IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)

PWAMANG, JSC

MARFUL-SAU, JSC

DORDZIE (MRS), JSC

AMEGATCHER, JSC

KOTEY, JSC

OWUSU (MS), JSC

REFERENCE

NO. J6/02/2019

24TH JUNE, 2020

THE REPUBLIC

VRS

1. THE CHIEF JUSTICE OF THE REPUBLIC OF GHANA ……
   RESPONDENT
2. THE ATTORNEY-GENERAL

EX-PARTE: JUSTICE KWAME OHENE-ESSEL (RTD) ……. APPLICANT

JUDGMENT

DOTSE JSC:-

PROLOGUE

It is often said that ***"justice delayed, is justice denied".*** The reverse of this is also another common saying, it states as follows ***"justice hurried, is justice buried".***

There must therefore always be a delicate balance in the expeditious adjudication of cases to ensure that either way, no one is unduly disadvantaged by the vigilance or indolence of the judicial system.

This case relates to a reference made by the learned High Court Judge, Gifty Agyei Addo J, presiding over the High Court, Human Rights Division 1, Accra in Suit No. HR/0102/2017 in an application for Judicial Review in the nature of Certiorari and Prohibition pursuant to order 55 of C. I. 47 intitutled ***The Republic v 1. The Chief Justice of the Republic of Ghana, 2. The Attorney-General – Respondents; Ex-parte Justice Kwame Ohene-Essel (Rtd) – Applicant.***

The learned trial High Court Judge Gifty Adjei Addo J referred articles 146 (3) and (5) and also 155 (1) (b) of the Constitution 1992 to the Supreme Court pursuant to article 130 (2) of the Constitution for interpretation.

FACTS OF THE CASE

The facts of this case are as follows:-

Arising from the submission of a petition by TIGEREYEPI, a private investigative entity, acting per Anas Aremeyaw Anas on the 31st of August 2015 to the President of the Republic of Ghana on allegations of corruption against some members of the Judiciary, including the Applicant herein, who was at all material times a High Court Judge at Tarkwa, the President acting in accordance with Article 146 (3) of the Constitution 1992

referred the said petition to the Chief Justice, (1st Respondent herein) to determine whether a prima facie case for removal of the Applicant has been made.

Based on the allegations made by the TIGEREYEP1 against the Applicant which had been referred to the 1st Respondent herein, by the President, the 1st Respondent forwarded the said petition to the Applicant and requested him to respond to same by letter dated 9th September 2015.

The Applicant was therefore invited to the office of the 1st Respondent on 10th September 2015, whereupon he was given the letter and copy of the audio visual transcript of the allegations against him and the Applicant was duly requested to respond to same by 14th September 2015.

On 22nd September 2015, the Applicant in the company of his Solicitor was given the opportunity to watch the audio visual recording of his alleged misconduct.

However, the 1st Respondent after studying the petition, the audio visuals as well as the Applicant's response made a determination in which a prima facie case was established against the Applicant.

Consequently, by a letter dated 2nd October 2015, signed by the Vice-President who was then acting as the President, directed that the Applicant should be suspended as a Justice of the High Court pending the conclusions of the impeachment process that had commenced under Article 146 of the Constitution.

The Applicant was duly informed of the directive by the President on 5th October 2015 that he has been suspended from office.

On 23rd October 2015, the Applicant's lawyers wrote to the President of the Republic of Ghana and sought by that letter to retire voluntarily from the Judiciary, alleging in particular that their client the Applicant, had a debilitating health condition and that

notwithstanding the fact that the Applicant was facing administrative disciplinary proceedings, he wished to retire as a Justice of the Superior Court with effect from 22nd November 2015.

On 8th January 2016, the 1st Respondent, in her capacity as the Head of the Judiciary, directed the Judicial Secretary **to inform the Applicant that following his suspension from office arising from the TIGEREYEPI petition, the Judicial Council at its meeting on 16th December 2015 decided that he should be placed on half salary with immediate effect in accordance with the practice and convention in the public service.**

Payment of allowances to the Applicant, save rent allowances were also suspended pending the outcome of the impeachment process commenced and or triggered by Article 146 of the Constitution. The salaries and other benefits due the Applicant were to be restored to him if he was exonerated.

Before any other process envisaged under Article 146 in respect of the Applicant could be triggered beyond what had already commenced, the Applicant challenged the entire impeachment proceedings against him by **causing a writ of summons and a statement of claim, Suit No. GJ/47/2016, dated 14th January 2016 issued against, three Defendants, namely, 1st Defendant, Anas Aremeyaw Anas, 2nd Defendant, The Chief Justice and 3rd Defendant, Attorney- General respectively.**

The 2nd and 3rd defendants entered appearance on 21st January 2016 and filed their Defence on 26th September 2016, a lapse of almost 8 months contrary to the Rules of procedure as set out in the High Court (Civil Procedure) Rules 2004 (C. I. 47). See order 11 r 2 (1) of C.I. 47.

On the 14th of August 2017, the 1st Respondent as the administrative head of the Judiciary, instructed a Deputy Judicial Secretary to author the following letter to the Applicant which we deem expedient to capture in full:-

"His Lordship Justice Kwame Ohene-Essel

Justice of the High Court

Tarkwa

14th August 2017

Retirement of a Superior Court Judge on the attainment of Sixty-Five (65) years – Justice Kwame Ohene Essel

Our records indicate that you will attain the mandatory retiring age of sixty-five (65) years on 23rd August 2017.

