THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E266 OF 2020

OKIYA OMTATAH OKOITI.....PETITIONER

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

-AND-

THE INSPECTOR GENERAL OF NATIONAL POLICE SERVICE....1st INTERESTED PARTY

THE ATTORNEY GENERAL.....2nd INTERESTED PARTY

-AND-

INTERNATIONAL COMMISSION OF JURISTS (KENYA SECTION).....AMICUS CURIAE

JUDGMENT

THE PARTIES

1. The Petitioner, Okiya Omtatah Okoiti, describes himself as a law-abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, which is a legal entity, incorporated in Kenya and founded on republican principles with the purpose of promoting democratic governance, economic development, and prosperity.

2. The Respondent, the Director of Public Prosecutions, is a public office established under Article 157 of the Constitution and is charged with the role of prosecuting criminal cases against any person before any court, other than a court martial.

3. The 1st Interested Party, the Inspector General of the National Police Service, is a public office established under Article 245 of the Constitution and charged with the key role of preventing and investigating crime.

4. The 2nd Interested Party, the Attorney General, is the principal legal adviser of the national government and is constitutionally established and mandated by Article 156 to represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.

5. The Amicus Curiae, International Commission of Jurists-Kenya Section, is a society registered under the Societies Act, Cap. 108. It seeks to promote human rights, democratic governance, justice, and the rule of law.

THE PETITIONER'S CASE

6. The Petitioner's case is premised on the petition dated 3rd September, 2020 brought under Articles 22 (1) & (2) (c), 23, 48, 50(1), 165(3), and 258 (1) & (2) (c) of the Constitution. The Petitioner alleges contravention and violation of Articles 1(1), 2(1) & (2), 3(1), 10(1) & (2), 47(1), 157(4) & (6), 245(4)(a) & (b), 259(1), and Section 7(1) of the Sixth Schedule of the Constitution and sections 35(b) & (e), 50(1), 52(4)

and 64 of the National Police Service Act, 2011, and sections 36A and 89 of the Criminal Procedure Code, Cap. 75 by the Director of Public Prosecutions (hereinafter simply referred to as the DPP).

7. The petition is supported by the Petitioner's affidavit sworn on 3rd September, 2020.

8. Through the petition, the Petitioner seeks the following reliefs:

i. A DECLARATION THAT Section 5(2)(b) & (3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 is unconstitutional and, therefore, invalid, null and void.

ii. A DECLARATION THAT the DPP's "Guidelines on the Decision to Charge, 2019" is unconstitutional and, therefore, invalid, null and void.

iii. A DECLARATION THAT the principal decision to charge or not to charge a suspect with a crime and registering such a charge in court is the culmination of and an integral part of the investigative process and it is strictly the exclusive mandate of the National Police Service.

iv. A DECLARATION THAT the expression "any offence alleged to have been committed," in Article 157(6)(a) of the Constitution, as read together with the expressions "any information or allegation of criminal conduct," in Article 157(4) of the Constitution, and "any particular offence or offences," in Article 245(4)(a) of the Constitution, refers only to an offence or offences disclosed in a formal charge sheet registered in court.

v. A DECLARATION THAT the DPP's mandate to institute and undertake criminal proceedings commences only where a charge is contested.

vi. A DECLARATION THAT the DPP does NOT have any mandate in the criminal investigation process, and has no capacity in law to call for police files before formal charges are laid in a court.

vii. A DECLARATION THAT the DPP's practice of endorsing or approving miscellaneous criminal applications made by the police, including police applications for custodial periods to hold suspects for further investigations, before the applications are filed in court, is unconstitutional and, therefore, invalid, null and void.

viii. A DECLARATION THAT the DPP does NOT have the capacity in law to direct and draft miscellaneous criminal applications on behalf of investigators.

ix. A DECLARATION THAT under the laws of Kenya, there is no provision or power for prior screening of police files and suspects by the DPP before the police file charges with the court.

x. A DECLARATION THAT the DPP has no capacity in law to endorse charge sheets before they are registered in court.

xi. A DECLARATION THAT the DPP does NOT have any powers or role to play in drawing, signing and presenting a charge sheet in court.

xii. A DECLARATION THAT the discretion of the police to arrest and investigate suspects ends when a formal charge sheet is drawn and filed in court and a suspect is presented in court, and that it is only then that the DPP's discretion to prosecute kicks in.

xiii. A DECLARATION THAT to be binding, any subsidiary legislation purporting to set out the exercise of the powers and functions of the DPP must be published in the Kenya Gazette before they become effective.

xiv. AN ORDER ANNULLING and QUASHING Section 5(2)(b) & (3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013.

xv. AN ORDER ANNULLING and QUASHING the DPP's "Guidelines on the Decision to Charge, 2019".

xvi. AN ORDER COMPELLING the Respondent to bear the costs of this suit.

xvii. Any other relief the court may deem just to grant.

