour or half an hour or two hours earlier in the court itself. [Judge's Chambers]

... So, one day I noticed Nurdin Akasha emerging from that place and there were two other people of his sitting outside.

... It was maybe 1:25 - 1:30 pm. I remember the time very well.

... And then he left afterwards after 5 or 10 minutes, he left with two or three ladies. Two I think, he left with them. I was so disturbed and I mentioned it to Khan since he was now not coming to the court anymore, so I had problems.”.

When he was asked whether the case proceeded that afternoon, Khurshid Butt continued:-

**“Khurshid Butt** - Well, I do not remember now exactly, I do not want to give you wrong picture. You know I was so tensed up, you know, on that day. I just did not know what was happening thereafter.”.

He, however, confirmed that the case proceeded that afternoon when advocates for all the parties made their final submissions to Justice Waki. His assertion that M. A. Khan did not come to court that day, is, however untrue since, according to the record of proceedings in that case, it was M. A. Khan who that day made submissions in the matter, before Justice Waki.

The totality of Khurshid Butt's evidence in this regard, is that he was so depressed and tensed up at the time that he himself cannot be positive on what he allegedly saw. He cannot identify who else Justice Waki was allegedly with. He did not confront Justice Waki at the time to protest, if indeed he was suspicious. He only later mentioned this to M. A. Khan, who according to him, and which is not correct, had not gone to court that day. He never registered any complaint, either orally or in writing, of this alleged incident, with any of the authorities he was

constantly in touch with. He never registered a complaint of this incident to anyone in any of his letters we have referred to. He never registered a complaint of this incident with the Ringera Committee. This allegation that Justice Waki held a private meeting with Nurdin Akasha in his Chambers on the 27<sup>th</sup> February, 2003, first appeared, in January 2004, when the list of allegations were being prepared for service on Justice Waki.

Other than HCCC No. 1473 of 1997, no other case or proceedings involving the Akashas was shown to us to have been dealt with in any way whatsoever by Justice Waki.

The other evidence that came to us in a rather dramatic way, was that of Festus Ngolwa M'iburi. In the afternoon of the 10<sup>th</sup> of March, 2004, after the Tribunal had been sitting for about a month, this person dramatically appeared before us. He was introduced ostensibly on the ground that he had very critical evidence to give and for which, he feared his security would be at risk. It was represented to us that we should take his evidence before any harm could be done to him and thereby stop him from giving evidence. He feared that he would be harmed by the sons of Abdalla Akasha and sought police protection which was granted by the Tribunal.

Festus is presently a miraa farmer in Meru and runs a small kiosk in Eastleigh, Nairobi, where he also sells his miraa. His story is that he was employed by Abdalla Akasha as a houseboy, and later became his driver, then port loader and finally, the transport manager of his transport business. Festus knew and willingly, and unashamedly, participated in the drug trafficking business of Abdalla Akasha. He testified that the primary business that Abdalla Akasha was involved in, and from which he earned billions of shillings, was the illegal importation, sale and distribution of hashish and other drugs. Festus maintained that everything he owned was from his relationship with Abdalla Akasha and that he would never then or now, reveal details of that business nor betray Abdalla Akasha.

When he was asked why he had suddenly appeared before the Tribunal to give evidence, Festus, suspiciously, said that he had recently seen Samuel John Kithiki on television giving evidence before the Tribunal, and he therefore also wanted to say what he knew. Festus said that he did not even know Kithiki whom he saw on television giving evidence before the Tribunal, and which made him come to give evidence

before the Tribunal. He had only seen Kithiki driving a big car in Mombasa. Under cross-examination, he added that he wanted to give evidence about the corruption of judges because he was unhappy with the judgment of Justice Mary Ang'awa in a motor accident claim in which he had suffered serious injuries.

Festus's evidence was that on a date he cannot remember, on a Saturday, either in 1997 or 1998, his employer, Abdalla Akasha, called him to his bedroom, gave him a brown envelope the contents of which he did not know, and told him to take it "to our friend", meaning Justice Waki, at Nyali Golf and Country Club. When he got there, he spoke to no one, went into the entrance corridor and then opened a door and went into the reception office. From there, he went into the main lounge of the club, where he found Justice Waki sitting with two other people at a round table, and gave him the envelope. Justice Waki only thanked him, and Festus left. He also maintained that he had seen Justice Waki visit the Akashas' residence at Nyali twice. On these occasions, Justice Waki would be brought in a 4X4 vehicle by a driver whom he did not know. He could not remember the colour, the make or the registration number of the vehicle. He also said that he saw Justice Waki visit Abdalla Akasha's residence at Shanzu, Mombasa. He was later, when the Tribunal visited Abdalla Akasha's houses in Mombasa, to change this by saying that he meant another house near the Silver Beach Hotel.

We find this evidence preposterous because in the same breath, Festus maintained that he had never been introduced to Justice Waki. He did not even know Justice Waki's name which he only learnt of when he came to the Tribunal. He did not even know that Justice Waki was a Judge. More importantly, he did not know how Justice Waki was supposed to have been helping the Akashas. He also did not know the allegations of misbehaviour that had led to Justice Waki being investigated by the Tribunal. In fact, in his examination in chief, he maintained that he did not even know what was in the envelope that he took to Justice Waki. When the Tribunal, with Festus, visited the Nyali Golf and Country Club, Festus could not find the door that he had said led from the entrance corridor into the reception office. Indeed, there was no such door.

Festus further narrated an incident when he was in Abdalla Akasha's car together with him and his sons, Kamaldin and Nurdin. They were driving on a weekday between 3:00 and 4:00 pm along Mama Ngina Drive, in Mombasa, between the Provincial Commissioner's Office and the Immigration Department, when Abdalla Akasha with whom he was sitting in the back of the car, instructed Kamaldin, who was driving, to wave down an oncoming GK Peugeot 504 car with a "J" plate. The two cars passed each other by a few metres and then stopped. Abdalla

Akasha then got out of his car and went to speak to the one who was in the back seat of the Peugeot car. Festus did not see those who were in this car or hear what Abdalla Akasha and them talked about.<sup>3</sup> He could not even remember the registration number of the car. We found this to be a worthless piece of evidence.

Based on our visit to the Nyali Golf and Country Club with Festus and his evidence before the Tribunal, we are of the view, that what Festus described never occurred. We are satisfied that Festus, before we went there with him, had never been inside the Nyali Golf and Country Club, let alone to deliver an envelope to Justice Waki. Festus himself, admitted that apart from his alleged visit to the club to give an envelope to Justice Waki, whenever he drove Abdalla Akasha to the club, he remained outside waiting in the car.

In his entire evidence, other than the name of Justice Waki and that of Kanyi Advocate, formerly Chief Magistrate in Mombasa, Festus either refused or was unable to identify by name, any other public servant whom he alleged was in cahoots with Abdalla Akasha in the illegal drug trafficking. He was at pains to, quite ridiculously, maintain that the Akasha family became publicly known as drug barons only after the seizure of 4.5 tons of hashish in December, 1999. This was clearly, a feeble attempt to sanitize the Akashas public image because this family, going by newspaper reports as far back as 1994, were reputed to be involved in illegal drug trafficking.

Festus, the houseboy who is now a miraa grower and trader, is also a confessed drug trafficker. He was also involved in other unseemly transactions and dealings for and on behalf of his employer, Abdalla Akasha. He refused to be candid in his evidence. He confessed to being selective in what he told the Tribunal. He tendered his vague evidence in a rather melodramatic fashion.

The following also demonstrates the kind of unscrupulous and manipulative person that Festus is. After he had been provided with police protection by the Tribunal, Festus one day, told the Tribunal that he feared for his life as he was being trailed by the sons of Abdalla Akasha and that he and his police guard, had reported the matter to the police. He was obviously, expecting that the police protection would not be discontinued. The Abdalla Akasha's sons, Baktash, Nuri, Feisal and another, were subsequently arrested on the 13<sup>th</sup> April, 2004, and charged with threatening to kill Festus and also conspiring to defeat the course of justice by obstructing Festus, through threatening him, from continuing to give evidence before the Tribunal, against Justice Waki. Not surprising, for those like us, who now know Festus well, he on the 10<sup>th</sup> August, 2004, sought leave of the Chief Magistrate, Nairobi, to

withdraw the charges against the four accused persons. According to the certified copy of the related part of the proceedings before the Chief Magistrate, Festus, in his evidence on oath before the Chief Magistrate (listed as Exhibit 92 in Appendix "D" of this Report), said that he had brought up all the accused persons and that if he had known when he reported the matter to the police, that the four would be charged, he would not have done so – suggesting ridiculously, and deceptively, that he would rather be killed than have the four arrested and charged. Furthermore, as a Meru, he said that he could not testify against the accused persons in whose home he had grown up. He then said, and this is a lie, that: "I went back to the tribunal to ask that the accused be pardoned".

We do not believe the genuineness of all this. Festus being the type of person that we know him to be, must have done this for some benefits. His evidence was totally without credibility and unbelievable and unreliable.

The other surprise witness was Mohammed Ghani Taib. He also sought to connect Justice Waki to the Akashas. We have addressed and assessed his evidence under Allegation Number Nine of this Report.

And now an assessment of the personality of Khurshid Butt, the main complainant before the Tribunal. Khurshid Butt is 65 years old. In 1966, when his father died, Khurshid Butt retired as a primary school teacher to take over his father's estate agency business of Butts Beach Properties in Mombasa. He had, whilst a teacher, been an official of the Kenya National Union of Teachers and the Senior Civil Servants Association. To his credit, Khurshid Butt had by the 30<sup>th</sup> August, 1974, been admitted as a Fellow of the English Association of Estate Agents and Valuers.

Khurshid Butt has remained single since his divorce in 1967. He describes himself as a loner who prefers his own company. Not even his brothers and sisters know how he lives. He told the Tribunal that since his crusade for "justice" following his assault by the Akashas, all his friends have abandoned him. He has had to deal with everything alone. In 1995, he sold Butts Beach Properties which was not doing very well. He also sold a house in Mombasa to meet his medical and other expenses.

In his written statement to the Tribunal in 2004, he stated:-

“In view of damaged special organs of the head I cannot remember the dates.”.

Even as laymen, we observed in Khurshid Butt’s behaviour before the Tribunal, signs of mental instability which is not unlike his behaviour on the 3<sup>rd</sup> February, 1997, before the then Senior Principal Magistrate, P. N. Mugo, Esq. when he was giving evidence in the criminal case where Baktash Akasha had been charged with assaulting him. This is the relevant part of the record of the court proceedings during Khurshid Butt’s cross-examination:

“All this work was to be paid by stages. I was paid Shs.450,000/- first. We had not agreed to Shs.2.2.m for the job. I did a lot of extra work worth Shs.850,000/-. (witness given a document by Mr. Kanyi which he tears into pieces)

Mr. Kanyi – I move this court to deal with this witness for destroying evidence as this was a document we intended to use in our defence.

Court: Stood over for 15 minutes for the advocates to agree on behaviour of this witness.

P. N. Mugo

S.P.M.

Court: The behaviour of this witness who is a very good actor is noted but he is warned against the extremes of tearing Ex. or shouting in Court. These are theatre actions not Court.

P. N. Mugo

S.P.M.

Mr. Bwonmwonga – I have warned this witness against this behaviour in Court. We have now patched the document he tore and glued it together.”.

He exhibited before the Tribunal on many occasions, uncontrollable behaviour, an obsession without any credible evidence, that by and large, the Judiciary, the Police, the Attorney – General’s Chambers were all out to victimize him and that he was as he had put it, the Victim of Torture, Injustice and Corruption by the Judiciary, Bar and the Bench. Apart from his letters of complaint already referred to, there are other letters which support the obsessive intolerance and instability of Khurshid Butt’s character.

The following excerpts from letters that he wrote to his advocates, Messrs Kaplan & Stratton, concerning cases which they were handling for Khurshid Butt tell their own stories:

In his letter of the 29<sup>th</sup> November, 1999, headed Re: Myself vs. Ibrahim and Baktash Akasha, he wrote:-

"You would no doubt appreciate and agree with me that it was **CRIMINAL** on the part of the **ATTORNEY - GENERAL** and the **CHIEF JUSTICE** to have allowed the **CHIEF MAGISTRATE** to delay and prolong the Criminal matter for litrally (sic) **FIVE** (5) years bearing in mind "**JUSTICE DELAYED** is **JUSTICE DENIED**" despite my several letters' appeals and imploring them in the matter.

Obviously they are a **DISGRACEFUL LOT** who have prostituted and bastardized the entire system of **JUSTICE** and rule of law of this Country. They preach Water and drink Wine.

Under **NO** circumstances I am going to take this **NONSENSE** any more than I have done.

...

I am **NOT** prepared to be threatened, intimidated, traumatized and cheated by these **IDIOTS, SWINES, CONMEN** and **RASCALS** operating under the **OATH** of their offices in **LAW COURTS** in borrowed robes."

In his letter of the 18<sup>th</sup> January, 2001, headed Re: High Court Criminal Appeal No. 627/1998 High Court Civil Suit No. 1473 of 1997, relating to the appeal by Baktash Akasha against his conviction for assaulting Khurshid Butt by Senior Principal Magistrate Mugo, and the already mentioned suit between Khurshid Butt and the Akasha family, Khurshid Butt wrote, consistent with his unstable personality, the following:-

"I have to refer to the above matter, that has been adjourned **FOUR (4)** times todate as a result of which I have gone into acute/severe Depression and have been put on heavy doses of prescribed medicines again in this matter.