I have instructions of the Honourable Chief Justice therefore to inform you that you will **retire as a Justice of the High Court on 23rd August 2017 in accordance with Article 145 (2) (a) of the 1992 Constitution.**

You are requested to handover all properties of the service in your possession, including your official vehicle, by the due date.

You are to take note that in view of the impeachment proceedings against you, the processing of your retirement benefits will be withheld until the determination of the matter.

By a copy of this letter the Director of Human Resource is requested to delete your name from the payroll." Emphasis

Signed

Justice Juliana Amonoo- Neizer (Mrs) DJS

Cc: The Honourable Chief Justice and 8 others"

Upon the receipt of the letter referred to supra, the Applicant instituted *Suit No. HR/0102) 2017*, **on the 22nd day of November, 2017 in which he applied for Judicial Review in the nature of Certiorari and Prohibition with its accompanying affidavit in support and other processes pursuant to Order 55 of C. I. 47 against the 1st and 2nd Respondents herein claiming the following reliefs:-**

1. An order of Certiorari quashing Exhibit "KOE1" the retirement letter issued by the 1st Respondent to the Applicant as it is unconstitutional and therefore unlawful.
2. An order compelling the 1st Respondent to issue a retirement letter to the Applicant in line with official Judicial Practice.
3. An order compelling the Head of Pension and the Controller and Accountant-General to pay all entitlements provided for under the 1992 Constitution to the Applicant.
4. An order prohibiting the 1st Respondent, her agents, assigns etc, from any further acts in respect of his gratuity and or pension benefits.

In the determination of the Application before her, the learned High Court Judge Gifty Agyei-Addo distilled the following issues as arising out of the application before her for determination. These are:-

1. **Whether or not impeachment proceedings have been commenced against the Applicant herein under Article 146 of the 1992 Constitution.**
2. **Whether or not the Respondent can withhold the Applicant's retirement benefits under the 1992 Constitution.**
3. **Whether or not the Applicant's right to fair hearing had been violated by the Respondents.**
4. **Whether or not Exhibit "KOEI" is unconstitutional.**

The learned High Court Judge, in a considered analysis and Ruling, however decided to refer the following issue to the Supreme Court for interpretation:-

> ***"Whether or not upon a true and proper interpretation and or construction of Article 146 (3) and (5), the Applicant can be permitted to enjoy his rights under Article 155 (1) (b) of the 1992 Constitution upon his retirement by reason of age, when by reason of he exercising his constitutional right to challenge the prima facie case in court, proceedings under Article 146 (5) of the 1992 Constitution could not be completed by the Respondent." Emphasis***

We have observed from the considered referral made by the learned High Judge that it is consistent and in tandem with the Rules of the Supreme Court, C. I. 16, especially Rule 67 1, (2) and (3) thereof.

We are also of the view that the referral has been properly made pursuant to the decision of this court in ***Nartey v Gati [2010] SCGLR 745.***

The above constitute in the main the undisputed facts of this referral.

ASSUMPTIONS

Having apprized ourselves with the erudite statement of case filed by learned counsel for the Applicant, Solomon Oppong-Twumasi and that of the learned Principal State Attorney for the Respondents, Daphne Akonor (Ms), one thorny issue which has been thrown out is **whether the institution of Suit No. GJ/47/2016 on 14th January 2016 by the Applicant against the Respondents herein and one other, stalled the impeachment proceedings against the Applicant.**

Learned counsel for the Respondents argued in her statement of case as follows:-

> *"Since the Applicant, the Plaintiff therein, instituted civil action, Suit No. GJ/47/2016 against the 2rd and 3rd Defendants therein, now 1st and 2nd Respondents,* ***challenging the***

impeachment proceedings against the Applicant, he thereby stalled the proceedings. The Applicant's suit is still pending in the High Court. *" Emphasis*

On the other hand, learned counsel for the Applicant argued vehemently as follows:-

"2.1. "Whether by fate, or design however, ***the Chief Justice did not set up any Committee to investigate the Applicant all the way from May 2015, when he was suspended, until his eventual constitutionally-mandated compulsory retirement in August 2017,*** *more than two (2) good years after the Applicant's suspension from office by the President of the Republic, the Applicant's appointing authority. Emphasis*

(The reference to May 2015 is wrong. The actual date should have been October 2015).

2.2 "It is also important to note that although the 1st and 2nd Respondents herein, who were the Defendants in the Applicant's suit at the High Court filed their defence, the 1st Defendant, Anas Aremeyaw Anas, who had to be served the writ by means of substituted service however failed to enter appearance, let alone file a defence."

2.3 "Once again, as if by design or fate, the defendants did not take any steps to either have the Applicant's action dismissed at their instance for want of prosecution or in the alternative have the matter heard. Eventually, the Applicant became due to retire in terms of the 1992 Constitution. ***It was when the Applicant was about to go on retirement that the letter which triggered off these proceedings (Exhibit "KOE4) was written to the Applicant by the 1st Respondent."*** *Emphasis*

LEGAL AND UNDISPUTED FACTS

i. The Applicant was suspended from office on or by the 5th of October 2015 and not May 2015. Legally speaking therefore and consistent with the decision of

this court, in the unreported case of ***Justice Dery v Tigereyepi, Chief Justice and Attorney-General, Suit No. Writ JI/29/2015 dated 4th February 2016*** where our illustrious Brother Benin JSC in his characteristic fashion, stated that, **the impeachment process in Article 146 of the constitution is triggered the moment the President receives the petition against a Superior Court Judge as happened in this case. In the instant case, this date will therefore be somewhere late August 2015 or September 2015.**

ii. What is clear therefore is that, upto the date the Applicant instituted the suit in January 2016, against the Respondents, the impeachment process had clearly been commenced.