9. According to the Petitioner, the genesis of his petition is traced to the DPP's press statements made on 24th August, 2020 on the investigations into the alleged theft of public funds at Masai Mara University by the Vice Chancellor, Prof. Mary Walingo and others, and on 25th August, 2020 on the corruption allegations facing the Migori County Governor Zachary Okoth Obado and others. The Petitioner avers that the DPP's direction for the arrest of the suspects in those matters was a display of his contempt of Article 245(4)(a) & (b) of the Constitution which insulates the Inspector General of the National Police Service (hereinafter simply referred to as the I.G.) against being instructed or directed with respect to the investigation of any particular offence or the enforcement of the law against any person.

10. The Petitioner avers that the 'Guidelines on the Decision to Charge, 2019' (hereinafter referred to as the 2019 DPP Guidelines) published

by the Respondent in the Daily Nation on 30th July, 2020, usurps the constitutional and statutory powers of the National Police Service as regards its mandate to investigate crimes and to charge suspects. He contends that the DPP has no mandate to supervise or manage police investigations and to charge suspects. Further, that the DPP does not have power to direct the I.G. to investigate any particular offence or offences. According to the Petitioner, the DPP can only direct the I.G. to investigate any information or allegation of criminal conduct but the I.G. has no obligation to report back to the DPP on the outcome of the investigations.

11. The Petitioner asserts that the 2019 DPP Guidelines are unconstitutional as the decision to charge a person in Kenya suspected of committing a criminal offence is the mandate of the police and not the DPP. He further avers that the 2019 DPP Guidelines do not distinguish between a suspect and an accused person, and the difference between the decision to charge suspects, which is an exclusive function of the police, and the decision to institute criminal proceedings against accused persons which is the function of the DPP.

12. The Petitioner further avers that the 2019 DPP Guidelines were enacted without public participation and in contravention of the Statutory Instruments Act, 2013. He contends that for the 2019 DPP Guidelines, which purport to set out the exercise of the powers and functions of the DPP, can only be binding once published in the Kenya Gazette.

13. Moreover, the Petitioner argues that the 2019 DPP Guidelines offend the doctrine of checks and balances embedded in the Constitution which set in place various mechanisms to reduce mistakes, prevent improper misbehavior, or decrease the centralization of power in one State organ or officer. According to the Petitioner, the doctrine informs the architecture of the Constitution with regard to police independence in investigations and the need to hold the DPP accountable. The Petitioner avers that the 2019 DPP Guidelines dismantles the doctrine of checks and balances and he fears that once this happens the DPP will be in a position to selectively direct prosecutions to achieve undisclosed collateral purposes or for improper motives or corrupt practices.

14. It is the Petitioner's case that as the lead investigative agency of criminal matters in Kenya, the Directorate of Criminal Investigations (DCI) has the mandate of carrying out criminal investigations in the country. It is the Petitioner's averment that the Criminal Procedure Code, Cap. 75 (CPC) provides the procedures to be followed in criminal investigations and criminal proceedings. Further, that pursuant to Article 49(1) of the Constitution, a suspect at the time of arrest responds to charges as drawn and signed by the investigating officer in accordance with Section 89 of the CPC. According to the Petitioner, it is after the charges are read to the suspect that the investigating officer presents the charge sheet and the suspect to court as provided under Section 89(4) of the CPC.

15. The Petitioner asserts that it is only after charges have been laid in court by a police officer that a suspect is transformed into an accused person and it is at this point that the DPP takes over and proceeds to prosecute the case. It is on this premise that the Petitioner argues that there is no provision or power for the prior screening of police files and suspects by the DPP before the police file charges with the court.

16. The Petitioner deposes that Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions to exercise State powers of prosecution after charges have been drafted and laid before the court by the police. According to the Petitioner, pursuant to Article 157(6)(a), (b) & (c) of the Constitution, the DPP's powers and functions are clearly defined and limited to instituting and undertaking criminal proceedings before any court other than a court martial.