1. Is this not misuse and abuse of due process of law?.
2. Is this not OBSTRUCTION of Justice?.
3. Is this not abuse of office?.
4. Is this not abuse of legal, financial and fundamental human rights?.

5. Is this not contrary to rule of law & Justice?.
6. Is this not SUBVERSION of Justice?.
7. Is this not meant to kill the 62 year old law abiding citizen, the complainant?.
8. Does it not make an absolute mockery of rule of law and Justice?.
9. Is this not corruption?.
10. Is there no redress?.
11. Is there no solution?.
12. Are we on the last catastrophic chapter?.
13. What action do you wish to take in this matter as my legal and constitutional advisers?.

What do you wish me to do in this matter of grave concern?.

As it is, already 25 local and overseas medical practitioners have attended on me at substantial costs and have become a part of my life.

I would be grateful, if you please finally advise me on this grave matter before I get a nervous breakdown.”.

And Khurshid Butt himself, attached to that letter, the following revealing medical report by Dr. Shamsheer S. Dhillon dated the 30<sup>th</sup> December, 2000:-

“Name of Patient: KHURSHID A. BUTT

Address: \_\_\_\_\_

The above is now again suffering from an Acute Exacerbation of Severe Depression. He tends to be very unstable, has insomnia and is under treatment with DRUGS.”.

Subsequent to all these letters, Khurshid Butt again wrote on the 14<sup>th</sup> April, 2003, to his advocates, the well known Senior Counsel, Satish Gautama, and M. A. Khan, who had appeared for him in the application before Justice Waki in the High Court Civil Case No. 1473 of 1997. In this letter headed RE: CURRUPTION IN JUDICIARY HCCC NO 1473 OF 1997 KHURSHID AHMED BUTT VS BAKTASH AKASHA AND 17 OTHERS, he asked his advocates to be with him when he makes his complaint of misbehaviour by Justice Waki, to the Ringera Committee. Khurshid Butt, however, as one would have expected, made no mention whatsoever in this letter, of Justice Waki’s alleged wining and dining with the Akasha family at their Nyali, Mombasa home while hearing the applications in Nairobi. In this letter which he flamboyantly but rather impolitely, copied to His Excellency the President and also to the Chief

Justice and the Minister for Justice and Constitutional Affairs, Khurshid Butt made the now expected following wild accusations:-

"I would be grateful if you please lodge a legal and constitutional complaint personally to the Chairman, INTEGRITY AND ANTI - CORRUPTION COMMITTEE appointed on 19<sup>th</sup> MARCH, 2003 by the Honourable Chief Justice, MR. JUSTICE EVANS GICHERU. As intimated to your goodselves, the particulars of which are well within your knowledge.

...

Subsequently after inordinate delays FALSE, MALICIOUS AND DAMAGING AFFIDAVITS were filed by the Criminal Defendants to obstruct and frustrate Justice, which is an abuse of due process of law and waste of time. Infact, the Judge made several adjournments and deliberately wasted the time with inordinate delays ordering the counsel, to take a new date from the Registry to put the plaintiff to expenses every time, we appeared in court after duration of TWO (2) months for 15 or 30 minutes only. And it is interesting, to note that every time we appeared the judge was hostile and shouted for no obvious reasons. All along the hearing the Judge was hostile and shouted like a mad man, which I consider to be the contempt of court. I have confirmed that the Judge was compromised prior to the hearing of this long prolonged matter. I had made a complaint to yourselves and the ANTI-CORRUPTION POLICE UNIT on 16/9/2002 over the above matter a copy of which is enclosed for your ready reference.

...

In nutshul (sic) my complaint is:

...

The judge belongs to the Evil of Axis (sic) of Corrupt judges within the judiciary including, the disgraced former Chief Justice who was appointed irregularly if not criminally and corruptly. Corrupt Judges are known to have conspired with the AKASHA family for the past 10 years. According to the AKASHA'S the entire family boasted that they had

bought the entire Judiciary and are untouchables, so they were and still are sacred cows of the then KANU (MOI) GOVERNMENT.

The Judgment delivered by the Judge is CORRUPT, who misdirected himself in the performance of his Judicial Duties.

I would be grateful, I beg, I implore, I request you and your Senior to appear before the Chairman, Integrity and Anti-Corruption Committee before 28/4/2003 at the Milimani Commercial Court Building, Ground Floor between 9:00 a.m. to 1:00 p.m. or 2:30 p.m. to 4:00 p.m. daily basis as and when it is convenient to you urgently and lodge my complaint without fear or favour.”.

It is not surprising, having regard to the type of person Khurshid Butt is, that his very two advocates, both of whom told the Tribunal that they held Justice Waki in great esteem as a judge, denied, in their evidence before the Tribunal, Khurshid Butt’s allegation that every time the matter came before Justice Waki, he:-

“was hostile and shouted for no obvious justified reason. All along the hearing the Judge was hostile and shouted like a mad man, which I consider to be the contempt of court.”.

Subsequently, and this is not surprising, as Khurshid Butt had criticized some of his other advocates in his evidence before the Tribunal, he described Satish Gautama and M. A. Khan who were his advocates in the High Court Civil Case No. 1473 of 1997, as follows:-

“They were cowards, they are thugs, white collared thugs and I can produce that from my correspondence right here... They are wolves in sheep’s clothing, both of them. I have no apologies to make.”.

Khurshid Butt did not fail, upon the publication in the Daily Nation of the 31<sup>st</sup> October, 2003, of the establishment of Law Society of

Kenya's Committee to investigate corruption in the Judiciary, to write to it on the 1<sup>st</sup> November, 2003, a letter vaguely alleging corruption and misbehaviour against members of the Judiciary, including Justice Waki, and members of the Bar. The evidence before the Tribunal was that the Committee considered Khurshid Butt's allegations of misconduct by Justice Waki but did not include in its Report to the Chief Justice, any finding of corruption or misbehaviour on the part of Justice Waki. In his evidence before the Tribunal, the Chairman of the Law Society of Kenya, Ahmednasir Abdullahi, who had also considered Khurshid Butt's letter, dismissed it. He said *inter alia*:-

"... I thought that it did not raise issues that should be of concern to me .... But I made up my mind when I read it that in my view, that was something that did not raise anything of concern. I mean people make such complaints everyday, if you see the kind of letters they write to the Society."

Khurshid Butt's written complaints also found their way into the newspapers. He showed the Tribunal his many letters and articles of complaint which had been published in the local newspapers. They were sometimes under the pen name of Mwana Halali or Mzee Halali or Man of Vision and sometimes in his own name. These letters and articles also support the view that Khurshid Butt was a perpetual, querulous and uncontrollable accuser. In his writings, he portrayed himself as a victim suffering from injustice and therefore seeking justice. These letters and articles appear to have all begun after his assault by the Akashas in 1994. The letters and articles were couched in bombastic language and were generalized complaints of corruption in the government with particular emphasis against the Police Force, the Judiciary, Customs and Excise Department and Administration. The diatribe often lacked specific details. But more importantly, there is not a single letter to the editor or article that made any specific complaint against Justice Waki.

Apart from the medical report of Dr. Dhillon already referred to, S. M. Madzayo, Esq. who appeared for Khurshid Butt in a case where he was suing Pegasus Tea Ltd. for unpaid rent, produced a medical report dated the 7<sup>th</sup> April, 1990, which Khurshid Butt had given him in 1999, to be used to persuade Justice Waki who happened to be hearing the matter, not to insist on Khurshid Butt giving evidence that day. This medical report by Dr. S. M. Mwinzi FRCP, a well known Consultant

Neurologist, is the basis of Dr. Mwinzi's evidence, in camera, before the Tribunal, given with the permission of his patient, Khurshid Butt. Dr. Mwinzi's evidence before the Tribunal confirmed what is contained in his medical report that Khurshid Butt suffered a posttraumatic stress disorder which is a mental disorder. This medical report and Dr. Mwinzi's evidence, support our layman's view of Khurshid Butt's continued mental instability and which clearly, adversely affects the credibility of his complaints against Justice Waki and his evidence before the Tribunal. The following excerpts of this medical report speak for themselves:-

- "Diagnosis: (a) Posttraumatic stress disorder  
(b) Headache of vascular type  
aggravated by stress/anxiety  
(c) Cervical spondylosis with  
radiculopathy

This medical report is based on a neurological evaluation I carried out on Mr. Butt on 17.3.98 and 26.3.98. He provided all the history and showed me supporting medical reports prepared by various doctors that have seen him over the last 3 ½ years including psychiatrists, ENT specialists and ophthalmologists. He needed to consult a neurologist on account of headache and other neurological symptoms that had not so far been evaluated.

...

Apart from these neurological symptoms he has psychological symptoms that border on neurology. He lacks initiative. He cannot concentrate. He feels that his memory and ability to retain information has declined considerably. He is insecure and constantly frightened and anxious. As a result of these impediments he has been unable to work since the time of the assault. Consequently he has gained excessive weight which in itself is unhealthy.

...

The neck and interscapular pain as well as the sensory symptoms in the upper limbs are almost certainly due to the changes in the cervical spine which may well have been caused or aggravated by the injuries sustained on 24.6.94. The intermittent headache is probably vascular but

made worse by anxiety and depression. The titubation of the head may be difficult to explain but one does see it following head injury as well as in anxiety, extrapyramidal and cerebellar disease or even old age. The most significant disability in this case however is that related to the psychological effects of the trauma (posttraumatic stress syndrome or disorder) characterized by a combination of disabling anxiety and depressive symptoms.”.

In the Plaintiff of the High Court Civil Case 1473 of 1997 drawn and filed on the 17<sup>th</sup> June, 1997, by the well known and respectable law firm of Messrs. Kaplan & Stratton, and no doubt on the basis of reliable instructions and supportive evidence given and produced by Khurshid Butt, Khurshid Butt sought against the Akasha family, damages for, *inter alia*, the following significant “Present Complaints” caused by his being assaulted by the Akasha family:-

- “(a) decompensation and inability to continue with his work and normal social interaction,
- ...
- (c) the catacactorus changes have been hastened if not initiated by the trauma,
- ...
- (e) psychological trauma, paranoid psychosis, temporary blackouts, headaches and secondary anxiety depression,”.

Khurshid Butt’s amended plaintiff drawn and filed on the 18<sup>th</sup> May, 2001, four years later, by the same law firm, maintained the foregoing “Present Complaints” and further, that Khurshid Butt:-

“has been undergoing treatment in various hospitals in Kenya, England and India and is still at the time of filing this suit, undergoing such treatment. The Plaintiff also claims general damages for future operations and medical care.”.

Apart from anything else, Khurshid Butt’s own claim is that in May, 2001, he had not been cured of his Present Complaints of mental disorders described above and further that it would still take sometime for this to be done.

Black's Medical Dictionary, Thirty-First Edition; 1976, defines "paranoia" and "psychosis" as follows:-

**"PARANOIA** is the term applied to a form of fixed delusional insanity in which the delusions, usually of persecution, all centre round some perverted idea and have an important bearing upon the insane person's actions. In this form of insanity, heredity plays an important part, recovery is unlikely, and in marked cases restraint is often necessary to prevent criminal acts. Many paranoid persons, however, are able to go about freely and transact business, with which their delusions do not interfere, and are regarded simply as eccentric persons.

**PSYCHOSIS** is a term applied to serious disorder of the mind, amounting to insanity."

In his letter of the 29<sup>th</sup> March, 2003, to the Minister for Justice and Constitutional Affairs already adverted to, Khurshid Butt had also claimed, and this shows the type of person that he then was, that:-

"Not only have I suffered from constant ill health since being attacked by the Akashas but recent threats upon my life by them led me to suffer from a nervous break down."

When Khurshid Butt appeared before the Tribunal, this had obviously not been relieved. He was obsessively self-righteous. He would become exceedingly irritable at the slightest challenge to his evidence and would call any one who challenged him a liar, corrupt and lacking moral courage to tell the truth. He could only testify before the Tribunal for 2 - 3 hours a day. Thereafter, he would lose his self-control.

In response to Allegations Numbers One, Two and Four made against him, Justice Waki testified on oath.

In so doing, he provided a duly signed aide mémoire which was concise in setting out specific answers to the allegations. His oral testimony on oath also followed the pattern of the aide mémoire.

Insofar as his conduct relating to HCCC No. 1473 of 1997 and the allegations arising therefrom, his denials were categorical.

He did not know, nor had he ever spoken to, visited or socialized with Abdalla Akasha or any member of his family prior to 1995. The period prior to 1995 is significant because this was before he was appointed a Judge and also the period during which, it had been alleged that he had improperly as a Judge, visited and socialized with Abdalla Akasha and his family who were involved in drug trafficking, and whilst hearing HCCC No. 1473 of 1997 in which the Akashas were Defendants/Applicants. Up till now he did not know, neither had he spoken to, visited, socialized with or had any relationship with any of the Akashas or their families.

He had never met nor in any way, dealt with both Festus Ngolwa M'Tburi and Mohammed Ghani Taib who claim to have been employees of the Akashas. He had never seen them before until they appeared before the Tribunal. Both as an Advocate of the High Court of Kenya and as a High Court Judge stationed in Mombasa, he never dealt with any single case in which the Akashas were involved as litigants.

From the date of his appointment as a High Court Judge, to the 21<sup>st</sup> January, 2004, when he received the list of allegations, he had never received any complaint against him alleging corruption or injudicious conduct. More importantly, he had never received any complaints against him of the nature contained in the Ringera Report, the list of allegations or even those presented in oral and documentary testimony, before the Tribunal.