iii. Thirdly, it should also be noted that the Applicant never applied for and obtained any injunction or prohibitory process against the Respondent in the suit.

iv. Fourthly, there being no limitation on the Respondents in Suit No. GJ/47/2016 instituted by the Applicant against them, the Respondents could have expedited the proceedings in the Suit referred to supra if Applicant was found to be tardy. There was no vigilance by either party.

v. What has been demonstrated is a lethargy in the conduct of the suit by both parties. Why do we say so? The Applicant filed suit No. GJ/47/2016 against the Respondents and one other on 14th January 2016. It is on record that the Respondents herein, therein 2nd and 3rd Defendants entered **appearance to the writ on 21st January 2016 but filed their defence on 26th September 2016.** It should be noted that, the time limited for entering appearance is 8 days from the date of service. See Order 9 r. 5 (a) of C. I. 47. Similarly, a Defendant like the Respondents herein, on whose behalf an appearance has been entered and who intends to defend the action shall unless the court gives leave to the contrary, file a defence for service on the plaintiff before the expiration of 14

days from the time limited for appearance. See Order 11, r. 2 (1) of C. I. 47. The plaintiff on whom a defence is served shall also file a reply if necessary before the expiration of seven days after the service of the defence on him. See Order 11. R. 3 (2) of C. I. 47.

From an analysis of all the above, it does appear to us that both parties, i.e. the Applicant and Respondents were tardy in their prosecution of the said Suit No. GJ/47/2016 at the High Court, Accra.

In view of the fact that Article 146 in its entirety and 155 (1) (b) of the Constitution 1992 are considered germane to the resolution of the referred constitutional issues, we deem it fit and proper to set out the provisions in extenso as follows:-

146. "Removal of Justices of the Superior Court and Chairman of the Regional Tribunals

(1) A Justice of the Superior Court or a Chairman of a Regional Tribunal shall not be removed from office except for stated misbehavior or incompetence or on ground of inability to perform the functions of his office arising from infirmity of body or mind.

(2) A Justice of the Superior Court of Judicature or a Chairman of a Regional Tribunal may only be removed in accordance with the procedure specified in this article.

(3) ***If the President receives a petition for the removal of a Justice of the Superior Court*** *other than the Chief Justice or for the removal of the Chairman of a Regional Tribunal,* ***he shall refer the petition to the Chief Justice, who shall determine whether there is a prima facie case****.*

(4) Where the Chief Justice decides there is a prima facie case, ***he shall set up a committee consisting of three Justices of the Superior Court or Chairmen of***

the Regional Tribunals or both, appointed by the Judicial Council and two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers, and who shall be appointed by the Chief Justice on the advice of the Council of State.

(5) *The Committee appointed under clause (4) of* ***this article shall investigate the complaint and shall make its recommendations to the Chief Justice who shall forward it to the President.***

(6) *Where the petition is for the removal of the Chief Justice, the President shall, acting in consultation with the Council of State, appoint a committee consisting of two justices of the Supreme Court, one of whom shall be appointed Chairman by the President, and three other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.*

(7) *The Committee appointed under clause (6) of this article shall inquire into the petition and recommend to the President whether the Chief Justice ought to be removed from office.*

(8) ***All proceedings under this article shall be held in camera, and the Justice or Chairman against whom the petition is made is entitled to be heard in his defence by himself or by a lawyer or other expert of his choice****.*

(9) *The President shall, in each case, act in accordance with the recommendations of the Committee.*

(10) *Where a petition has been referred to a Committee under this article, the President may,*

(a) *in the case of the Chief Justice, acting in accordance with the advice of the Council of State, by warrant signed by him, suspend the Chief Justice;*

(b) in the case of any other Justice of the Superior Court or of a Chairman of a Regional Tribunal, acting in accordance with the advice of the Judicial Council, suspend that Justice or that Chairman of a Regional Tribunal.

(11) The President may, at any time, revoke a suspension under this article."

155. "Retiring awards of Superior Court Justices

(1) Notwithstanding the provisions of this Chapter, a Justice of the Superior Court of Judicature who has attained ***the age of sixty years or above, shall, on retiring, in addition to any gratuity payable to him, be paid a pension equal to the salary payable for the time being to a Justice of the Superior Court from which he retired where***

(b) he has served for twenty years or more in the public service at least five continuous years of which were as a Justice of the Superior Court of Judicature, and upon retirement under this clause, he shall not hold any private office of profit or emolument whether directly or indirectly."

FINDINGS OF FACT MADE BY THE REFERRAL COURT

The learned trial Judge made the following findings of fact before she made the referral. These are:-

1. That a prima facie case had been established against the Applicant by the 1st Respondent on 30th September 2015.
2. Secondly, the Respondents had failed to proceed against the Applicant under the Article 146 (5) procedures from the said 30th September 2015 until the 14th of January 2016 when the Applicant issued writ No. GJ/47/2016 against the

Respondents and one other, **challenging the prima facie evidence on grounds of breach of his fundamental human rights.**

3. Thirdly, although the said suit was instituted on **14th January 2016, as at 23rd April 2018 the suit had merely travelled to the grant of interlocutory judgment in default of appearance against only the 1st defendant therein**, Anas Aremeyaw Anas, whose investigative work formed the basis of the prima facie case being established against the Applicant.