17. The Petitioner further contends that while Article 157(6)(c) of the Constitution empowers the DPP to discontinue prosecution, at any stage before judgment is delivered, this power is neither unlimited nor unfettered and must be exercised with the supervision of the court pursuant to Article 157(7) & (8), so as to ensure transparency and accountability. It is therefore the Petitioner's case that the DPP like every other constitutional and public authority in the country, is constrained by the Constitution and the laws of Kenya.

18. The Petitioner avers that despite the clear distinction of the police and the DPP in the Constitution, the DPP's actions of overstepping his mandate has seen the police experience challenges in relation to their mandate of instituting proceedings before courts which is a grave threat to the Constitution and the full enjoyment of the rights and fundamental freedoms in the Bill of Rights.

19. In addition, the Petitioner avers that the DPP has interfered with the police mandate by demanding that he must give his approval before the police make applications for holding suspects beyond twenty-four hours for further investigation. He asserts that considering that no charge has been laid before the court, the DPP does not have the capacity in law to direct and draft miscellaneous criminal applications on behalf of investigators seeking to hold suspects beyond the constitutionally provided twenty-four hours.

20. The Petitioner claims that by providing that the DPP can **"direct that investigations be conducted by an investigative agency named in the direction",** Section 5(2)(b) of the Office of the Director of Public Prosecutions Act, 2013 (ODPP Act) is null and void for contravening Article 245(4) of the Constitution, which insulates the I.G. against being directed in respect to the investigation of any particular offence or offences. Further, that in view of Section 4(1) of the Independent Policing Oversight Authority Act, 2011, the DPP has no powers to direct the Independent Policing Oversight Authority. It is also the Petitioner's case that Section 5(3) of the ODPP Act equally violates Article 245(4) by authorizing the DPP to **"assign an officer subordinate to him to assist or guide in the investigation of a crime"** and compelling every investigative agency to **"give effect to that direction."**

21. The Petitioner consequently contends that the DPP's impugned actions violate or threaten Articles 1(1), 2(1), (2) & (3), and 259(1) & (3) of the Constitution by deliberately defying the provisions of Articles 10(2), 27, 35, 47, and 227(1) & (2) of the Constitution; that the DPP's impugned acts and omissions violate and threaten the national values and principles of governance of patriotism, rule of law, participation of the people, transparency, accountability, and sustainable development under Article 10(2) of the Constitution; that the DPP's impugned acts and omissions violate or threaten Article 47 of the Constitution by taking administrative action that is not lawful, reasonable and procedurally fair; that the decision of the DPP to usurp police powers violate or threaten Articles 157(4) & (6), 245(4)(a) & (b), and 259(1) of the Constitution; and, that the DPP has violated Articles 73(2)(b)-(e) and 75(1) of the Constitution by purporting to execute his mandate outside the law to achieve an undisclosed collateral purpose.

22. It is further the Petitioner's case that the DPP's actions have violated Article 259(1) of the Constitution by setting to defeat the purposes, values and principles of the Constitution; that the impugned actions of the DPP violate sections 36A and 89 of the CPC, as read together with

sections 35, 50(1), 52(4), and 64 of the National Police Service Act, 2011; that by failing to subject the 2019 DPP Guidelines to public participation, the DPP breached the requirement for public participation; and, that the DPP violated the principle of the rule of law by enacting the 2019 DPP Guidelines without complying with the Statutory Instruments Act, 2013.

23. In conclusion the Petitioner urged this Court to find the decisions in **Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR** and **Ethics and Anti-Corruption Commission v James Makura M'abira [2020] eKLR** as of no consequence to these proceedings and allow his petition.

THE RESPONDENT'S CASE

24. The DPP opposed the petition through a replying affidavit sworn on 29th October, 2020 by Victor Juma Owiti. Through the affidavit, the DPP commences his case by averring that since independence the prosecutorial power has been exclusively vested in the office of the Attorney General or the DPP.

25. It is averred that the DPP exercises the State power of prosecution and by virtue of Article 157(10) of the Constitution, that power is exercised independently and is not subject to any direction or control by anybody or authority including the National Police Service. Further, that Section 57(4) of the ODPP Act states that the Act has the force of law throughout Kenya as long as it is not inconsistent with the Constitution.