He had never met, spoken to or in any way, dealt with Khurshid Butt. It was only when he was shown the High Court record of proceedings in **HCCC No. 158 of 1996 Khurshid A. Butt vs Pegasus Tea Limited**, that he recollected that on the 17<sup>th</sup> June, 1998, that case was listed before him for hearing which he adjourned on the application of Khurshid Butt's advocate, Mr. Madzayo. The allegation of misconduct against Justice Waki in that case has been examined under Allegation Number Three of this Report.

HCCC No. 1473 of 1997 was filed in Nairobi when Justice Waki was still stationed in Mombasa. He was transferred back to Nairobi on the 17<sup>th</sup> September, 2001. It was on the 30<sup>th</sup> April, 2002, that the applications to set aside the default judgments first came before him. He heard these applications over a period of time and delivered his ruling on the 21<sup>st</sup> March, 2003. During the hearing of these applications, neither Khurshid Butt nor his advocates, M. A. Khan and Satish Gautama SC, ever raised any complaints of any kind including the alleged visit by

Nurdin Akasha to his Chambers, to Justice Waki before the ruling was delivered or thereafter. Justice Waki recalls having seen Khurshid Butt during the hearing of the applications.

As regards the accusation by Khurshid Butt that Justice Waki had, in December, 2002, whilst hearing the applications in HCCC No. 1473 of 1997, gone to the trouble of going all the way from Nairobi to Mombasa, to visit Baktash Akasha, Justice Waki led the following believable evidence that shattered Khurshid Butt's allegations. Justice Waki gave evidence which was also supported by wedding photographs, that on the 14<sup>th</sup> December, 2002, he was involved in the preparation, and attended the wedding, of his sister at Wamunyu, his rural home. That, on the 15<sup>th</sup> December, he spent the day at Wamunyu with his family.

Justice Waki said that during the entire hearing of the applications in HCCC No. 1473 of 1997, he was neither biased nor showed any partiality towards any of the parties. He certainly did not shout, lose his temper or behave like a mad man as alleged by Khurshid Butt. Khurshid Butt's advocates had as already observed, asserted that Justice Waki behaved most properly. Justice Waki reiterated and with which we agree, that in writing his ruling of the 21<sup>st</sup> March, 2003, he considered all the material that was placed before him by the advocates of the litigants. He properly exercised his judicial discretion in coming to the decision that he came to. He was not influenced by any extraneous matters of whatever nature, and that he stood by that decision. We could not agree more.

As regards the allegation that he was a member of a cartel that rotated around the Akashas and their associates, namely Sammy Kithiki, Yusuf Dato, Sunny Nawab, Amjad Melek and Mr. Kanyi, Justice Waki categorically denied knowledge of the existence of any cartel or being a member of it. He had only met Sammy Kithiki once at Nyali Golf and Country Club, and played golf with L. Maghnani there, once. He did not know Sunny Nawab or Amjad Melek. He knew Mr. Kanyi as an Advocate of the High Court of Kenya practicing in Mombasa.

The allegations against Justice Waki that he wined and dined with the Akashas, and that he was a member of a cartel are totally without foundation. Nor is there any foundation in the allegation that Justice Waki was influenced in any way to give a ruling favourable to the Akashas and to the detriment of Khurshid Butt.

We find the allegations that Justice Waki had a private meeting with Nurdin Akasha, one of the Defendants/Applicants in HCCC No. 1473 of 1997; that he was corrupted, biased and hostile against

Khurshid Butt in that matter; and that he was a member of Abdalla Akasha's drug trafficking or corrupt cartel; to be without any substance and totally unbelievable.

The totality of the evidence adduced in relation to Allegations Numbers One, Two and Four in this Report against Justice Waki cannot and do not support any of these allegations, and which are hereby totally rejected.

### **Allegation Number Three**

The Statement of Misbehaviour made against Justice Waki is:-

#### **STATEMENT OF MISBEHAVIOUR**

That as a judge of the High Court he failed to disqualify himself from participating in proceedings in which he was unable to decide impartially or in which a reasonable fair minded and informed person might believe that he (the subject) as a judge would be unable to decide the matter impartially.

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 11-13 of this Report.

This matter can be quickly disposed of.

First of all, in his complaint statement to the Ringera Committee, Khurshid Butt did not make any reference whatsoever, to the above Statement of Misbehaviour and Particulars of Misbehaviour or any other facts related thereto. Similarly, in his many vociferous letters of complaint already referred to in the Introduction of this Report, Khurshid Butt did not include a word about Justice Waki's alleged misbehaviour on the 17<sup>th</sup> June, 1998. All this makes Khurshid Butt's allegation an afterthought.

We will, however, consider the evidence produced before the Tribunal in support of the alleged misbehaviour of Justice Waki.

In his evidence in support of this allegation, Khurshid Butt said that on the 17<sup>th</sup> June, 1998, he and Mrs. Tutui, advocate for the Defendant, were in court when the case was called for hearing before Justice Waki and that his advocate, Mr. Madzayo, was absent. Justice Waki had then, in compliance with what Mrs. Tutui said she would like done, granted an adjournment of the case with costs and on condition that interest on the amount claimed by the Plaintiff, Khurshid Butt, that may become due, between then and the next hearing date, would be forfeited.

According to Khurshid Butt, it was whilst Justice Waki was writing this order that his advocate, Mr. Madzayo, rushed too late, into the

court. He apologised to the Judge for being late but was not allowed to make any submissions.

Khurshid Butt made the following typically vague and highfalutin assertion when it was put to him before the Tribunal, whether Justice Waki had asked him if he was willing to proceed in the case without his counsel, Mr. Madzayo. Khurshid Butt said:-

“If he would have asked me I would have said yes ... You know I am one of those people who confront people’s face ... He did not ask me, My Lord, anything and I could see the bias straight away. My Lord, I am a student of psychology, I taught, I was a teacher and you know the first thing that you learn as a teacher, is primary school teacher psychology about children and people. If we cannot psychologically deal with them, we cannot teach ... So my Lord, I at once knew he is a Kamba, she is a Kamba, I had already known their associations also ...”.

Mrs. Tutui and Mr. Madzayo, who were apparently, called by Assisting Counsel to give evidence in support of Khurshid Butt’s allegation of misconduct against Justice Waki, shattered Khurshid Butt’s evidence. They both said that they were before Justice Waki when the case that was fixed for hearing that day, was called, and that Mr. Madzayo who was appearing for Khurshid Butt then sought an adjournment as he had only been briefed the day before, by Khurshid Butt in a rather complicated matter. Mrs. Tutui had replied that she was willing to indulge Mr. Madzayo on condition that costs for the day were paid by the Plaintiff and that no interest on the amount claimed would accrue between then and the next hearing date. Mr. Madzayo had no objection to this and Justice Waki made the consent orders which, in our view, are not improper.

The foregoing, which is as recorded in Justice Waki’s handwritten records of the proceedings before him (listed as Exhibit 8 in Appendix “B” of the Report), strengthens the veracity of the evidence of these two lawyers. Why should for instance, Justice Waki put down in his record of the proceedings, that Mr. Madzayo had applied for an adjournment if he had not done so. And consistent with the orders made by Justice Waki, Mr. Madzayo on the 6<sup>th</sup> July, 1998, wrote to Mrs. Tutui the following letter, (listed as Exhibit 30 in Appendix “D” of this Report):-

"Dear Madam,

RE: HCCC NO. 158 OF 1996  
KHURSHID A. BUTT VERSUS  
PEGASUS TEA LTD

The above matter refers and to our recent conversation at the Law Court, where I sought an adjournment on the same.

We shall be very grateful to know whether you have instructions to explore a possibility of an out of Court settlement. If so, kindly confirm a date by phone with the undersigned.

Yours faithfully

S. M. MADZAYO."

Furthermore, having regard to the type of person that Khurshid Butt is, we have no hesitation in dismissing his version of what happened in court on the 17<sup>th</sup> June, 1998. We also find Mr. Madzayo's evidence that on the 16<sup>th</sup> June, 1998, he had warned Khurshid Butt that their application for adjournment might be granted subject to conditions, most credible. Indeed, Khurshid Butt had cleverly, he must have thought, given to Mr. Madzayo, Dr. S. M. Mwinzi's medical report on him to be used by Mr. Madzayo in support of Khurshid Butt's mental inability to give evidence on the 17<sup>th</sup> June, 1998.

As regards the allegation of close and intimate association at the time between Mrs. Tutui and Justice Waki, this is not even supported by Khurshid Butt's own evidence already referred to. Mrs. Tutui's evidence that prior to her being appointed a Commissioner of Assize in 1999, she had, by the 17<sup>th</sup> June, 1998, had no social contact with Justice Waki is not denied. There is nothing wrong with her admitted social contact with Justice Waki after her appointment as Commissioner of Assize and when she worked as a judicial colleague of Justice Waki at the Mombasa High Court.

If indeed, as alleged by Khurshid Butt, Mr. Madzayo was not in court when Justice Waki demonstrated bias and hostility against him, one would have expected Khurshid Butt, as he could do, to have protested vociferously, and asked Justice Waki to disqualify himself from hearing the matter. When Justice Khaminwa was hearing an application to strike out his suit for non prosecution, he had verbally intervened and accused the judiciary of being corrupt. As already shown, whilst giving

evidence in the criminal trial of Baktash Akasha before Chief Magistrate Mûgo, Khurshid Butt had not hesitated to tear into pieces a documentary exhibit that was given to him to look at.

Should Justice Waki have disqualified himself from hearing the matter? The test that would apply and as laid down in the well known case of ***R v Liverpool City Justice ex parte Topping (1983) 1 All ER 490*** is:-

“would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant would not be possible?”

Whilst bearing in mind the above dictum, the situation should be avoided whereby applications to judges to disqualify themselves on the grounds of possible bias, are not too readily acceded to, as this may result in counsel or litigants selecting the judges they want to hear their matters.

In any case, taking into consideration all the relevant facts, we have come to the conclusion that Justice Waki did not behave improperly.

## **Allegation Number Five**

The Statement of Misbehaviour made against Justice Waki is:-

### **STATEMENT OF MISBEHAVIOUR**

That, while a judge of the High Court of Kenya in the Republic of Kenya that he conducted himself in a way and manner inconsistent with the dignity of the judicial office.

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 14-15 of this Report.

This allegation involves showing both that there was such a thing as a drug trafficking cartel and that Justice Waki associated or kept company with individuals who were members of the cartel. If what is meant by "cartel", is a group of people who were paid by the Akashas to look after their drug trafficking interests by protecting them from the police, the courts and other authorities, the Tribunal heard sufficient evidence to believe that there probably was indeed such a group. The establishment of who were the members of the cartel is, however, another matter. We think it likely that it may have included members of the Judiciary, police and administration at various levels. Unless Justice Waki was very naive, which clearly he is not, for him to have associated, or kept close company, with individuals who to his knowledge, were in fact, members of such a cartel, would amount to misbehaviour.

Based on the evidence given before the Tribunal, the involvement of the Akashas in drug trafficking was no secret in Mombasa and Justice Waki might, though he denies it, have known about this after his arrival in Mombasa as a Judge at the beginning of 1996, if not before. We consider that, if it could be proved that Justice Waki, while he was a Judge, had visited the 'Akashas' house or houses on a number of occasions or even once without a good innocent reason for such visit, then misconduct of a sufficient gravity would arise leading to a recommendation of removal. Numerous such visits prior to his becoming a Judge could also result in a failure to disqualify himself from subsequently hearing a case involving the Akashas, amounting to misbehaviour unless special circumstances were established.

Our decision as to whether or not such visits took place has been dealt with under Allegations Numbers One, Two and Four of this Report.

Our decision therein, is that such visits did not take place. We therefore find that Allegation Number Five has not been established.

## **Allegation Number Six**

The Statement of Misbehaviour made against Justice Waki is:-

### **STATEMENT OF MISBEHAVIOUR**

That while a judge of the High Court at Mombasa he kept, maintained a close personal association with individuals who were members of the legal profession and ordinarily practiced in the Mombasa High Court. That the said association gave rise to the suspicion and/or appearance of favourism (sic) or partiality.

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 15-16 of this Report.

The Assisting Counsel set out to establish that Mrs. Pamela Tutui, an advocate practising in Mombasa at all material times until she was appointed to the Judiciary as a Commissioner of Assize, was so closely associated with Justice Waki that it gave rise to the suspicion and/or appearance that Justice Waki was treating her, when she appeared in court before him, with favouritism or partiality.

No evidence, other than by Khurshid Butt, was given by anyone who in fact claimed to harbour such suspicion or belief that such favouritism existed. However, the actual existence of such suspicion or appearance would not have to be proved if the conduct complained of was reasonably likely to engender such suspicion or appearance.

It is clear that Justice Waki made no attempt to disqualify himself from hearing matters in which Mrs. Tutui was acting for one of the parties. Both Justice Waki and Mrs. Tutui gave evidence before the Tribunal which showed clearly that before Justice Waki was made a Judge, he and Mrs. Tutui knew each other as practising advocates, Justice Waki then practising in Machakos and Nairobi and only occasionally in Mombasa, and Mrs. Tutui mostly in Mombasa.

After Justice Waki was appointed a Judge of the High Court in September, 1995, and posted to Mombasa in January, 1996, Mrs. Tutui appeared from time to time for parties in cases being heard by him. Apart from the cases mentioned by Khurshid Butt, there is no evidence that there were any cases heard by Justice Waki in which Mrs. Tutui was appearing, and which gave rise to any suggestion that she had been

treated more favourably than she should have been. The cases mentioned by Khurshid Butt in this context were all cases in which he was a party. However, **Mombasa High Court Civil Case No. 158 of 1996 Khurshid Ahmed Butt vs Pegasus Tea Ltd** was the only matter in which Justice Waki made a ruling, and which was considered under Allegation Number Three of this Report wherein we held that Justice Waki did not give Mrs. Tutui any preferential treatment.