Since the details of the above have been set out in very great detail in the narration and commentary on the undisputed facts, we will proceed to the resolution of the legal issues raised for determination.

DETERMINATION OF LEGAL ISSUES

Various decisions of this court have been referred to us for our consideration in the determination of this referral application.

We are of the considered view that, the following two (2) cases are really germane to the resolution of the legal issues raised herein namely, ***Frank Kwadwo Amoah v The Attorney-General [2013-2015] 2 GLR, 246 and unreported decision of this court in the case of Justice Edward Boateng v Judicial Secretary and Attorney-General Reference No. J6/3/2017 dated 28th February 2018.***

The following criteria can be said to be the applicable guidelines in determining the qualifications that a retiring Superior Court Judge must satisfy to enjoy the provisions of Article 155 (1) as decided by the cases referred to supra:-

1. Attainment of sixty years (60) or above
2. The second is that, the said Judge must have worked for a continuous period of ten or more years as a Justice of the Superior court or he must have served for

twenty years (20) or more in the public service, out of which at least five continuous years must be as a Justice of the Superior Court of judicature.

3. **The Judge must be of high moral character and proven integrity. See Article 139 (4) of the Constitution 1992.**
4. The said Judge must not be a convicted felon – see the unreported decision in the case of Justice Edward Boateng supra which will be referred to as the *Rule in the Justice Boateng case.*

IMPEACHMENT PROCESS UNDER ARTICLE 146 OF THE CONSTITUTION

A critical reading of Article 146 provisions of the Constitution 1992 make it quite apparent that the processes for impeachment of a superior court Judge other than that of the Chief Justice are as follows:-

1. The receipt of a petition by the President of the Republic (who is the appointing authority of Justices of the Superior Court) and the reference of the said petition by the President to the Chief Justice to determine whether there is a prima facie case.
2. The Chief Justice determines whether there is a prima facie case. When this is established, then the following steps are automatically triggered.
3. Three Justices of the Superior Court are appointed by the Judicial Council, whilst the Council of State also appoints two members, who should not be members of Parliament, nor lawyers and this five member Committee is then appointed by the Chief Justice, and this **is referred to as the Chief Justice's Committee.**
4. **This Committee has the sole responsibility of investigating the complaints made against the Judge concerned. In other words, this Committee as it were may confirm and authenticate the prima facie findings or depart from them and hold a contrary opinion.**

5. The recommendations of the Chief Justice's Committee shall be submitted to the Chief Justice at the end of their work.
6. The Chief Justice shall under the circumstances automatically forward the recommendations of the Committee to the President. It appears from the reading of Article 146 (5) of the Constitution that the Chief Justice in this instant is only a conduit for the transmission of the report to the President and has no discretion in the matter.
7. By virtue of Article 146 (9) the President is also obliged to act upon the recommendations of the Committee and has no discretion in the matter.

PROCEDURE AT THE COMMITTEE

1. All proceedings under this Committee are to be held in camera.
2. The Judge against whom the petition has been made is entitled to be heard in his or her defence by himself or by a lawyer or other expert of his choice.

This latter procedure is a reinforcement or reiteration of the principles of fair trial enshrined in Article 19 of the constitution 1992.

DETERMINATION OF THE REFERRAL ISSUE

Admittedly, it is clear that the process of impeachment of the Applicant has been commenced by the referral of the petition against the Applicant by the President to the Chief Justice.

Additionally, the Chief Justice has also made a determination by the finding of a prima facie case against the Applicant in the following terms:-

"Ohene Essel J.

The petition was based on the alleged payment of GH¢1000.00 to the Judge in his residence. The evidence is that Ezekiel, the Court Clerk, handed over the money to the Judge. In the 6

minute video clip that I watched with the Judge and his counsel, although the latter stated that he did not see any such event take place, I did see it happen…."

The Chief Justice concluded thus:-

His written response consisted of a flat denial of the matters alleged and technicalities including legal definition of burglary, the term employed by the petitioner to describe the offence in relation to which the bribe was paid. ***The petition discloses a prima facie case against the Judge pertaining to the following acts of misbehavior or misconduct.***

- *Ex-parte discussions with one party on a case pending before him contrary to Rule 3 (7) and 4 (A) of the (CCJMG).*
- *Ex-parte discussions with court personnel on a case pending before him contrary to Rule 3 (7) (B) (i) and 4 (A) of the (CCJMG).*
- *Bribery and corruption contrary to S. 244 of the Crimial Offences Act and Rule (2) of the (CCJMG).*

It must be noted that, beyond this prima facie determination, the case against the Applicant has not proceeded any further. Some attempt and a bold one for that matter has been urged on this court by learned counsel for the Respondents that it was the case filed by the Applicant on 14th January 2016 that stalled any further proceedings.

How this was done is not clear. However, it bears emphasis that, apart from endorsing his writ with a relief for injunction against the Respondents, the Applicant at no point in time filed any process to injunct or prohibit the Respondents from pursuing the impeachment against him.

Secondly, the Respondents could have taken steps under Order 11 r. 18 to strike out the Applicant's writ of summons under any of those grounds stated therein if they were minded to.

Thirdly, and more importantly, after the close of pleadings, or where the plaintiff as in this case the Applicant failed to apply for directions as required by the rules, the defendant, in this case Respondents are entitled to apply for the directions or move specifically for the action to be dismissed. See order 32 of C. I. 47.

The Applicant also should have applied for judgment in default, but it appears he was only bidding for time.