26. The DPP avers that Section 50 of the ODPP Act empowers him to make regulations, guidelines, policies and other directions whereas Section 5(1)(c) of the Act empowers him to formulate and keep under review the public prosecution policy. According to the DPP, his office has formulated key prosecution documents with the objective of guiding the making of the decision on whether or not to prosecute any person for any offence. It is averred that it was in that context that the 2019 DPP Guidelines were formulated.

27. In response to the Petitioner's allegation that there was no public participation in the formulation of the 2019 DPP Guidelines, the DPP avers that on 6th August, 2018 his office published an advertisement in the national dailies and the Kenya Gazette inviting the public to give feedback in form of comments, recommendations or suggestions on the draft 2019 DPP Guidelines. The invitation was re-published in the Kenya Gazette on 27th August, 2018. Further, that numerous meetings were held with various stakeholders, including the National Police Service, to deliberate on the draft 2019 DPP Guidelines.

28. The DPP deposes that on 31st August, 2018 he appointed a task force on the decision to charge. His deposition is that the task force comprised of principal players in the justice sector. According to the DPP, the public, individual public officers, and the Law Society of Kenya were invited through advertisement to make submissions and comments on the Draft General Prosecution Guidelines prepared by the task force.

29. The DPP additionally depose that the task force went round the country sensitizing stakeholders on the Draft Guidelines and that a service week was conducted in March 2019 where prosecutors across the country successfully piloted the Draft Guidelines.

30. It is the DPP's case that the 2019 DPP Guidelines are geared towards guiding prosecutors in arriving at the decision whether to charge a suspect or not and are not meant to substitute or replace the Constitution or any law. According to the DPP, the 2019 DPP Guidelines cannot be said to trump the concept and rationale of the doctrine of checks and balances as there are sufficient constitutional, statutory and other mechanisms for holding him accountable for the exercise of his powers.

31. Concerning his press statements in regard to the Masai Mara University and Migori County investigations, the DPP asserts that the statements he made on those matters simply gave effect to Article 10(2) of the Constitution on transparency and accountability. Further, that Article 245(4) as read together with Articles 245(5) and 157(4) exempts the DPP from the general provisions of Article 245(4) of the Constitution.

32. It is the DPP's position that the Petitioner has not shown how the 2019 DPP Guidelines contravene the provisions of the Constitution and thus the allegation that the document is unconstitutional is without merit. The DPP stresses that the power to institute criminal proceedings, being dependent on the sufficiency of evidence and public interest, is his exclusive mandate. He points out that the National Police Service Act, 2011 does not vest the police with the power to make the decision to charge. Further, that the Constitution does not contemplate the splitting of the State powers of prosecution between the DPP and the National Police Service.

33. The DPP rejects the claim by the Petitioner that certain provisions of the ODPP Act are unconstitutional and states that neither Section 5(2)(b) & (3) nor any other provision of the Act is in contravention of Article 245(4) or any other provision of the Constitution. It is deposed that the impugned provisions are in line with Article 157(4) of the Constitution which empowers him to direct the I.G. as regards investigations, and obligates the I.G. to comply with such directions.

34. As to why he should be involved in any application seeking the holding of a suspect beyond twenty-four hours, the DPP avers that Section 36A of the CPC ensures the protection of the fundamental rights of arrested persons and does not give power to the police to make the decision to charge since that mandate exclusively belongs to him.

35. The DPP deposes that while Section 7(1) of the Sixth Schedule to the Constitution preserves the CPC as a valid piece of legislation, it also requires that statutes in existence before the effective date of the Constitution must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. In that regard it is deposed that Section 89 of the CPC should be read with the necessary modifications and adaptations so as to comply with the Constitution which now vests the exercise of State powers of prosecution on the DPP.

THE 2ND INTERESTED PARTY'S GROUNDS OF OPPOSITION

36. The Attorney General filed Grounds of Opposition dated 19th November, 2020 and opposed the petition on the grounds that it offends the doctrine of presumption of constitutionality of legally enacted statutes, regulations and policies; that the Petitioner has not demonstrated any unconstitutionality; that the DPP made the 2019 DPP Guidelines pursuant to powers vested upon him by the Constitution and statutory law; that Article 157(6) of the Constitution directly vests State powers of prosecution on the DPP and the Petitioner cannot through judicial craft seek to have such powers abrogated or exercised by another person on whom such authority is not vested; and, that pursuant to Section 5(4) (e) of the ODPP Act, the DPP can review a decision to prosecute or not to prosecute.