It was suggested that Justice Waki should always have disqualified himself from hearing any case in which Mrs. Tutui was appearing for a party, due to the closeness of the relationship between him and Mrs. Tutui. Justice Waki agreed during his evidence that if the relationship had been close he should, and would, have disqualified himself, from hearing such a matter, but since there was no such relationship in June, 1998, when the only decision by Justice Waki claimed to be in favour of Mrs. Tutui's client was made, it would have been wrong to do so even if he had been so requested.

As already observed under Allegation Number Three of this Report:-

“... allegation of close and intimate association ... between Mrs. Tutui and Justice Waki ... is not even supported by Butts own evidence ...”.

What is more, it was clear from the evidence that after Mrs. Tutui was appointed to judicial office as a Commissioner of Assize on the 26<sup>th</sup> May, 1999, she and Justice Waki and their respective families, came to know each other better as professional judicial colleagues. There is nothing unusual or improper for this to happen. Furthermore, since she was now herself hearing cases and was no longer appearing for clients by this time, the issue of Justice Waki failing to disqualify himself, cannot arise after her appointment. Her appointment as a Commissioner of Assize was revoked on the 22<sup>nd</sup> September, 2003, by which time, Justice Waki had been elevated to the Court of Appeal. There has been no suggestion that there were any relevant events subsequent to her return to practice as an advocate.

Allegation Number Six also asserts that Justice Waki maintained a close personal and social relationship with advocate L. Maghnani who was practising as such, in Mombasa. It is further asserted that he was the advocate for the Akasha family who were also close friends of Justice Waki.

We will first consider whether the close personal and social relationship between L. Maghnani and Justice Waki has been established. This assertion seems to be based on the following facts:-

- that Maghnani was in practice in Mombasa as an advocate;
- that he and Justice Waki were members of the Nyali Golf and Country Club;
- that on one occasion they had played in the same group of three in the Monthly Mug competition at the Nyali Golf and Country Club;
- that he acted as an advocate for the Akashas in conveyancing matters; and
- that Justice Waki was a close friend of the Akashas.

Even if we accepted the last fact, which we do not, (see Allegations Numbers One, Two and Four of this Report) the other facts make far too tenuous a connection between Justice Waki and L. Maghnani to justify the description of any relationship between them as being "close and personal". Furthermore, it is hard to see what misbehaviour by Justice Waki is being suggested. It is not in our view misbehaviour for a Judge to have as a friend a practicing advocate. Misbehaviour could arise if the Judge failed to disqualify himself, from hearing cases in which his advocate friend was representing a party or if the Judge allowed his friendship to influence his judgement. It would also arise if the Judge had a close friendship with a person who was, to the Judge's knowledge, a member of a cartel of drug traffickers which, in our view, is not the case (see Allegations Numbers One, Two, Four and Five of this Report).

There is evidence from Mr. Dato, that L. Maghnani acted as an advocate in conveyancing matters. This, however, is not sufficient to show that he was a member of the so-called cartel. The fact that an advocate acts for a criminal does not necessarily mean that he is an accomplice any more than it would, for a building contractor to enter into a contract to renovate a house belonging to a criminal.

In our view, Allegation Number Six has not been established.

## **Allegation Number Seven**

The Statement of Misbehaviour made against Justice Waki is:-

### **STATEMENT OF MISBEHAVIOUR**

That as a judge of the High Court of Kenya he failed to exhibit and promote high standards of judicial conduct in order to reinforce public confidence, which is fundamental to the maintenance of judicial independence.

The Particulars of Misbehaviour and Summary of Evidence are set out at pages 16-18 of this Report.

This allegation is very similar to and overlaps with Allegations Numbers One, Two, Three, Four and Six of this Report.

The allegation that Justice Waki visited the Akasha family have already been dealt with under Allegations Numbers One, Two and Four of this Report. The class of people alleged to have been visited by Justice Waki is, in this allegation, extended to include the "associates" of the Akasha family. But no specific associates of the Akasha family have been identified in the evidence, as having been so visited.

In considering these issues we came to the conclusion that the allegation had not been established. We also came to the same negative conclusion when we considered, under Allegations Numbers One, Two, Three, Four and Six of this Report, the alleged visits by Justice Waki to the Akashas; his alleged association with Mrs. Tutui and L. Maghnani; and the allegation that Justice Waki allowed a party to the suit HCCC No. 1473 of 1997, Nurdin Akasha, to enter his Chambers for a private meeting, while he was hearing the case, in the absence of the opposing party or his advocates".

It follows in our view, that Allegation Number Seven, has not been established.

## **Allegation Number Eight**

The Statement of Misbehaviour and the Particulars of Misbehaviour made against Justice Waki are:-

### **(a) STATEMENT OF MISBEHAVIOUR**

Justice Waki accepted a monetary bribe from Mr. C. Kirundi an Advocate in a matter that was before him, namely High Court Civil Case No. 495 of 1989 Juliane Ulrike Stamm v Tiwi Beach Hotel Ltd.

### **(b) PARTICULARS OF MISBEHAVIOUR**

Mr. Kirundi gave his court clerk, Ephantus Muhoro, who had been sent to Mombasa to fix a hearing date for the hearing of the matter, an inch thick envelope full of one thousand shillings currency notes which Muhoro, as he had been instructed by Mr. Kirundi, gave on 10<sup>th</sup> December, 1998, to Justice Waki in his Chambers.

As already indicated in the introduction of this Report, the Tribunal heard evidence concerning Allegation Number Eight though it was not one of the original list of allegations served on Justice Waki. The origin of this allegation which surfaced on the 25<sup>th</sup> March, 2004, was a statement made that day by Ephantus Muhoro to the Assisting Counsel. Muhoro said that without having ever made a report to anyone about the allegation of bribery against Justice Waki, the Assisting Counsel had remarkably, on the 21<sup>st</sup> March, 2004, called him on his cell phone and asked him to see him. Being apprehensive about the Assisting Counsel's request, Muhoro rather went the next day, to the Integrity Centre where he told his story to Jesse Wachanga, who happened to be the assistant to the Assisting Counsel. Jesse Wachanga asked him to record his statement, which he did on the 25<sup>th</sup> March, 2004. For the first time, and though he was to say he did not know the purpose of what he had been sent to do, Muhoro in his statement and evidence before the Tribunal alleged that nearly six years ago, on the 10<sup>th</sup> December, 1998, and when he was advocate Chege Kirundi's court clerk, he had given Justice Waki at the Mombasa Law Courts, where he had gone to obtain hearing dates of the **High Court Civil Case No. 495 of 1989 Juliane Ulrike Stamm v**

**Tiwi Beach Hotel Ltd**, (hereinafter referred to as the **Stamm Case**), an inch thick envelope full of one thousand shillings currency notes which Chege Kirundi had asked him to give to Justice Waki.

In the **Stamm Case**, advocate Pheroze Nowrojee was for the Plaintiff and Chege Kirundi for the Defendant.

Muhoro said that he did not know what the money he gave to Justice Waki, was for. He set this out in his statement in the following manner:-

“As regards the money which was stack (sic) in the envelope, I would which (sic) to state that I do not know what it was meant for and I don't want to speculate.”.

And then cynically, to show that he could not be accused of being a party to the alleged misbehaviour on the part of Justice Waki, Muhoro went on to state that:-

“This was not the first time that Mr. Kirundi sent me with money. He had trusted me with the money on two other occasions viz –

- (1) Booking for his relatives at Utalii and
- (2) Filing documents in court.”.

Why did Muhoro, who stopped working for Chege Kirundi in October, 2000, only conclude in 2004, that he had been used to bribe Justice Waki in the **Stamm Case**?

Muhoro said that it was only after he had read in the newspaper what Ralf Stephan, the husband of the Plaintiff in the **Stamm Case** had on the 3<sup>rd</sup> and 4<sup>th</sup> March, 2004, told the Tribunal, that he decided that he had to do something.

The relevant part of what Ralf Stephan told the Tribunal, was that his wife had lost the **Stamm Case**, which was heard by Justice Waki because he had not followed the advice of Justice Waki's court clerk, Samuel Mutua Chenze, to replace Pheroze Nowrojee with L. Maghnani as the Plaintiff's lawyer in the **Stamm Case**. The implication being, though Ralf Stephan did not say so, that L. Maghnani was a close friend of Justice Waki and would therefore, obtain a favourable judgment from Justice Waki. Samuel Chenze denied that he gave Ralf Stephan any advice as alleged by him. Furthermore, the evidence before the Tribunal was that L. Maghnani had long stopped appearing in court and that his legal practice was confined to conveyancing and business transactions.

What Muhoro then did, and even before recording his statement on 24<sup>th</sup> March, 2004, was to write on the 10<sup>th</sup> March, 2004, a letter to Mr. Nowrojee, whom he knew had represented the Plaintiff in the **Stamm Case**, and to no one else. This letter was, in our view, an attempted dubious device by Muhoro seeking through Pheroze Nowrojee, some reward for what he would tell Pheroze Nowrojee about the alleged bribing of Justice Waki.

After the Ringera Report became public knowledge, Ralf Stephan had, though a notice of appeal concerning Justice Waki's judgment in the **Stamm Case** had already been filed, and though he had never expressed to Pheroze Nowrojee any reservations about Justice Waki, nevertheless, asked Pheroze Nowrojee to forward Justice Waki's judgment in the **Stamm Case**, to whoever would be appointed to look into the Ringera Report. This was to be a further complaint against Justice Waki on the grounds of errors or mistakes in the judgment. Pheroze Nowrojee said he refused to do this as he did not think the errors constituted corruption or misconduct on the part of Justice Waki. Pheroze Nowrojee said he told Ralf Stephan to seek a second or even third opinion on the matter. Later, he read in the press that Ralf Stephan had appeared before the Tribunal. It was soon after this, that Muhoro, whom he did not know and had never met, wrote his letter to him.

Pheroze Nowrojee was surprised to receive Muhoro's letter. He did not think that he was the one to whom such a letter should be written. Also the letter had been written about a year after the public known inquiries into judicial conduct by the Ringera Committee and the Law Society of Kenya, had been commenced. Lastly, Pheroze Nowrojee could not have assured Muhoro of his safety as he had sought in his letter. It is not surprising, that Pheroze Nowrojee did not bother to reply to Muhoro's letter.

This letter which was given the short shrift that it deserves, by Pheroze Nowrojee, is as follows:-

"Dear Sir,

Subject: Julianne Ulrike Stamm Versus Tiwi Beach, Mombasa High Court.

I refer to the above case and in relation to the outcome of the case that was determined by the suspended Judge Hon. Justice Waki. I was working with the law firm of Kirundi & Advocates as a Clerk and hence handled the file.

There are some things that happened which I would like to say even if it is recording a statement. But before we start this exercise I would like to meet you and have your assurance of my safety. The rest you will be told once you arrange meeting at your convenience.

Yours faithfully,

Ephantus Muhoro".

Pheroze Nowrojee rather, on the 11<sup>th</sup> March, 2004, wrote the following letter to Ralf Stephan, in which he did not only, refer to his disagreement with Ralf Stephan concerning what reprisal Ralf Stephan may have had in mind against Justice Waki when he gave evidence before the Tribunal, but also, to Muhoro's letter which he faxed to Ralf Stephan:-

"Dear Ralf,

RE: STAMM v. TIWI BEACHES LTD.

I of course cannot act any further for you in the Tiwi matter as we had earlier differed over the course you wanted taken, and which you have now pursued.

However, I have yesterday received a letter from a Mr. Ephantus Muhoro, which I enclose.

I cannot participate in the matter and have no interest therein. I will not meet the writer, and am delivering the letter to you to do with it what you consider fit, consistent with the safety of its writer, as indicated by him.

Kindly acknowledge receipt.

Yours faithfully,  
PHEROZE NOWROJEE".

It was only after Muhoro's failure to reap any benefits from the letter he wrote on the 10<sup>th</sup> March, 2004, to Pheroze Nowrojee, that he was as he had suggested in his statement, called on his cell phone by the Assisting Counsel on the 21<sup>st</sup> March, 2004. The Assisting Counsel would

certainly not have known the number of Muhoro's cell phone, if it had not, one way or another, been passed on to him by Muhoro.

And if Muhoro is now suggesting that he had been used as a conduit to bribe Justice Waki, then as an accomplice, it would be desirable that his evidence be corroborated, which is not the case.

And now to the evidence of Muhoro relating to his trip to Mombasa and where he bribed Justice Waki.

Muhoro had been emphatic that on the 10<sup>th</sup> December, 1998, he went to the Nairobi airport about 6:35 am to catch his flight to Mombasa. He boarded his flight to Mombasa at 7:00 am and arrived at Mombasa at about 7:50 am. By 9:00 am he had reached the Mombasa Law Courts. It was not until he was confronted in cross-examination, with his used air ticket which showed that his flight to Mombasa was to take off at 9:00 am, that Muhoro, admitted that he had given the wrong times, though he had not lied. It was also in his cross-examination that Muhoro finally admitted, although he had in his statement said that he did not want to speculate on the objective of giving the money to Justice Waki, to being an accomplice in bribing the Judge.