Having put all the above matters in perspective, we are of the considered view that it will be a travesty of justice to conclude that the suit filed by the Applicant on 14th January 2016 stalled the impeachment process for which he must be solely held responsible.

We have stressed on the procedure that is expected under impeachment processes embarked upon under Article 146 of the Constitution 1992. The procedures are laid out in Article 146 (8) of the Constitution 1992.

From our analysis of the procedure, we are of the considered opinion that, it is at the Chief Justices Committee level (i.e. Committee of five) that any semblance of constitutional requirements on the principles of fair trial as expressed in Article 19 of the Constitution 1992 are to be complied with.

It is at this stage that the Applicant for the very first time will have the opportunity to meet face to face with his accusers, in this case Anas Aremeyaw Anas. Under the fair trial procedure, the Applicant would also have the opportunity to cross-examine the petitioner either by himself or by counsel or expert as the case might be. See article 146 (8) of the Constitution.

In the prima facie finding by the 1st Respondent for example, one Ezekiel, described as a Court Clerk of the Applicant was named as the person who handed over the money to the Judge, Applicant herein. Under normal circumstances, either the petitioner calls the

said Ezekiel to support his case or the Applicant might call the said Ezekiel as a witness, or the Committee might call him as a witness for the Committee.

The Applicant would have been given the opportunity to give evidence and also to be cross-examined. It is only after all these procedures of a fair trial in Article 19 of the constitution are complied with that the Committee's recommendations will be deemed to have been made constitutionally. *See Article 19 (1) (2) (c) (d) (e) (f) and (g).*

19. "Fair Trial

(1) A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.

(2) A person charged with a criminal offence shall,

(c) be presumed to be innocent until he is proved or has pleaded guilty;

(d) be informed immediately in a language that he understands, and in detail, of the nature of the offence charged;

(e) be given adequate time and facilities for the preparation of his defence;

(f) be permitted to defend himself before the Court in person or by a lawyer of his choice;

(g) be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution;…

In essence, all the above constitutional provisions should be deemed to have been subsumed in Article 146 (8) referred to supra.

From the nature of the 1st Respondent's findings in the prima facie report, there is no doubt that the Applicant was on trial in a criminal case with serious consequences which can lead to his dismissal among other recommendations.

Indeed, so serious and important are these Article 19 provisions of the Constitution on fair trial that the Supreme Court in the land mark decision in the unreported case of ***Republic v Eugene Baffoe-Bonnie and four others reference No. JI/06/2018 dated 7th June 2018***, unanimously held as follows:

> ***"The right of an accused person to require for a disclosure to be made by the prosecution may be made before the commencement of the trial or within a reasonable time in the cause of the trial, before they are tendered by the prosecution in the trial court. " emphasis***

The court however stated that the duty to disclose is not absolute and stated a number of exceptions.

But the crux of the matter is that, ***"judges like ordinary citizens, who dispense justice to others should not be denied justice"*** when it concerns them as happened in the case of the Applicant.

It must be noted that, it is at the Chief Justice's Committee, that the actual investigations into the petition are conducted with all the trappings of fair trial as provided for in Article 19 (1) (2) (c) (d) (e) (f) (g) and Article 146 (8) of the Constitution 1992 are deemed to be complied with if the Committee had been set up and practicalised.

WHAT DID THE COURT DECIDE IN THE JUSTICE FRANK KWADWO AMOAH CASE

Facts

The plaintiff was a High Court Judge at all material times. Sometime in 2010, the Chief Justice received complaints of judicial impropriety against him, in that he delivered a judgment in a case in December 2009 and subsequently purportedly delivered another judgment substantially different in all respects in the same case in March, 2010.

The Chief Justice referred the complaint to a Court of Appeal Judge to conduct further investigations. From the investigations, it emerged that, Justice Amoah has indeed delivered four separate judgments on different dates in the same case. Thereby confirming the allegations of misconduct against the Judge.

The Chief Justice then referred the matter to the Judicial Council which also referred the matter to its Disciplinary Committee to inquire into the petition and the allegations of misconduct.

On 16th September 2010, the Judicial Council accepted the findings of the Committee and petitioned His Excellency the President for the removal of the erring Judge in accordance with Article 146 provisions of the constitution 1992. After studying the petition, the President referred it back to the Chief Justice to make a prima facie determination under Article 146 (3) of the Constitution 1992.

Having established a prima facie case against the Plaintiff therein, the Chief Justice proceeded to establish the Article 146 (4) Committee that she was required to appoint with the mandate to impeach the plaintiff on 11th January 2011.

When Justice Amoah received notice of the impeachment Committee, he on the 17th of January 2011 in a letter addressed to the Chief Justice gave notice of his intention to retire voluntarily from the Bench in order for him to be elected as the Paramount Chief of the Assin Fosu Traditional Area. The Chief Justice forwarded a copy of the letter to the President with a comment. As a result, the President, in a communication dated 8th March 2011 responded thus:-

> *"I regret to inform you that His Excellency the President is unable to grant your request of voluntary retirement,* ***due to the notice of impeachment for misconduct served on you by Her Ladyship the Chief Justice. Besides, you failed to give adequate notice of your intention to retire voluntarily from the Judiciary as required per Article 145 (4) of the Constitution."*** *Emphasis*

The reference should have been to article 145 (3) of the Constitution.

Justice Amoah responded to the President's letter on 24th March 2011 and he thereafter did not receive any response on his request to go on voluntary retirement. On 26th March 2011, Justice Amoah wrote to his employers to enquire about his gratuity and salary arrears. This request was turned down and he was directed to communicate with the office of the President.