37. It is additionally the Attorney-General's case that by virtue of Article 157(4) of the Constitution, Section 5 of the ODPP Act and Section 35(h) of the National Police Service Act, the DPP has power to direct the I.G. to investigate any information or allegation of criminal conduct and the I.G. is obligated to comply with such direction; that the independence accorded to the I.G. under Article 245(1)(b)& (4) (a) & (b)of the Constitution does not in any way isolate the I.G. from co-operating and collaborating with other State organs; and that by dint of sections 5(1)(c) & (d), 5(4)(g) and 50 of the ODPP Act the DPP is empowered to make regulations, policies and guidelines, and formulate and keep under review public prosecution policy and do all such other things as are necessary or incidental to the performance of his functions under the Constitution and law.

38. Further, that the impugned Section 5(2)(b) of the ODPP Act mirrors Articles 157(4) and 245(5) of the Constitution and cannot therefore be said to be unconstitutional; that the petition is an affront to the supremacy of the Constitution as it seeks to confer the prosecutorial powers of the DPP on the I.G. and challenges the exercise of constitutional powers by the DPP; that pursuant to Section 7 of the Sixth Schedule to the Constitution, the provisions of sections 36A and 89 of the CPC should be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them in conformity with Article 157 of the Constitution.

39. The Attorney-General further asserts that sections 10, 23, 24, 34, 35 and 39 of the National Police Service Act, Cap. 84 do not vest the power to institute criminal proceedings or undertake criminal prosecutions upon the National Police Service; that the "turf war" as alleged by the Petitioner is at best speculative therefore not warranting intervention in the form of the prayers sought; and, that the grant of the reliefs sought would not enhance the constitutional values and objects under the Bill of Rights and are disproportionate to the mischief that is sought to be cured.

40. In conclusion, the Attorney General asserts that granting the orders sought by the Petitioner would occasion irredeemable and irreparable injury to the State and to the citizens of Kenya who are beneficiaries of the DPP's services. The Court is consequently urged to find that the petition is misguided and dismiss it.

41. Although the grounds of opposition indicate that the same were filed on behalf of the Attorney-General alone, Ms Mutindi who appeared for all the Interested Parties in this matter told the Court on 15th September, 2021 that the same were also the I.G.'s grounds of opposition to the petition. In the circumstances the grounds of opposition will be treated as the response to the petition by both Interested Parties.

THE PETITIONER'S REPLY

42. In reply to the Respondent's replying affidavit and the Interested Parties' grounds of opposition, the Petitioner filed a supplementary affidavit sworn on 1st March, 2021. In specific response to the DPP's replying affidavit, the Petitioner avers that the provision in the National Prosecution Policy, 2007 which purports to vest the decision to charge in the DPP, is neither provided for nor regulated by statute as there is no statutory provision requiring the consent of the DPP before a prosecution can be mounted and that such a provision would contravene Article 157(6)(b) of the Constitution which allows other persons or authorities to commence criminal proceedings in any court, other than a court martial.

43. The Petitioner stresses that vesting the decision to charge in the DPP would override Article 157(4) of the Constitution as read together with Section 89 of the CPC which vests the decision to charge in police officers. According to the Petitioner, since Section 89(4) of the CPC allows the police to sign and present the charge to the court, no room is left for the DPP to do so since the law does not require the police to report to the DPP. According to the Petitioner, the DPP has no investigatory power as such power is solely reposed in the police. It is the Petitioner's averment that Article 245(4)(b) of the Constitution is violated where the police must seek and get the clearance of the DPP before they can enforce the law by charging suspects in court.

44. The Petitioner reiterates that the 2019 DPP Guidelines are invalid, null and void as they were not subjected to public participation and for being enacted in contravention of the Statutory Instruments Act, 2013, including to the extent that they were not laid in Parliament and published in the Kenya Gazette.

45. It is the Petitioner's position that the decision to charge is not an aspect of prosecution, and that as can be seen from Article 157(12) of the Constitution which allows Parliament to enact legislation conferring powers of prosecution on authorities other than the DPP, the Constitution does not vest all State powers of prosecution in the DPP. According to the Petitioner, Article 157(12) validates Section 89(5) of the CPC and brings it within Section 7(1) of the Sixth Schedule to the Constitution.