Muhoro said that when he arrived at the Mombasa Law Courts, he saw Morris Kioko one of the clerks in the civil registry, who brought out the court file in the **Stamm Case** for the purpose of taking the hearing dates. Muhoro said that at about 11:00 am he asked Morris Kioko to take him to Justice Waki's Chambers and that Morris Kioko took him to the door of Justice Waki's Chambers which, Muhoro repeatedly claimed, was on the same first floor of the court building as the civil registry. He then knocked on the door of the Judge's Chambers, opened it, and went in where he saw Justice Waki sitting behind his desk. Muhoro who asserted that the High Court was at that time on vacation, then gave Justice Waki the envelope of money, telling him that it was from Chege Kirundi. Justice Waki then told him to let him know if he had any problems getting the hearing dates that he wanted. Muhoro said he went back again to see the Judge as the civil registry could not give him suitable hearing dates. Justice Waki then telephoned a clerk in the civil registry and told Muhoro that all would be well. Muhoro went to see this clerk who gave the hearing dates, the 19<sup>th</sup> and 20<sup>th</sup> May, 1999, that Muhoro had sought. Strangely, this court clerk was not identified, neither did he give evidence before the Tribunal.

Subsequently, when the **Stamm Case** came before Commissioner of Assize, Shah, for hearing, Pheroze Nowrojee had insisted that the matter be heard by Justice Waki as he had previously, opened his client's case before him. Chege Kirundi, on the other hand, was quite happy and this would seem to be inconsistent with his having bribed Justice Waki, for the matter to be heard by Commissioner of Assize, Shah.

Apart from the foregoing circumstantial issues that adversely affect the credibility of Muhoro's evidence, there are the following hard facts which in our view, demolish Muhoro's allegation of bribery misconduct on the part of Justice Waki:-

First of all, the Mombasa High Court on the 16<sup>th</sup> December, 1998, was not on vacation as Muhoro vehemently claimed. The Christmas court vacation of the Mombasa High Court according to Rule 2(3) of the High Court Practice and Procedure Rules, is from the 21<sup>st</sup> December, to the 4<sup>th</sup> February.

Then, and this is not denied, Justice Waki was on thirty-three days leave commencing from the 16<sup>th</sup> November, to the 31<sup>st</sup> December, 1998, and could not have sat on any matter on the 10<sup>th</sup> December, 1998. This is fortified by the High Court Diary for that day, and also confirmed by the Deputy Registrar of the Mombasa High Court, Humphrey Njiru, that only Justice Hayanga, and Justice Mitey who was sitting in place of Justice Waki who was then on leave, heard any matters that day. But what is significant, is that when a Judge is on leave and another one takes his place, the Judge who is on leave may go to his Chambers to see, for instance, if there is any mail for him, but certainly not sit in the Chambers. That is why Muhoro's claim that he found Justice Waki sitting in his Chambers on the 10<sup>th</sup> December, 1998, when he was on leave and Justice Mitey was filling the vacuum created, is incredible. In any case, we are more inclined to accept Justice Waki's evidence that on the 10<sup>th</sup> December, 1998, he was already in Nairobi arranging the air flight for his undoubted trip on 16<sup>th</sup> December, 1998, with his wife and children, and which had been approved by the then Chief Justice, to Zimbabwe.

And lastly, Muhoro's story that the civil registry and Justice Waki's Chambers are both on the first floor of the Mombasa Law Courts, is not true. The civil registry as is well known, is on the ground floor of the law court, and Justice Waki's Chambers is on the first floor. To get to these

Chambers, one has first to go to an ante room on the first floor, where one waits until called to the Judge's Chambers. One would then first go into the Judge's Secretary's office which is separated from the ante room by a glass partition, and then, from the Secretary's office, to the Judge's Chambers through the connecting door. The only way in which one can gain direct entrance into the Judge's Chambers is from the rear entrance of the Mombasa Law Courts which is reserved for Judge's only and guarded by policemen. Morris Kioko told the Tribunal, and which in the circumstances, we accept as true, that on the 10<sup>th</sup> December, 1998, he took Muhoro upstairs to the ante room on the first floor, and left him there, and not at the door of the Judge's Chambers as claimed by Muhoro.

We reject Muhoro's allegation which is also uncorroborated, that he bribed Justice Waki in the **Stamm Case**, with an envelope full of one thousand shillings currency notes given to him by Chege Kirundi.

## **Allegation Number Nine**

The Statement of Misbehaviour and the Particulars of Misbehaviour made against Justice Waki are:-

### **(a) STATEMENT OF MISBEHAVIOUR**

That Baktash Akasha, through Justice Waki, bribed Chief Magistrate Boaz Olao with four million shillings in the criminal case which he was hearing and in which Baktash Akasha and Mohammed Aslam Ghani Taib, among others, had been charged with drug trafficking.

### **(b) PARTICULARS OF MISBEHAVIOUR**

That between 11:00 a.m. and 12 noon on the 27<sup>th</sup> May, 2000, at the Kentmere Club near Limuru, Baktash Akasha in the company of Mohammed Aslam Ghani Taib, gave to Justice Waki four million shillings which he then passed on to Chief Magistrate Boaz Olao to induce him, *inter alia*, to grant bail to Baktash Akasha and Mohammed Aslam Ghani Taib in the drug trafficking criminal case which he was hearing.

Similarly, as in the case of Allegation Number Eight, the Tribunal heard evidence in respect of Allegation Number Nine which, though not one of the original list of allegations served on Justice Waki, was nonetheless related to them.

The short issue in respect of Allegation Number Nine, is whether such a meeting at the Kentmere Club on the 27<sup>th</sup> May, 2000, as alleged in the allegation, ever took place.

We will now consider the evidential pros and cons relating to the allegation of the bribery of Chief Magistrate Boaz Olao through Justice Waki, by Baktash Akasha.

The evidence led in support of the allegation made against Justice Waki, is that of Mohammed Ghani Taib. Ghani Taib told the Tribunal that the drug trafficking criminal case against him, Baktash Akasha and others, and which was initially, to be heard in Mombasa, was later transferred to be heard by Chief Magistrate Boaz Olao in Nairobi, as it was feared that the Akashas' influence over law enforcement agencies in Mombasa, including the Judiciary, would militate against a fair

adjudication of the criminal case. Whilst both Ghani Taib and Baktash Akasha were granted bail on the 19<sup>th</sup> May, 2000, it was not until the 26<sup>th</sup> May, 2000, that Ghani Taib's release from prison, was finally processed. Ghani Taib was met upon his release from prison that day, by Baktash Akasha, his sister Romana, and Romana's husband, who took Ghani Taib to dinner.

At the dinner, Baktash Akasha told Ghani Taib that they would go the next day, to Limuru to meet Justice Waki and Chief Magistrate Olao, and that it was Justice Waki who had influenced Chief Magistrate Olao in granting them bail. Ghani Taib continued that in the morning of the next day, which was the 27<sup>th</sup> May, 2000, Baktash Akasha's sister, Romana, brought four million shillings in one thousand shillings currency notes which were put in a DHL box and tied up. The money was to be taken as part payment to Chief Magistrate Boaz Olao, who, Baktash Akasha had told Ghani Taib, had asked for ten million shillings "tumalize hiyo kesi" (so that we finish the case). According to Ghani Taib, Baktash Akasha, Romana and himself, arrived in Baktash Akasha's car at Kentmere Club sometime between 11.00 am and 12 noon that day. They parked the car at the car park and went into the club where they joined Justice Waki and Chief Magistrate Olao who were seated next to the bar. Justice Waki then introduced Baktash Akasha to Chief Magistrate Olao and soft drinks were ordered.

Ghani Taib, as an accomplice, went on to confess before the Tribunal and which was uncorroborated, that Baktash Akasha then told Chief Magistrate Olao that his motor vehicles and bank accounts which it turned out, did not even belong to him, had been impounded and frozen by the police in connection with the criminal case that he was hearing. Chief Magistrate Olao then told Baktash Akasha to tell his lawyer to make the necessary application. Baktash Akasha also asked Chief Magistrate Olao to assist him and Ghani Taib in the criminal case and he replied that he would see what he could do. When Baktash Akasha told Chief Magistrate Olao that the "luggage" was in his car, Chief Magistrate Olao said that the "luggage" should be given to his friend, Justice Waki. They all then went to the car park. Ghani Taib took from Baktash Akasha's car, the DHL box with the money in it, and gave it to Baktash Akasha, who then gave it to Justice Waki. Justice Waki put the box into the boot of a red Peugeot 405 car which was parked next to Baktash Akasha's car. Thereafter, Baktash Akasha, Romana and Ghani Taib left for Nairobi.

We find the evidence of the convicted drug trafficker and self confessed traitor, Ghani Taib, unworthy of belief. Ghani Taib happily disclosed to the Tribunal that he had been a police informer and was as such, paid two hundred thousand shillings for betraying to the police,

whilst employed by Abdalla Akasha in drug trafficking, the existence of a large consignment of Abdalla Akasha's narcotic drugs (hashish) in a house rented by him. He had done this upon the instructions of Kamaldin, a son of Abdalla Akasha, after a bitter quarrel between father and son. Furthermore, when the police raided the house rented by Abdalla Akasha, only half of the hashish were found there. Abdalla Akasha's sons promised him four hundred thousand US dollars if he kept his mouth shut about this, which he did.

In his evidence before the Tribunal, Chief Magistrate Olao acknowledged that he owned a red Peugeot 405 car, Reg. No. KAG 193C, which he drove himself, and which, when he sat at the Nairobi Law Courts during the year 2000, he would park near the entrance to the Nairobi Law Courts which remand prisoners regularly used to go into and out of court. He also said that he worked in Kiambu as a Magistrate for seven months in 1999, and became an honorary member of the Kentmere Club which he visited once or twice. Chief Magistrate Olao denied having been bribed on the 27<sup>th</sup> May, 2000, with four million shillings at Kentmere Club. He said he could not recall exactly, where he was four years ago, on that date, and that if he had really received that amount of money on that date, he would presumably, not only, have remembered it, but would also, not have convicted Ghani Taib. Chief Magistrate Olao also alleged that Ghani Taib must have made the accusation out of malice because he convicted him in the criminal case in question. Chief Magistrate Olao, however, conceded that he had convicted many people and no one else had made allegations against him, to his knowledge. Regarding his relationship with Justice Waki, he acknowledged that he served as a Magistrate in Machakos on-and-off for a total of nine years, and that during that time, and before which Justice Waki was appointed a Judge, Justice Waki then in private legal practice, appeared before him, but he did not socialize with him then or as a Judge.

In his evidence before the Tribunal, Justice Waki denied having gone at all, to Kentmere Club on the 27<sup>th</sup> May, 2000, or having facilitated the giving by Baktash Akasha of a four million shillings bribe to Chief Magistrate Boaz Olao as alleged by Ghani Taib or for any other purpose. Indeed, he had never been to Kentmere Club in his life. While acknowledging that during his private law practice in Machakos, he used to appear before Chief Magistrate Olao, Justice Waki denied having socialized with him. Justice Waki also denied having associated with Baktash Akasha or any other member of the Akasha family. He said the only case involving the Akashas he recalled dealing with, and which he dealt with only in part, was HCCC No. 1473 of 1997 (see Allegation Number One) in which, Khurshid Butt was the Plaintiff and the Akashas were Defendants, and which he handled professionally.

Justice Waki told the Tribunal that through out the 27<sup>th</sup> May, 2000, he was nowhere near the Kentmere Club and that on that day, he was down in Mombasa, taking part in the Monthly Mug golf tournament at the Nyali Golf and Country Club.

First of all, credible documentary evidence that were produced before the Tribunal, and identified by Musa Muga the Manager of the Nyali Golf and Country Club, established that Justice Waki was on the 27<sup>th</sup> May, 2000, in Mombasa and took part in the Monthly Mug tournament of the Nyali Golf and Country Club on that day. The first of this, is the entry in relation to the 27<sup>th</sup> May, 2000, in the Work Ticket of Justice Waki's official car, which was made in the year 2000, and which shows that he was at Nyali in Mombasa all of that day. The Club's statement of account for Justice Waki for the year 2000, also shows that from the 26<sup>th</sup> to 28<sup>th</sup> May, 2000, Justice Waki had accumulated an outstanding bar bill of seven thousand, nine hundred and ninety shillings. As regards the golf tournament itself, various certified documents which were made on the 27<sup>th</sup> May, 2000, establish that Justice Waki took part in the golf tournament that lasted some four hours, on the 27<sup>th</sup> May, 2000. These are the relevant pages of the Competition Book in which those who wish to take part in the competition enter their names and which pages show that Justice Waki had entered his name to take part in the competition and which had been ticked by the Golf Captain in making the Draw Sheet showing who would play against whom; the Pro-Shop accounts of entry fees paid by the competitors, which show that Justice Waki is not one of those who had not paid their competition fees, neither was he entered as "N/S"(No Show), signifying that he did not play that day; and the list of draw by the Golf Captain showing that Justice Waki was playing on the 27<sup>th</sup> May, 2000, against N Mahihu who retired before completing the tournament, and A Kikuvi. Then there is the Score Register of Justice Waki made by an independent Handicap Convener and based on Justice Waki's score cards in golf competitions. Justice Waki's undisputed handicapping in his Score Register for the year 2000, also includes handicapping based on his score in the 27<sup>th</sup> May, 2000, golf competition. The score cards are abandoned after the handicapping has been recorded and by the year 2004, there were none for the year 2000, available in respect of Justice Waki or any other golfer.