Subsequently, Justice Amoah was notified that his application to go on quinquennial leave as well as casual leave were refused. On 18th March 2011 the Judicial Secretary acknowledged the fact that the Judge had voluntarily retired from the Judicial Service with effect from 1st March 2011 and directed him to vacate his official bungalow and also handover his official car.

This was followed by another correspondence dated 23rd February 2012 by which the Judicial Secretary, notified Justice Amoah on behalf of the Chief Justice that his name had been deleted from the list of the Judicial Service.

Justice Amoah was however paid salary arrears covering 2008, 2009, and 2010 at which time he was an active Judge in the Judicial Service.

Justice Amoah's complaints in these proceedings are that, all efforts to effect the payment to him of his gratuity and retirement benefits have proved futile **wherefore on 20th February 2014, he issued out a writ claiming reliefs touching on the refusal by the President to accept his voluntary retirement and specifically for a**

> *"Declaration that the Plaintiff having compulsory retired as a High Court Judge, since 7th December 2011, he is not subject to the processes prescribed for the removal of a Justice of the Superior Court under Article 146 of the Constitution inter alia other reliefs."*

We have had to set out the facts in extenso in the Justice Frank Amoah case in order to draw the necessary parallels if any with the instant case. The principal question which arose from the contention of the parties therein **was whether it was permissible in law for the plaintiff's entitlement to gratuity to be withheld by the defendant because of the stalled impeachment proceedings.**

In addressing the vexed issue of whether Justice Frank Amoah, having reached the compulsory retiring age is still subject to disciplinary proceedings contemplated against Superior Court Judges in Article 146, the Supreme Court, speaking with unanimity through Anin-Yeboah JSC (as he then was) held as follows:-

> *"We have carefully given thought and consideration to the various articles in the Constitution to which reference has been made in the course of this judgment and* ***have come to the opinion that article 146 of the Constitution deals with persons who are in the employment of the Judiciary as Judges and does not apply to Judges who have retired by operation of law compulsorily. We are of the view that, as impeachment proceedings are for the purpose of removing a serving Judge from employment on clearly stated constitutional grounds, it is unreasonable to impute to the law maker that the provision was intended to apply to retired Judges as well.*** *A Judge who has compulsorily retired is clearly outside the scope of article*

*146. The operative words which describe the consequence of impeachment as provided in article 146 "**shall be removed from office" render any other interpretation of the consequences of retirement on the impeachment process not only unreasonable but an abuse of the language." Emphasis supplied***

There are quite some similarities in the facts of the Justice Amoah case and the instant case which needs to be emphasised.

In both cases, the Judges were facing one disciplinary enquiry or the other. Whilst that of Justice Amoah was for misconduct arising from his work as a Judge, that of the Applicant herein arose as a result of petition arising from a video documentary by Anas Aremeyaw Anas who carried out massive undercover investigations into the Judiciary and Judicial Service with cataclystic consequences.

Secondly, in both cases, the impeachment processes under Article 146 of the Constitution were not completed.

Thirdly, in both cases, the Judges had been retired compulsorily by operation of law, whilst the impeachment processes were incomplete.

The Supreme Court, speaking again with one voice through Anin Yeboah JSC (as he then was) addressed the effect of how the pending disciplinary proceedings had stalled. He stated thus:-

*"We now turn our attention to the continuing withholding of the Plaintiff's gratuity by the Defendant because of the pending disciplinary proceedings which on the facts of this case have been stalled for more than three years now. **On the facts of this case, the Committee was constituted in 2011 but to date notwithstanding the unavailability of two members no explanation has been offered by the defendant for the inability of the constituting authority to have the Committee re-constituted before the Plaintiff retired compulsorily.** We have noted from the*

proceedings before us that the delay in proceeding with the investigation is not attributable to any act or omission of the Plaintiff such as to disentitle him from seeking to benefit from his own wrong doing. ***We are of the opinion that, as the proceedings have stalled for quite a considerable length of time without any explanation resulting in the plaintiff acquiring an accrued right by virtue of article 145 (2) (b) as a compulsorily retired superior Court Judge and now properly belongs to the category of pensioners and entitled to retiring awards.*** *We are of the view, however, that if the proceedings were on going before the retirement of the plaintiff, his retirement cannot bring them to an end as the matters giving rise to the proceedings would have arisen during his tenure." Emphasis*

From our discussions in this delivery, it is apparent that the Applicant can under no stretch of imagination be deemed as having been responsible for the stalled proceedings. The fact of his suit in the law courts notwithstanding. That act can only be deemed to be an exercise of his constitutional fundamental human rights. Besides he did not injunct the Respondents. We therefore draw the necessary nexus with this Frank Amoah case and conclude that not having been held as the cause of the stalled impeachment proceedings, the Applicant must not suffer any consequences therein.

The crux of the matter is that, not having acted diligently, the Respondents cannot now at this late stage be deemed to conduct impeachment proceedings against the Applicant who has compulsorily retired as a High Court Judge. Indeed, as was held by the eminent jurist in the Justice Frank Amoah case, an impeachment proceedings cannot be commenced in respect of a retired Judge.

After all, if the process is completed, and the recommendation is for removal from office, from where will he be removed from and to what effect? Perhaps, the only punishment then will be the forfeiture of his pension benefits as provided for under Article 155 (1) (b) of the Constitution 1992.

Before we determine that matter which is the main referral issue for this case, let us deal summarily with the case of Justice Edward Boateng already referred to supra.