46. The Petitioner insists that the DPP violates Article 245(4)(a) of the Constitution whenever he interferes with police investigations. According to him, the DPP only has capacity to review police files under the 'supervision' of a court of law, after charges have been filed. The Petitioner's view is that no law vests the DPP with powers to determine who is to be charged and the only power granted to him is to terminate a prosecution with the consent of the trial court. Further, that no law vests the DPP with power to initiate formal criminal charges against suspects since what the Constitution allows the DPP to do is to institute and undertake criminal proceedings against any person before any court, other than a court martial.

47. According to the Petitioner, the fact that the Constitution vests the DPP with the power to institute and undertake criminal proceedings is

not in issue but what is in issue is that the DPP has no authority to direct investigations and to charge suspects. Further, that unlike the police, the DPP has no mandate to set suspects free and that the DPP can only free accused persons with the permission of the trial court. The Petitioner cites the decision of the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** in support of his deposition that a statute cannot extend jurisdiction beyond what the Constitution grants.

48. Replying to the Interested Parties' grounds of opposition, the Petitioner cites the decision of the Supreme Court in the case of **In the Matter of Interim Independent Electoral Commission [2011] eKLR** and avers that Article 245(4)(a) & (b) protects the I.G. from taking orders or instructions from other State organs or persons. According to the Petitioner, the DPP has no power to direct any investigative agency to conduct investigations because the DPP's power to direct the investigation of any information or allegation of criminal conduct is only applicable to the I.G. The Court is therefore urged to allow the petition as prayed.

THE PETITIONER'S SUBMISSIONS

49. The Petitioner filed written submissions dated 1st March, 2021. The Petitioner commences by submitting that the petition is filed in the public interest and that by virtue of Articles 258(1) and 22(1) & (2) of the Constitution he is vested with the necessary *locus standi* to institute this suit. To buttress this position, reliance was placed on the cases of **Kiluwa Limited & another v Commissioner of Lands & 3 others [2015] eKLR** and **Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016] eKLR.**

50. The Petitioner submits that the crux of his case is founded on the notion that the Constitution clearly demarcates the role of the police from that of the DPP in the criminal justice system. He submits that the police are assigned the duty to independently investigate crimes and charge suspects, while the DPP is assigned the role of independently prosecuting persons the police charge in court. He contends that it is imperative that this Court pronounces the boundary in law between the two organs.

51. The Petitioner then proceeds to identify various issues for the determination of the Court and submits on those issues as hereunder.

a) Whether the provisions of sections 5(2)(b) and 5(3) of the Office of the Director of Public Prosecutions Act, 2013 are unconstitutional?

52. The Petitioner states that according to Article 2(1) any law that is inconsistent with the Constitution is void to the extent of the inconsistency. He submits that Article 259(1) requires that the Constitution be construed in a manner that promotes its purposes, values and principles. It is the Petitioner's contention that drawing from Article 245(4) of the Constitution and Section 35 of the National Police Service Act, 2011 the role of the police is distinct from that of the DPP which is provided under Article 157 of the Constitution. He asserts that the power of the DPP under Article 157(4) to direct the I.G. is limited to investigation of '*any information or allegation of criminal conduct*'.

53. The Petitioner further submits that the expression *'any offence alleged to have been committed'* in Article 157(6)(a) of the Constitution, as read together with the expressions *'any information or allegation of criminal conduct'* in Article 157(4) of the Constitution, and *'any particular offence or offences,'* in Article 245(4)(a) of the Constitution, refer only to material criminal acts, which can be disclosed in a formal charge sheet registered in court. He therefore argues that Section 5(2)(b) of the ODPP Act is null and void for contravening Article 245(4)(a) of the Constitution, which insulates the I.G. from being directed in respect to the investigation of any particular offence or offences.

54. In addition, the Petitioner contends that the expression *'an investigative agency named in the direction'* expands the mandate of the DPP beyond what is provided under Article 157(4) of the Constitution. He asserts that whereas the Constitution only empowers the DPP to give directions to the I.G., the ODPP Act which, at Section 2, defines an investigative agency to mean the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority and Anti-Counterfeit Agency or any other government entity mandated with criminal investigation role under any written law, expands the powers of the DPP beyond that given to him by the Constitution.

55. It is the Petitioner's position that Parliament has no power to expand the mandate bestowed upon the DPP under Articles 157 & 158 of the Constitution. Further, that unlike Articles 243(4) & 245(8) of the Constitution which requires Parliament to enact legislation to give full effect to the Articles which establish the National Police Service and its command, Article 157(12) only allows Parliament to *'enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.'* The Petitioner pointed to the cases of **Kenya Human Rights Commission v Attorney General [2018] eKLR**; **Olum & another v Attorney General [2002] EA;** and **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** as enunciating the principles for interpreting the Constitution.

b) Whether meddling in police investigations compromises the DPP'S independence?