The Golf Captain, Moses Obonyo, confirmed that he did the draw that pitted Justice Waki against Mahihu and Kikuvi in the 27<sup>th</sup> May, 2000, golf competition. He emphasised that the Score Register, the Pro-Shop accounts of entry fees and the Draw Sheet made by him, constituted uncontrovertible evidence that Justice Waki played in the Monthly Mug golf tournament of the 27<sup>th</sup> May, 2000. Ngari Mahihu

confirmed that he played with Justice Waki on the 27<sup>th</sup> May, 2000. Of the three of them, he was the first to tee off at 12:48 p.m., followed immediately by Justice Waki, and then by Kikuvi. This was an incident Mahihu said, he could never forget, because he was for the first time, drawn to play with a Judge. Also whilst they were playing, Kikuvi at the third tee, taught him a Kikamba song and Justice Waki also did the same at the fourth tee. When they got to the eleventh tee, he hit four balls out of bounds. He did not have a good score and so retired. He, however, continued to walk round the course and mark Justice Waki's score card which was used in making the handicap entry for the 27<sup>th</sup> May, 2000, in Justice Waki's Score Register. Whilst Kikuvi's Score Register also showed that Kikuvi played in the Monthly Mug golf tournament of the 27<sup>th</sup> May, 2000, Mahihu said that his own Score Register did not show that he played in that Monthly Mug tournament simply because he retired at the eleventh tee and did not complete the tournament.

The documentary evidence, identified by the Manager of the Nyali Golf and Country Club, Musa Muga, establishing Justice Waki's participation in the Monthly Mug golf competition on the 27<sup>th</sup> May, 2000, were already in existence some four years before Ghani Taib made his allegation against Justice Waki which was also, some three months after the Tribunal had begun its hearings. The documentary evidence, in our view, cannot have been contrived as an afterthought. We also find the evidence of Justice Waki, Moses Obonyo and Ngari Mahihu most credible. The documentary and verbal evidence which establish Justice Waki's alibi that he was not at Kentmere Club at any time on the 27<sup>th</sup> May, 2000, demolish the evidence of Ghani Taib that in the company of Baktash Akasha, they bribed, Chief Magistrate Olao, through Justice Waki, with four million shillings.

The Allegation Number Nine made by Ghani Taib is hereby dismissed.

## **RECOMMENDATION**

It must now be obvious what the recommendation of the Tribunal to His Excellency the President will be.

Whilst we must not allow a Judge who has misbehaved to continue being a judge, we will not allow a Judge to be dismissed on trumped up allegations of misbehaviour. As we have already concluded, none of the allegations of misbehaviour made against Justice Waki which we find to be mischievous allegations made by dubious persons, have been established.

The recommendation of the Tribunal in accordance with section 62(4) of the Constitution, is that Justice Waki ought not to be removed from office as none of the nine allegations of misbehaviour made against him, have been established. Consequently, and in accordance with section 62(6) of the Constitution, the current suspension of Justice Waki from exercising the functions of his office, immediately ceases to have effect.



# THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

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

**Vol. CVI—No. 124**

**NAIROBI, 11th December, 2003**

**Price Sh. 40**

GAZETTE NOTICE No. 8828

## THE CONSTITUTION OF KENYA

### APPOINTMENT OF MEMBERS OF A TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL, MOIJO M. OLE KEIWUA AND P. N. WAKI

WHEREAS the question has arisen that the conduct of the Judges of Appeal, Moijo M. ole Keiwua and P.N. Waki, ought to be investigated.

NOW THEREFORE, in exercise of the powers conferred by sections 62 (5) and (6) and 64 (3) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appoint—

Justice (Rtd.) Akilano Molande Akiwumi,  
Justice Benjamin Patrick Kubo,  
Joe Okwach,  
Philip Nzamba Kitonga,  
William Shirley Deverell,

to be members of a tribunal to investigate the conduct of Judges of Appeal, Moijo M. ole Keiwua and P. N. Waki.

Justice (Rtd.) Akilano Molande Akiwumi shall be the Chairman of the tribunal and its mandate shall be—

- (a) to investigate the conduct of Judges of Appeal, Moijo M. ole Keiwua and P.N. Waki, including, but not limited to, the allegations that the said Judges of Appeal have been involved in corruption, unethical practices and absence of integrity in the performance of the functions of their office.
- (b) to make a report and its recommendations thereon to me expeditiously. In the meantime, the said Judges of Appeal stand suspended from exercising the functions of their office with immediate effect.

The tribunal shall have all the powers necessary for the proper execution of its mandate, including the power to—

- (a) determine the times and venue of its meetings; and
- (b) to regulate its own procedure.

Gazette Notice No. 7280 of 2003, is revoked.

Dated the 10th December, 2003.

MWAI KIBAKI,  
*President.*

GAZETTE NOTICE No. 8829

## THE CONSTITUTION OF KENYA

### APPOINTMENT OF MEMBERS OF A TRIBUNAL TO INVESTIGATE THE CONDUCT OF PUISNE JUDGES, DANIEL K. S. AGANYANYA, TOM MBALUTO, A. MBOGHOLI MSAGHA, ROSELYN NAMBUYE, J. V. ODERO JUMA, AND J. KASANGA MULWA

WHEREAS the question has arisen that the conduct of the Puisne Judges, Daniel K. S. Aganyanya, Tom Mbaluto, A. Mbogholi Msagha, Roselyne Nambuye, J. V. Odero Juma and J. Kasanga Mulwa, ought to be investigated.

NOW THEREFORE, in exercise of the powers conferred by sections 62 (5) and (6) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appoint—

Justice (Rtd.) Abdul Majid Cockar,  
Justice John Mwera,  
Justice Leonard Njagi,  
Justice Daniel Musinga,  
Justice Isaack Lenaola,

to be members of a tribunal to investigate the conduct of Puisne Judges, Daniel K. S. Aganyanya, Tom Mbaluto, A. Mbogholi Msagha, Roselyne Nambuye, J. V. Odero Juma and J. Kasanga Mulwa.

Justice (Rtd.) Abdul Majid Cockar shall be the Chairman of the tribunal and its mandate shall be—

- (a) to investigate the conduct of Puisne Judges, Daniel K. S. Aganyanya, Tom Mbaluto, A. Mbogholi Msagha, Roselyne Nambuye, J. V. Odero Juma and J. Kasanga Mulwa, including, but not limited to, the allegations that the said Puisne Judges have been involved in corruption, unethical practices and absence of integrity in the performance of the functions of their office;
- (b) to make a report and its recommendations thereon to me expeditiously. In the meantime, the said Puisne Judges stand suspended from exercising the functions of their office with immediate effect.

The tribunal shall have all the powers necessary for the proper execution of its mandate, including the power to—

- (a) determine the times and venue of its meetings; and
- (b) to regulate its own procedure.

Gazette Notice No. 7282 of 2003, is revoked.

Dated the 10th December, 2003.

MWAI KIBAKI,  
*President.*



# THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

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

Vol. CVI—No. 10

NAIROBI, 20th January, 2004

Price Sh. 40

GAZETTE NOTICE No. 377

**THE CONSTITUTION OF KENYA**

APPOINTMENT OF COUNSEL AND SECRETARY TO THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF THE JUDGES OF APPEAL, MOJO M. OLE KEIWUA AND PHILIP N. WAKI

IN EXERCISE of the powers conferred by sections 62 (5) and (6) and 64 (3) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appoint—

**MBUTHI GATHENJI**

as counsel to assist the Tribunal\* appointed to investigate the conduct of Judges of Appeal, Moijo M. ole Keiwua and Philip N. Waki; and

**MARGARET NDUKU NZIOKA**

as secretary to the said Tribunal.

Gazette Notice No. 7281 of 2003, is revoked.

Dated the 19th January, 2004.

**MWAI KIBAKI,**  
*President.*

\*G.N. 8828/2003.

GAZETTE NOTICE No. 378

**THE CONSTITUTION OF KENYA**

APPOINTMENT OF COUNSEL AND SECRETARY TO THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF THE PUISNE JUDGES, DANIEL K. S. AGANYANYA, TOM MBALUTO, A. MBOGHOLI MSAGHA, ROSELYN NAMBUYE, J. V. ODERO JUMA AND J. KASANGA MULWA

IN EXERCISE of the powers conferred by sections 62 (5) and (6) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appoint—

**PHILIP KIPCHIRCHIR MURGOR**

as counsel to assist the Tribunal\* appointed to investigate the conduct of Puisne Judges, Daniel K. S. Aganyanya, Tom Mbaluto, A. Mboghli Msagha, Roselyn Nambuye, J. V. Odero Juma and J. Kasanga Mulwa; and

**MUCHAI LUMATETE**

as secretary to the said Tribunal.

Gazette Notice No. 7283 of 2003, is revoked.

Dated the 19th January, 2004.

**MWAI KIBAKI,**  
*President.*

\*G.N. 8829/2003.



# THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

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

Vol. CVI—No. 3

NAIROBI, 6th January, 2004

Price Sh. 40

GAZETTE NOTICE NO. 95

THE CONSTITUTION OF KENYA  
TRIBUNAL TO INVESTIGATE CONDUCT OF JUDGES OF  
APPEAL

(G. N. No. 8828 of 2003)

RULES OF PROCEDURE

WHEREAS in exercise of the powers conferred by sections 62 (5) and 64 (3) of the Constitution of Kenya, His Excellency the President, through Gazette Notice No. 8828 of 2003, appointed a Tribunal to investigate the conduct of Judges of Appeal, Moijo M. ole Keiwua and P. N. Waki;

AND WHEREAS the said Gazette Notice mandates the Tribunal to regulate its own procedure;

NOW THEREFORE, the Tribunal makes the following Rules of Procedure:

1. Nothing in these Rules shall be deemed to limit or otherwise affect all the powers of the Tribunal necessary for the proper execution of its mandate as set out in the aforementioned Gazette Notice.
2. The Tribunal shall sit on such days and at such times and venue, and conduct its hearings in such manner as it may determine.
3. The investigation by the Tribunal shall be held in private unless the Tribunal, at its own discretion or at the request of any of the subjects of the investigation, otherwise directs.
4. The investigation by, and the sittings of the Tribunal shall be undertaken by all members of the Tribunal:

Provided that the quorum for a hearing before the Tribunal shall be the Chairman and any two members.

5. The Tribunal may exclude any person or class of persons from all or any part of the investigation if satisfied that it is desirable to do so for—
  - (a) the preservation of order; or
  - (b) the due conduct of the investigation; or
  - (c) the protection of any witness in the investigation or any person referred to in the course of the investigation or the property or reputation of such witness or person,

and may, if satisfied that it is desirable to do so for any of the foregoing purposes, order that no person shall publish the name, address or photograph of any such witness or person or any evidence or information whereby he would be likely to be identified.

6. Each subject of the investigation or any person adversely affected or implicated in the investigation shall have the right to be present during all of the proceedings that relate to him or her and may choose to be represented by counsel of his or her choice.

7. The Counsel assisting the Tribunal shall present evidence relating to the investigation.

8. (1) The Tribunal shall serve on each subject of the investigation a hearing notice in Form 1 in the Schedule, at least fourteen (14) days before the date of the hearing.

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

9. (1) The Tribunal may—

(a) at its sole discretion; or

- (b) at the request of the Counsel assisting the Tribunal or any of the subjects of the investigation,

summon any person or persons to testify before it on oath or to produce such documents as the Tribunal may require, and the person so summoned shall be obliged to attend and to testify or produce the required documents and the provisions applying to witnesses summoned by ordinary courts of law shall apply to such person.

(2) A request made under paragraph (1) shall be in writing and shall be addressed to the Secretary to the Tribunal.

(3) A witness summons under this rule shall be in Form 2 in the Schedule.

10. The Tribunal shall not be bound by the provisions of the Evidence Act but shall be guided by the ordinary rules of evidence and procedure, including the rules of natural justice and relevancy.

11. Each subject of the investigation shall have the right to cross-examine any or all witnesses who give evidence against him or her. If the subject is represented by counsel, then such counsel shall conduct the cross-examination.

12. Each subject of the investigation shall be entitled to give or call evidence to rebut allegations made against him or her.

13. Each subject of the investigation and any witness called by the subject may be examined by the Tribunal or by the Counsel assisting the Tribunal.

- 14. The Tribunal may call for further evidence on any relevant point or matter before it and may recall any witness for further examination.
- 15. At the close of all the evidence that may be called before the Tribunal, Counsel assisting the Tribunal and each subject of the investigation or, if represented, their counsel may make such submissions as they may think necessary.
- 16. The Tribunal may, from time to time, by notice in the Gazette, amend these Rules.
- 17. Gazette Notice No. 7775 of 2003, is revoked.

SCHEDULE

FORM 1 (r. 8 (1))

HEARING NOTICE

To: .....(Subject)

WHEREAS His Excellency the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya has appointed a Tribunal to investigate your conduct as per the mandate of the Tribunal set out in Gazette Notice No. 8828 of 2003, annexed hereto:

TAKE NOTICE that we, the said Tribunal will assemble at ..... (venue), at ..... a.m./p.m., on ....., to carry out the said investigation.

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

AND FURTHER, take notice that the Tribunal will proceed to conduct the investigation and receive evidence pertaining thereto your absence notwithstanding.

GIVEN under the hand of the Chairman for and on behalf of the said Tribunal this ..... day of .....

*Chairman of the Tribunal.*

To be served on:

.....  
 .....  
 .....  
 .....

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

.....  
 ..... day of .....

FORM 2 (r. 9(3))

WITNESS SUMMONS

To: .....(Witness)

.....  
 .....  
 .....

WHEREAS His Excellency the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya has appointed a Tribunal to investigate the conduct of Judges of Appeal, the mandate of which is set out in Gazette Notice No. 8828 of 2003:

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

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

GIVEN under the hand of the Chairman for and on behalf of the said Tribunal this ..... day of .....