Our very respected brother, Gbadegbe JSC, who rendered the unanimous decision of the Supreme Court in the Justice Boateng Case stated as follows:-

> *"We now proceed to the issue arising under Article 155, the effect of which is that, the Plaintiff having retired on 31st December 2011, without being impeached is entitled to pension and gratuity notwithstanding the undeniable fact that he was convicted on July 19th 2013 for an offence involving dishonesty. The said conviction from the processes filed before us in the matter herein has not been set aside so for all purposes, the plaintiff is an ex-convict."*

The Court per Gbadegbe JSC continued the rendition on the qualifications of a Superior Court Judge as follows:-

> ***"In our opinion, to remain in continuous and uninterrupted service such as would entitle a Judge to pension and gratuity, such Judge should not lose any of the qualifications required of him as a Judge, including "high moral character and proven integrity" which by his conviction the plaintiff no longer had".*** *Emphasis*

In distinguishing the Amoah case from the Boateng case, this is what the court said:-

> ***"Unlike the situation before us, Amoah was not convicted and stripped of fundamental qualities required of a Judge in terms of article 139 (4) and as such his status as a Justice of the Superior Court remained intact when he retired." Emphasis***

Applying this to the instant case, we admit that there was a case pending against the Applicant, which also had the trappings of ripping him of the fundamental qualities of a Judge as required in article 139 (4) of the Constitution. However, through no fault of his,

that procedure or process has not been completed. It will be unreasonable on our part to assume that only one conclusion would have been reached by the Chief Justice's Committee if they had been constituted to go into the matter, which is removal.

Not having acted timeously, the benefit of the tardiness of the Respondents if any, no doubt must go to the Applicant.

Our attention has been drawn to the recent unreported decision of the Supreme Court, Writ No. J1/12/2018, intitutled, ***Justice Kwame Ansu-Gyeabour (rtd)- Plaintiff v The Chief Justice and Attorney-General – Defendants dated 19th December 2019*** in which the Supreme Court was called upon to decide whether the Plaintiff who has worked continuously for about 12 years as a Superior Court Judge and retired under Article 145 (2) (b) of the Constitution is entitled to payment of gratuity and end of service benefits which the defendants have unconstitutionally withheld because there was an impeachment proceedings against him before he retired mandatorily on 1st May 2015. The plaintiff accordingly invoked the original jurisdiction of the Supreme Court claiming inter alia:-

1. A declaration that Plaintiff, having worked as a High Court Judge and retired compulsorily, he could not be a subject of any constitutional procedures set out for the removal of a Justice of the Supreme Court under Article 146 of the Constitution 1992.

In determining this case, the Court speaking with one voice through our distinguished brother Appau JSC relied very heavily on the ***Frank Kwadwo Amoah v Attorney-Genearl [2013-2015] 2 GLR 246,*** and stated as follows:-

> "*Though the facts in the Amoah case are a little bit different from the instant one before us,* ***the main issues raised in the two cases are the same****. The only difference between the two cases is that, whilst in the Amoah case, the Plaintiff did not go to Court to challenge*

his impeachment, the Plaintiff in the instant case went to court to challenge his impeachment after his first appearance before the Justice Adinyira Committee. His action was however dismissed to pave way for his impeachment."

The court however found that, notwithstanding these slight differences, the core issues decided in the Amoah case adequately sum up the issue in the Justice Ansu-Gyeabour suit. These are:-

1. Whether or not a Superior Court Judge upon attaining the compulsory retiring age is amenable to impeachment proceedings, and
2. Whether or not inordinate delay in pending impeachment proceedings should deny a retired judge his entitlements and benefits upon attaining the compulsory age.

After quoting extensively from the Amoah case to support their arguments, Appau JSC who spoke on behalf of the court held in the Ansu-Gyeabour case as follows:-

"Plaintiff cannot be subject to proceedings under article 146 of the Constitution since at the time of his retirement, there was no existing impeachment Committee in place that was investigating him but for his statutory retirement. In other words, there were no ongoing impeachment proceedings against the Plaintiff at the time he reached his compulsory retiring age.

Any attempt to interpret Article 146 to rope in retired Justices of the Superior Courts who were not hitherto undergoing continuous impeachment proceedings prior to their retirement would be tantamount to re-writing the Constitution.

On the second issue, our view is that the 1st defendant is constitutionally clothed to write to a retired Justice of the Supreme Court to withhold his/her retirement benefits pending the completion of impeachment proceedings. But this can only happen where the impeachment process was ongoing as at the statutory date of retirement and the Committee

established for that purpose was well composed and intact. ***However, peculiar to this case, since there was no impeachment committee in place investigating plaintiff as at the time he retired on 1st May 2015, the 1st defendant erred in withholding his retirement benefits by authoring Exhibit KAG1."*** *Emphasis*

DETERMINATION OF REFERRED ISSUE

In deliberation over the issue referred to us for determination, we have reflected over the principles of constitutional interpretation espoused in locus classicus cases such as the following:

- ***Republic v Special Tribunal, Ex-parte Akosah [1980] GLR 592 C.A***
- ***Tuffour v Attorney-General [1980] GLR 637***
- ***New Patriotic Party v Attorney-General [1993-94] 2 GLR 35 (31st December case)***
- ***Yiadom 1 v Amaniampong [1981] GLR 3***
- ***Edusei v Attorney-General [1996-97] SCGLR 1***
- ***Edusei v Attorney-General (No.2) [1998-99] SCGLR 753***
- ***Osei Boateng v National Medial Commission & Appenteng [2012] 2 SCGLR 1038***
- ***Bimpong Buta v General Legal Council and Others [2003-2004] SCGLR 1200***
- ***Republic v High Court, (Fast Track Division) Accra Exparte; National Lottery Authority (Ghana Lotto Operators Association & Others – Interested Parties) 2009 SCGLR 390***

We have also been guided by the Interpretation Act, 2009, section 3 thereof which provides thus:-

"This Act shall not be construed as excluding the application to an enactment of a rule of interpretation or constitution applicable to that enactment and not inconsistent with this Act."