56. The Petitioner submits that Section 5(3) of the ODPP Act allows the Respondent or his agents to cross the line and assist or guide in the investigation of a crime which defeats the doctrine of checks and balances which informs the basic structure of the Constitution. He argues that the provision removes the checks and balances that the Constitution introduced when it separated the investigative and prosecutorial limbs of law enforcement. He claims that as a result of this interference the DPP loses his objectivity and may not be in a position to objectively exercise his powers of reviewing criminal cases before courts of law, to decide whether to prosecute, or drop the charges.

c) Whether the DPP can direct the Inspector General of Police to arrest suspects?

57. The Petitioner submits that Article 245(4)(b) of the Constitution is an absolute bar to the DPP issuing any instructions to the police to arrest suspects. He argues that an instruction by the DPP to police to arrest a suspect or suspects amounts to asking the police to enforce the law against a particular person or persons which would be contrary to the said Article.

d) Whether the DPP's "Guidelines on the Decision to Charge, 2019" are unconstitutional?

58. The Petitioner contends that the statement in the 2019 DPP Guidelines that the DPP is the sole custodian of prosecutorial power is based on an erroneous reading of the Constitution as the Constitution does not vest the State powers of prosecution solely in the DPP. The Petitioner points out that Article 157(6)(b) recognizes that criminal proceedings can be commenced by other persons or State authorities other than the DPP. Further, that Article 157(12) of the Constitution which authorizes Parliament to enact legislation conferring powers of prosecution on authorities other than the DPP affirms that the DPP is not the sole custodian of prosecutorial power.

59. It is submitted that through the 2019 DPP Guidelines, the DPP has usurped the constitutional and statutory powers of the National Police Service as regards the mandate of the police to investigate crimes and to charge suspects. Further, that contrary to Article 245(4)(a) & (b) of the Constitution, the 2019 DPP Guidelines empowers the DPP to meddle in and direct investigations, to supervise police investigations and to decide whether police should or should not charge suspects. Moreover, the Petitioner argues that a reading of Articles 243(4) and 245(8) of the Constitution together with Section 7(1) of the Sixth Schedule to the Constitution, clearly shows that sections 36A and 89 of the CPC, read together with sections 35, 50(1), 52(4), and 64 of the National Police Service Act, 2011, are valid law and thus override the 2019 DPP Guidelines.

60. The Petitioner additionally submits that the 2019 DPP Guidelines are also invalid to the extent that they were not subjected to public participation and to the extent that the Respondent violated the constitutional principle of the rule of law when he enacted the guidelines without complying with the Statutory Instruments Act, 2013 which requires that legislative documents be published in the Gazette and tabled before Parliament.

e) Whether allowing the DPP to charge suspects undermines the doctrine of checks and balances which informs the basic structure of the Constitution?

61. According to the Petitioner, Article 157(6) of the Constitution limits the DPP's prosecutorial powers to a court of law and he cannot therefore decide who is to be charged in court. He adds that the role of the DPP as a prosecutor is that of an agent of justice as was held in the U.S. Supreme Court case of **Berger v United States, 55 s. ct. 629 (1935).** The Petitioner contends that in stating that the mandate of the DPP is to decide who to charge and the kind of charges they should face, the 2019 DPP Guidelines contravene Article 157(6)(c), (7) & (8) of the Constitution which do not allow the DPP to exercise his powers outside court and without the supervision of the courts.

f) Whether the principal decision to charge or not to charge a suspect with a crime is strictly the exclusive mandate of the National Police Service?

62. The Petitioner submits that the charge sheet or information is in the discretion of the investigator, and it is the fundamental accusatory document made by the investigator. He argues that were the DPP to approve the charge or information it would be impossible for the police to comply with the requirement of the Constitution that a person should be presented in court within twenty-four hours of arrest. Further, that Article 49(1)(h) of the Constitution which draws a very clear distinction between a charge and a trial supports his contention that the power to charge belongs to the police whereas the mandate to try reposes with the DPP.

63. The Petitioner argues that the discretion of the police to arrest and investigate suspects ends when a formal charge or information is drawn and filed in court and a suspect is presented in court for trial. He avers that the prosecution process which concerns the DPP is commenced when the accused person denies the charge or information after the same is read to him or her by the court.