*Chairman of the Tribunal.*

To be served on:

.....  
 .....  
 .....  
 .....

Please acknowledge this witness summons by signing hereunder:

.....  
 ..... day of .....

Made on the 22nd December, 2003.

JUSTICE (RTD.) A. M. AKIWUMI,  
*Chairman of the Tribunal.*

**APPENDIX "C"**

**TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL**

**LIST OF WITNESSES**

	<b>TRIBUNAL WITNESS NO.</b>	<b>DATES OF TESTIMONY</b>	<b>HANSARD VOLUME</b>
1.	Mr. William Ouko (Registrar High Court)	09.02.04 13.02.04 19.02.04 03.03.04	1 2 3 10
2.	Grace Maingi Wakesho Dep. Sec. LSK	13.02.04 24.03.04 25.03.04	2 23 24
3.	Mohammed Khan (Adv.)	19.02.04 20.02.04 23.02.04	3 4 5
4.	Satish Gautama (Adv.)	19.02.04	3
5.	Evans Ngaira (Process Server)	24.02.04	6
6.	Alfred Ouma (Process Server)	24.02.04	6
7.	Humphrey Njiru (Deputy Registrar)	24.02.04 13.05.04	6 42
8.	Benjamin Mwangi (Exec. Officer)	24.02.04	6
9.	HenlamShadrack Mugendi (Justice Waki's driver)	25.02.04	7
10.	Patrick Mugo SSP (Anti-corruption)	25.02.04	7
11.	Musa Odada Muga Manager Nyali Golf Club	01.03.04 15.06.04	8 56
12.	Mrs. Pamela Mwikali Tutui (Adv.)	01.03.04 02.03.04	8 9
13.	Samuel John Kithikii (Estate Agent)	03.03.04	10
14.	Ralf Stephan (Husband to Juliana Urlike Stamm)	04.03.04 05.03.04	11 12
15.	Yusuf Ali Gullam Hussein Dato (Estate Agent)	05.03.04	12
16.	Samuel Mutua Chenze (Former clerk to Hon. Mr. Justice Waki at Mombasa Court)	09.03.04	13
17.	Jason Obilo SSP (CID)	09.03.04 10.03.04	13 14

	<b>TRIBUNAL WITNESS NO.</b>	<b>DATES OF TESTIMONY</b>	<b>HANSARD VOLUME</b>
18.	Khurshid Ahmed Butt (Complainant)	10.03.04 23.03.04 13.04.04 14.04.04 15.04.04 16.04.04 23.04.04 27.04.04 28.04.04 05.05.04 06.05.04 07.05.04 24.05.04 25.05.04 26.05.04 11.06.04 14.06.04	15 26 27 28 29 30 31 32 33 36 37 38 46 47 48 54 55
19.	Festus Ng'olwa M'Iburi (Akasha's worker)	10.03.04 12.03.04 15.03.04 16.03.04 17.03.04 18.03.04 23.03.04 25.05.04 26.05.04	15 17 18 19 20 21 26 47 48
20.	Abdalla Mohammed Shatry (Architect)	10.03.04	15
21.	Said Juma Ngonyo (Butt's employee)	11.03.04	16
22.	Hon. Justice Steward Madzayo (Judge of the Industrial Court)	19.03.04 28.05.04	22 50
23.	Ahmed Nasir Abdullahi (Chairman LSK)	24.03.04	23
24.	Mrs. Lucy Muthoni Kambuni (Deputy Chairman LSK)	24.03.04 25.03.04	23 24
25.	George Kegoro (Secretary LSK)	24.03.04	24
26.	Ephantus Muhoro (Former Clerk to Kirundi & Co. Adv.)	25.03.04 26.03.04 19.05.04 25.05.04 26.05.04	24 25 44 47 48
27.	Price Kalume Chai SSP (CID)	14.04.04 15.04.04	28 29
28.	Pherozee Nowrojee (Adv.)	05.05.04	36

	<b>TRIBUNAL WITNESS NO.</b>	<b>DATES OF TESTIMONY</b>	<b>HANSARD VOLUME</b>
29.	Morris Nzilu Kioko (Court Clerk)	05.05.04 06.05.04 10.05.04 11.05.04 13.05.04	36 37 40 40 42
30.	John Tuta (Adv. Anti-Corruption)	10.05.04	39
31.	John Mwachai (ACP Anti-Corruption)	10.05.04	39
32.	Mohammed Ghani Taib (Complainant)	11.05.04 12.05.04 13.05.04 14.05.04 19.05.04 20.05.04 27.05.04 28.05.04	40 41 42 43 44 45 49 50
33.	Wilfred Kaburu M'Muraa (Transport Officer, High Court Nairobi)	24.05.04	46
34.	Mr. Boaz Olao (Chief Magistrate, Thika)	31.05.04 04.06.04 08.06.04	51 52 53
35.	Peter Mbutia Gachuhi (Advocate – Nairobi)	31.05.04	51
36.	Dr. S. M. G. Mwinzi	31.05.04	(In camera)
37.	Moses Obonyo (Adv. Mombasa)	21.06.04	57
38.	Emmanuel Odhiambo (Prison's Officer)	21.06.04	57
39.	Hon. Mr. Justice Philip N. Waki (JA)	24.06.04 28.06.04 29.06.04	58 59 60 & 61
40.	Mr. Ngari Mahihu	29.06.04 30.06.04	62 63

**APPENDIX "D"**

**TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL**

**LIST OF EXHIBITS**

	<b>CONTENTS</b>	<b>VOL.</b>	<b>PAGE (S)</b>
Exhibit 1	Oath of Allegiance – High Court.		
Exhibit 2	Gazette Notice No. 6746 of 3/11/95 Appointment of Puisne Judges.	6	1765
Exhibit 3	Oath of Allegiance Court of Appeal.		
Exhibit 4	Gazette Notice No. 3630 of 6/6/03 Appointment of Judges of Appeal.	6	1767
Exhibit 5	Report of Integrity and Anti-Corruption Committee of the Judiciary – pages 6 and 7.	3	813-814
Exhibit 6	Extract from the proceedings of the Ringera Committee pages 35 – 40.	3	816-821
Exhibit 7	High Court Civil Case (Nairobi) No. 1473 of 1997 Kurshid Ahmed Butt v. Abdalla Ibrahim Akasha & Baktash Akasha.	3	1094-1135
Exhibit 8	High Court Civil Case (Mombasa) No. 158 of 1996 Khurshid A. Butt vs. Pegusus Tea Limited.	3	1177-1198
Exhibit 9	High Court Civil Case (Mombasa) No. 326 of 1998 K. A. Butt vs. Harro Krause.	4	1270-1304
Exhibit 10	High Court Civil Case (Mombasa) No. 619 of 2000 L. A. B. International Kenya Limited and E. Kooyman vs. K. A. Butt T/A Butts Beach Properties.	4	1439-1453
Exhibit 11	Justice Philip Waki – Personal File PJ 21098.	5	1582-1763
Exhibit 11(A)	Letter dated 6 <sup>th</sup> December 1995 to Justice Waki from Miss D. W. Njoroge.	5	1586
Exhibit 11(B)	Valuation Report by Lloyd Masika dated 10 <sup>th</sup> August 1994.	5	1587-1595
Exhibit 11(C)	Certificate of Title: LR.:No. 43455/144 dated 29 <sup>th</sup> May 1990.	5	1601-1603
Exhibit 11(D)	Transfer Title No. LR. 49648 /Title Deed.	5	1604-1605
Exhibit 11(E)	Letter dated 21/9/01 from Justice Waki to the Registrar of the High Court (folio 73).	5	1703
Exhibit 11(F)	Circular on transfer of Judges (folio 77).	5	170-7
Exhibit 11(G)	Letter dated 3 <sup>rd</sup> October 2001 to Justice Waki by the Chief Justice Bernard Chunga (folio 86).	5	1716-1717
Exhibit 11(H)	Letter dated 17 <sup>th</sup> October 2002 by the Chief Justice Bernard Chunga to Justice Philip Waki (folio 99).	5	1731

Exhibit 11(I)	Letter dated 25 <sup>th</sup> October 2002 to Justice Waki from the Principal Personnel Officer Mrs. C. M. N. Gitonga	5	1733
Exhibit 11(J)	Letter dated 24 <sup>th</sup> October 2002 from B. Chunga to Justice Waki.	5	1734
Exhibit 11(K)	Letter dated 1 <sup>st</sup> November 2002 from Justice Waki to the Registrar of the High Court Mr. William Ouko.	5	1735
Exhibit 12	Motor vehicle file – car no. G.K. 591 Peugeot 504 Saloon.	6	1895-2133
Exhibit 13	Hand written Cause List of 30/4/02.	6	1776-1778A
Exhibit 14	Typed Cause List of 30/4/02.	6	1779-1794
Exhibit 15	The Law Society of Kenya Digest of Professional Conduct and Etiquette.	6	2134-2152
Exhibit 16	The Report of the Integrity and Anti-Corruption Committee of the Judiciary (General Report) – pages 46 – 47.	6	2163-2164
Exhibit 17	Letter of 27/10/03 ref. no. CONF/PJ. No 21098 by the Registrar of the High Court Mr. William Ouko to Justice Philip Waki.	6	2165-2166
Exhibit 18	Bundle of Legal precedents/authorities produced by Kilonzo & Company Advocates.	7	2290-2460
Exhibit 19	Letter dated 5/2/03 to Chief Justice Bernard Chunga C. J. by Mr. K. A. Butt.	6	2167
Exhibit 20	Letter dated 29/1/03 to the Hon. Kiraitu Murungi by Mr. K. A. Butt.	6	2169-2170
Exhibit 21	Letter dated 28/11/03 to the Deputy Registrar of the High Court of Kenya (Mombasa) by Mr. K. A. Butt.	6	2278-2279
Exhibit 22	Letter dated 17 <sup>th</sup> December 2003 to Mrs. Pamela Tutui by the Deputy Registrar of the High Court Kenya (Mombasa) Mr. H. Njiru.	6	2280
Exhibit 23	letter dated 19 <sup>th</sup> December 2003 to the Deputy Registrar of the High Court of Kenya (Mombasa) Mr. H. Njiru by Mrs Pamela Tutui.	6	2281-2283
Exhibit 24	Chief Magistrate Court (Mombasa) Traffic Case 9891/2001. Republic-vs-Khurshid Ahmed Butt.	6	2266-2275
Exhibit 25	Letter dated 22 <sup>nd</sup> May 2000 to the Chief Justice from Justice P. N. Waki.	6	2284
Exhibit 26	Letter dated 26 <sup>th</sup> May 2000 to Justice Waki by Chief Justice B. Chunga.	6	2285
Exhibit 27	Minutes of the KAAC meeting held on 25 <sup>th</sup> September 2002.	6	2286-2287
Exhibit 28	Letter dated 9 <sup>th</sup> January 2003 to the Provincial Police Officer Coast Province from Mr. Mohamed I. Amin.	6	2288-2289

Exhibit 29	Bundle of documents/letters relating to Nyali Golf & Country Club on Justice Waki.	8	2560-2580
Exhibit 30	Bundle of documents/letters produced by Mrs. Pamela Tutui relating to HCC No. 158 of 1996: Pegasus case.	8	2581-2598
Exhibit 31	Statement recorded by Mrs. Pamela Tutui to Tribunals investigators at Mombasa on 17/1/04.	8	2599-2618
Exhibit 32	Bundle of letters produced by Mrs. Pamela Tutui.	8	2619-2643
Exhibit 33	Letter dated 8 <sup>th</sup> July 1991 to M/s J. V. Juma & Company Advocates from M/s Bryson Inamdar & Bowyer Advocates.	8	2644
Exhibit 34	Letter dated 27 <sup>th</sup> October 1997 addressed to the Deputy Registrar of the High Court (Mombasa) from Datoo Kithiku Limited.	8	2653
Exhibit 35	Nyali Golf and Country Club bye- Laws.	8	2671-2684
Exhibit 36	List of Judges in the Judiciary.	8	2685-2686
Exhibit 37	Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, Nairobi Kenya, May 2003.	8	2687-2690
Exhibit 38	Weekly Hansard: 14 <sup>th</sup> October 2003.	8	2691-2693
Exhibit 39	Bundle of documents produced by Mr. Ralf Stephan.	8	2700-2913
Exhibit 40	Publications and newspaper articles relating to Akasha produced by Mr. Jason Obilo.	8	2914-2951
Exhibit 41	Letter dated 19 <sup>th</sup> September, 1994 to Mr. Shadrack Kiruki, Commissioner of Police from Mr. K. A. Butt.	8	2952-2953
Exhibit 42	Bundle of charge sheets relating to criminal charges against the Akashas for unlawful possession of firearms.	8	2954-2960
Exhibit 43	File produced by Mr. Obilo relating to sale of plot 124/xxx Mombasa from S. M. Kassam to K. A. Butt.	8	2961-3059
Exhibit 44	Photographs of Mr. Festus Ngolua M'Buri taken with the Akashas.	9	3123-3124
Exhibit 45	Police abstract of 8/7/02 on the loss of ID of Festus Ngolua.	9	3125
Exhibit 46	Police abstract of road accident involving Festus Ngolua M'Buri of 8/9/99.	9	3126
Exhibit 47	Proceedings in Chief Magistrates Court (Nairobi) Criminal Case No. 1154 of 2000.	9	3169-3256
Exhibit 48	Documents produced by Justice Madzayo relating to civil suit no. 158 of 1996.	9	3257-3266
Exhibit 49			
Exhibit 50	Map of Mombasa Mainland North (sheet No. D82) showing New Nyali area including Nakumatt Nyali and the second house of Mr. Abdullah Akasha.	9	3288
Exhibit 51	Map of Mombasa (Sheet No. D95) showing Baktash Akashas house in Nyali area which Abdalla bought 30 million.	9	3289