The memorandum to the Interpretation Act also provides in part as follows:-

"The general rules for the construction or interpretation used by the courts were formulated by the Judges and not enacted by Parliament. From ***the mischief Rule enunciated in Heydon's case [(1584) 3 Co. Rep. 7a 76 E.R. 637] to the Literal Rule enunciated in the Sussex Peerage case [(1844) 11. Cox F 85; 8 E. R 1034], to the Golden Rule enunciated in Grey v Pearson [(1857) 6 H.L.C.61, 10 E.R. 1216], the courts in the Commonwealth have now moved to the Purposive Approach to the interpretation of legislation and indeed all written instruments. The Judges have abandoned the strict constructionist view of interpretation in favor of the true purpose of legislation.***

The Purposive Approach to interpretation takes account of the words of the Act according to their ordinary meaning as well as the context in which the words are used. Reliance is not placed solely on the linguistive context, but consideration is given to the subject matter, the scope, the purpose, and to some extent the background. Thus with the Purposive Approach to the interpretation of legislation, there is no concentration of language to the exclusion of the context. The aim, ultimately, is one of synthesis". *Emphasis*

The Supreme Court has followed the above principles in a number of cases such as the following which we duly considered and took into account before answering the referral question herein.

Some of these cases are:-

1. ***Agyei Twum v Attorney-General and Akwetey [2005-2006] SCGLR 732***

   In this case, in order to cure a mischief in the impeachment process for the removal of a Chief Justice as provided for in Article 146 (6) of the Constitution, the Court adopted a purposive interpretative approach.

2. ***Federation of Youth Association of Ghana FEYDAG (No.2) v Public Universities of Ghana & Others (No.2) 2011 SCGLR 1081***

   In this case, the Supreme Court used the purposive approach to reach the conclusion that the full fee-paying policy did not infringe the provisions of the 1992 Constitution.

3. ***In Ransford France (No 3) v Electoral Commission & Attorney-General [2012] 1 SCGLR 705***

   This was a case where the Plaintiff had sought to invoke the Supreme Court's original jurisdiction to invalidate the creation of forty five (45) additional Parliamentary Constituencies. The basis of the Plaintiff's argument was a literal reading of Article 296 (c) of the Constitution 1992. **The Supreme Court rejected the argument of the plaintiff in the Ransford France case using a purposive approach to interpret the provision.**

Basing ourselves on the above cases where the dominant rule of interpretation was the purposive approach, we are also of the view that, a similar approach, taking a cue from the Interpretation Act as well will serve us well in reaching a decision that will not only be pragmatic, but will serve the ends of justice very well.

This approach no doubt will enable us to holistically combine other principles of the Constitution like fair trial which have a bearing on the resultant effect of the implementation of the impeachment provisions in Article 146, punitive as they purport to be on the Applicant in this case.

CONCLUSION

In view of all the above, we accordingly answer the question referred to us by the High Court in regard to Article 146 (3) and (5) and 155 (1) (b) of the Constitution, to wit:-

Whether or not upon a true and proper interpretation and or construction of Article 146 (3) and (5), the Applicant can be permitted to enjoy his rights under Article 155 (1) (b) of the 1992 Constitution upon his retirement by reason of age, when by reason of the exercising of his constitutional right to challenge the prima facie case in court proceedings under Article 146 (5) of the 1992 Constitution could not be completed by the Respondent receives an affirmative answer from us.

In particular, **we answer that the Applicant is entitled to all the pension and gratuity benefits as provided for under Article 155 (1) (b) of the Constitution 1992 as are applicable to the Applicant for the reasons stated in the main body of the Ruling.**

EPILOGUE

It does appear that the administrative machinery put in place at the Judicial Service has been very slow in the pursuit of disciplinary proceedings against Judges. We can refer to the following, Justices Frank Amoah and Ansu-Gyeabour cases. This will be the third one in succession. In order to stem the tide of this unhealthy development, this court recommends to His Lordship The Chief Justice to immediately put in place a control mechanism to regulate in future any impeachment proceedings that would be instituted under Article 146 (4) and (5) of the Constitution by giving definite timelines within which they operate, bearing in mind the retiring date of the affected Judge. This will apparently disabuse the minds of the public against the Judiciary.

Indeed, this court will urge the Chief Justice to pursue with all the command he can master the processes already commenced at the Rules of Court Committee aimed at formulating Rules of Procedure for the impeachment of all Article 71 office holders which are conducted under this Article 146 proceedings.

These Rules will ensure that justice is not unduly hurried or delayed, period.

Finally, we are of the view that, even though ***"Judges like Caesar's wife must live above reproach***" they must also be accorded a fair measure of justice, fairness and equity in all deliberations that affect them.

An appeal is hereby being made to the Association of Magistrates and Judges of Ghana (AMJG) through their Executives to hold at least once every year a seminar on ethics for Judges and Magistrates on how to comport themselves whilst in office.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

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