Exhibit 52	Plan of proposed guest house on plot no. 2917/1/M.N for Mr. Akasha that was built by Mr. Butt	9	3290
Exhibit 53	Plan of Nyali Estate.	9	3291
Exhibit 54	Letter dated 27 January 2004 from Patel Advocates.	9	3292
Exhibit 55	Reply to letter dated 12 <sup>th</sup> February 2004 from Tribunal to Patel Advocates.	9	3295-3297
Exhibit 56	General Map of Mombasa showing the streets of Mombasa Island.	9	3298
Exhibit 57	Documents relating to the complaint of Mr. K. A. Butt given to the Law Society of Kenya produced by Lucy Kambuni, Vice Chairlady of the Law Society of Kenya.	9	3286-3287
Exhibit 58	LSK Act (Cap.18).	9	3299-3308
Exhibit 59	Letter by Muhoro to Nowrojee.	9	3309
Exhibit 60	Letter by Nowrojee to Ralf (ref. To 59).	9	3310
Exhibit 61	Letter dated 1 <sup>st</sup> December 1998 from Kirundi & Co. Advocates to Mr. Pheroze Nowrojee.	9	3311
Exhibit 62	Hand written proceedings in HCC (Mombasa) 495 of 1989 Julianne Ulrike vs. Tawi Beach Hotel.	9	3312-3315
Exhibit 63	Letter dated 25 <sup>th</sup> October 2000 by Kirundi and Company Advocates to Ephantus Githinji Muhoro.	9	3316
Exhibit 64	Terms of reference of the LSK Committee to investigate corruption in the Judiciary.	9	3317
Exhibit 65	Statement recorded by Ephantus Muhoro to Tribunal on 25/3/04.	9	3318-3335
Exhibit 66	Consent letter on hearing date dated 21 <sup>st</sup> December 1999.	9	3336
Exhibit 67	Letter dated 15 <sup>th</sup> January 1999 from Kirundi and Company Advocates to Tiwi Beach Hotel.	9	3337
Exhibit 68	Receipts (3) dated 10/12/98 for New Jambo Taxi Agencies produced by Mr. Muhoro	9	3338
Exhibit 69	Copy of file for Criminal Case No. 2959/94 (R-vs-Baktash Akasha) withdrawn under Section 87(a) of the CPC.	13	5003-5004
Exhibit 70	Newspaper extract – the Inside Story (Daily Nation, Monday 3/5/04)	13	5248-5251
Exhibit 71	Nyali Golf Club monthly Tee Time Schedule for 27 <sup>th</sup> May 2000	15	5753
Exhibit 72	Newspaper extract: Daily Nation of Friday 26 <sup>th</sup> May 2000 showing the Nyali Golf Club Month.	15	5781
Exhibit 73	Mombasa Golf Club and Nyali Golf & Country Club joint handicapping committee scores register.	15	5780
Exhibit 74	Kenya Airways Flight schedule to Mombasa for Saturday 22 <sup>nd</sup> May 2004 by Sameer Butt, Marketing Executive Kenya Airways.	15	5779

Exhibit 75	Extract from Black's Medical Dictionary Pages (31 <sup>st</sup> Edition) 548-557,644 and 702	15	5904-5916
Exhibit 76	Newspaper extract: Daily Nation of Friday May 19,2000 page 40.	15	5976
Exhibit 77	Extract from the Peugeot Challenge Cup 2000 Golf Register.	15	5977
Exhibit 78	Letter by Mr. Boaz N. Oloo dated 27/5/93 addressed to the Hon. Attorney-General.	15	5978-5979
Exhibit 79	Letter by Hon. Aganyanya J. dated 29/09/93 addressed to the Chief Justice.	15	5980
Exhibit 80	Anonymous letter addressed to the Chief Justice and received on 27/01/03.	15	5981
Exhibit 81	Letter dated 28 <sup>th</sup> May 2004 from K. A. Butt to Dr. S.M.G. Mwinzi.	15	5984
Exhibit 82	Warrant of Commitment on Remand (criminal 101) for Mohammed Ghani dated 9 <sup>th</sup> May 2000.	15	6006
Exhibit 83	Released order where surety has signed bond (criminal 137) dated 24 <sup>th</sup> May 2000 for Mohammed Ghani.	15	6007
Exhibit 84	Bond and Bail Bond (criminal 95) for Mohammed Ghani dated 24 <sup>th</sup> May 2000 surety: Stephen Ndegwa.	15	6008
Exhibit 85	Bail and Bond (criminal 95) for Mohammed Ghani dated 24 <sup>th</sup> May 2000 Surety: Wallace Muturi.	15	6009
Exhibit 86	Bundle of original documents relating to wedding of Justice Waki's sister on 14 <sup>th</sup> December, 2002 (Wedding invitation, copy of marriage certificate and seven photographs).		
Exhibit 87	Bundle of documents relating to Justice Waki's son (Sila Waki) visit to England between 22-24 May 2000.		
87(A)	Copy of Sila Waki's passport	16	6068
87(B)	Copy of the Visa.	16	6069
87(C)	Copy of permission from school to attend the conference.	16	6070
87(D)	Copy of Airline Ticket by KLM Royal Dutch Airlines.	16	6071
87(E)	Certificate of participation at the conference.	16	6072
Exhibit 88	Bundle of documents relating to complaint against Judicial officers in Mombasa by John Mburu Advocate	16	6094
88(A)	Newspaper extract of Daily Nation Newspaper of July 9 2004.		
88(B)	Justice Waki's letter to Mr. John Mburu dated 10 <sup>th</sup> July 2001.		6095-6097
88(C)	Letter by John Mburu to Justice Waki dated 13 <sup>th</sup> July 2001.		6098-6100
88(D)	Letter dated 27 <sup>th</sup> July 2001 from Justice Waki to John Mburu.		6101

Exhibit 89	Letter dated 4 <sup>th</sup> February 2003 from Chief Justice Chunga to Mr. B. Mbuchi Gichuki.	16	6103
Exhibit 90	Letter dated 23 <sup>rd</sup> May 2003 from Gachoka Mwangi & Co. Advocates to Justice Waki.	16	6102
Exhibit 91	Charge sheet against Bhaktash Akasha and three others court file CM's (Nairobi) no. 1033/04 Republic vs Baktash Akasha and three others.	17	6612-6613
Exhibit 92	Evidence on oath of Festus Ng'olua M'Iburi seeking withdrawal of charges against Bhaktash Akasha and three others criminal case CM's (Nairobi) no.1033 of 2004 Republic vs. Baktash Akasha and three others.	17	6614-6615
Exhibit 93	Medical report of Mr. K. A. Butt by Dr. S. M. G. Mwinzi dated 7/4/98.	10	3261-3263

**APPENDIX "E"**

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- 2. THE EXTRACT FROM THE PROCEEDINGS OF  
THE RINGERA COMMITTEE (PAGE 35-40)**
-

can see now. Director of Public Prosecutions – Chunga refused to know the witness. I went to Ghai an old school mate. He knew the problem.

My Kshs.5 – 7 million is gone. I went to Kaplan & Stratton, Advocates. **They also obstructed Justice.** They first sent their girl junior staff to present the case. They **extorted** Kshs. 1 million from me.

I have lengthy correspondence with me. For 10 years there has been corruption in the Judiciary. Akashas were partners with Moi family – Gideon Moi.

I have written to the newspapers under my pen name "Mwana Halali" now "Mzee Halali". The other day **Waki, J** upheld false affidavits signed by Mr. Akasha and misdirected the matter. Our case came last and it was adjourned. **Oguk, J** also handled the matter and gave **7 adjournments**. They quarrelled With **Boaz Olao** – they paid Khs.10 million, Najma Akasha (daughter of Akasha of Egyptian wife) paid the money to **Boaz Olao** to have the 2 men released. **Boaz Olao** got designer suits for from Dubai and rings for the wife.

Akasha had 3 wives:

1<sup>st</sup> wife: Palestinian wife, Karinia

2<sup>nd</sup> wife: Egyptian wife

3<sup>rd</sup> wife: 1/2 cast from - Bondeni Mombasa

I reported the matter to the Provincial Criminal Investigation Officer and I was told to keep off and I was told to tell the lady to go there.

Mr. Bwononga of the Attorney General's office was a good man and I got a conviction but it was all cosmetic. My offices were ransacked and police did the searches and I was not helped. At the police station they refused to give me P3 forms. These people were threatening me. The said Kiruki lost his job of Commissioner due to the drug traffic cases. Akashas have paid fees for **Chunga's** and **Wako's** children. Akasha spoke openly. **Kanyi** started working for the Akashas while in Mombasa. I employed the advocates to expose the matter but they did not take any initiation as **Wako** was their partner. **Waki, J** – was dealing duty as he as appointed due to Mulu Mutisya. **Hayanga, J**: is a Womaniser – all injunctions are given in all cases that women are involved e.g. in the Leisure Trading and Leisure Car hire cases. I have spent almost 7 million to fight Akasha. The **Magistrates** and **Judges** do not ask for money directly. They use **agents** or **advocates**. I am living with friends as my life is in danger. I live in **Brookside Telephone 3745818** – Ramesh

Sharma advocate through one Stella a Secretary. They can easily get to me, where I sleep on landline. I have other evidence in Mombasa. I can bring it later.

**23<sup>rd</sup> April, 2003**

**Khurshid Ahmed Butt:** I have come today with my advocate.

**Mr. Khan: Advocate:** Civil Case 1473/97. Khurshid Ahmed B. H. & Baktash & 7 others (include the family members).

This case was initiated by Kaplan & Stratton and I took it over in 2002. The service of summons on certain defendants in Mombasa through Timami & Co. Advocates and took 2 Process Servers; Alfred and Ngaira. They served the summons on Fatuma, one of the wives of Akasha and Noordin and Kamal Din Akasha. The defendants filed an application through their lawyers that they were not served before **Waki, J. 2002**. Their applications were heard in the afternoon. Our witnesses were there and Kapila was there. When our turn came, **Waki J.** said that it was too late to reach us at 3.15 p.m. We took 17/7/2002 and the matter proceeded **before** **Waki J.** An affidavit by Fatuma was produced by Kanyi advocate. When she was asked if the affidavit was signed

by her she said no and did not see the advocate and did not know of the affidavit. She denied the affidavit. My observation was that the Judge was biased in favour of the defendant. The affidavit was accepted despite her refusing the affidavit. The matter was put off to 4/11/2002 and then not heard.

The Process Server remained and the Judge was not eager to hear him, he said we had that 10 minutes to finish the matter. On 28/1/2003 he made submissions. Ruling was on 21/3/2003 and to our surprise it was against us. My client is of the view that Waki J. is known to the Akasha family and knew the two in Mombasa and he feels that I should come and tell the Committee.

As an advocate I cannot go to the Registry or to the Chief Justice that the matter should not go before Waki J unless there is the tangible evidence. The client told me to ask the Judge to disqualify himself. I did not want to do so as I would not want to antagonize the Judiciary. I did not think the information was sufficient.

Definitely, Waki J. was hostile to us and was favourable to the defendants. My client strongly feels that the Judge was favouring the defendants.

I felt the Judge was unfair when he said that we will take only 10 minutes. He should have asked us to be brief. The client said we appeal but the defendants filed defences and he said we proceed with the hearing of the matter.

The court record will bear me out that the witness said that the lawyer is a family advocate and came to their house. But she categorically said that it was not her affidavit and did not know anything about it. The Process Servers gave evidence. I am of the opinion that what was said should have been considered. The affidavit is here that we had in court.

**KURSHID AHMED BUTT**

I did construction work at the Akasha's house in Nyali where I was brutally assaulted. **Waki J. was a regular visitor there. Akasha said that he could do anything he wanted as he had the courts in his pockets.**

**I saw Waki J. at least 3 times. I do not know the exact story. They drank and ate in the house. I Reported the matter to the Anti-Corruption Department and then a list of people I found to be corrupt.** This is the list. I made the statement and a junior officer was called to record a letter of complaint. B.

Chunga – Deputy Public Prosecutor. He stage managed the prosecution of the case. This was him and Kidullah.

The **Proceedings of Criminal Case 2252/95**. This is the file of proceedings. When the Chief Magistrate, Mombasa, Kanyi obtained bribes on the matter it was withdrawn. He left the Judiciary and took over the case and he was a friend of the Chief magistrate there.

This is a file of correspondence that led to the matter coming to Nairobi. The Attorney General ordered investigations on the matter be done but the Director of Criminal Investigations did not do so. The Attorney-General should have ensured proper investigations were done. Waki J., Hayanga J, and Chief Justice Chunga were a cartel.

Two cases of breach of contract: Hayanga J. gave an ex-parte order and I had not been served. I asked and I was told I would be jailed. Check the files. **HCCC 158 of 1996** and **HCCC 326 of 1998**.

Hayanga J. shouted at me all the time in court. He called the Policemen to lock me up and they did not do so. The appeal was adjourned 5 times. I came and I wrote to the advocate. It was Criminal Case and no application was made by the advocate. Mr. Oguk adjourned the matter 6 times. Bwononga was not happy.

STATE OF TEXAS  
COUNTY OF [unclear]  
ASS. NO. 2014-274  
[unclear]