64. The Petitioner stresses that Article 245(4)(b) of the Constitution is an absolute bar to anybody directing the police to charge suspects. According to him, the decision to charge suspects is an exclusive function of the police and must be distinguished from the decision to institute criminal proceedings against accused persons which the Constitution reserves for the DPP, private actors, and other authorities.

g) Whether the DPP can lawfully review police files before formal charges are laid in court?

65. The Petitioner submits that since the DPP does not have any mandate in the criminal investigation process, it follows that he has no capacity in law to call for police files before formal charges are laid in court. He argues that police files are not part of criminal proceedings before a court of law and that there is no legal provision which allows the DPP to screen police files and suspects before the police can file formal charges in court.

h) Whether the DPP has capacity in law to draw, sign/endorse, register, and present charge sheets or information sheets before court?

66. The Petitioner submits that the DPP has no role in drawing, signing, endorsing, registering, and or presenting charge sheets or information sheets before court as can be gleaned from Article 245(4)(a) & (b) and sections 36A and 89 of the CPC, as read together with Article 157(12) of the Constitution, Section 7(1) of the Sixth Schedule to the Constitution, and sections 35, 50(1), 52(4) and 64 of the National Police Service Act, 2011.

i) Whether the DPP has the capacity in law to direct and/or draft miscellaneous criminal applications on behalf of investigators?

67. As to whether the DPP has the mandate to draft applications for detention of suspects by the police beyond twenty-four hours after arrest, the Petitioner submits that the CPC at Section 36A and the Prevention of Terrorism Act, 2012 at Section 33 exclusively vests the mandate of making such miscellaneous criminal applications in the police and provides for the procedure for doing so. He therefore asserts that the DPP's practice of endorsing or approving miscellaneous criminal applications made by the police, including police applications to hold suspects for further investigations, is unconstitutional.

j) Whether only Courts and Parliament can enforce Section 7(1) of the Sixth Schedule to the Constitution?

68. The Petitioner submits that the power granted by Section 7(1) of the Sixth Schedule of the Constitution to construe with alterations, adaptations, qualifications and exceptions necessary to bring into conformity with the Constitution all law in force immediately before the effective date only reposes in the Judiciary and Parliament. According to the Petitioner, the DPP cannot be allowed to interpret any provision of statute in force before the effective date with a view to taking over the functions of the police.

k) The costs of the petition:

69. On the issue of costs, the Petitioner submits that this being a public interest matter, Article 48 enjoins this Court to remove financial barriers to access to justice. He submits that in the unlikely event that the petition does not succeed, he should not be condemned to pay the costs of the suit as the matter was filed in good faith and without any selfish gain, to safeguard the Constitution from being violated as well as to protect the Bill of Rights. He urges the Court to uphold the principle established in the cases of **John Harun Mwau & 3 others v Attorney-General & 2 others [2012] eKLR**; **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR**; **Boaz Waruku v Kenya Universities & Colleges Central Placement Service & 3 others [2020] eKLR**; and **Biowatch Trust v Registrar Genetic Resources & others (CCT 80/2008) [2009] ZACC 14** that in public interest litigation an unsuccessful claimant should not be ordered to pay costs as doing so would discourage those who might wish to vindicate constitutional rights.

THE RESPONDENT'S SUBMISSIONS

70. Through submissions dated 26th November, 2020 the DPP identified various issues for the determination of this Court and submitted as follows.

a) The locus standi of the Petitioner:

71. The DPP submits that the petition is veiled as public interest litigation in order to cover the Petitioner's motive for personal gain, private profit and other oblique considerations. The decision in **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** is cited in support of the proposition that although public interest litigation is meant to serve the purpose of protecting the rights of the public at large, it can be misused by persons seeking publicity and those with vested political interests.

72. The DPP contends that a cursory perusal of the petition discloses that the Petitioner is on a witch-hunt as his case has no legal or factual basis. According to the DPP, the Petitioner is not a member of any of the investigative agencies that may have to interact with the 2019 DPP Guidelines and is either on a private profiteering exercise or is hell-bent on creating unnecessary confusion in the criminal justice system. The Court is therefore urged to find the petition without merit and dismiss it in *limine.*

b) Determining the boundary between the powers of the police to process (investigate incidents and draw, sign and file charge sheets) and present suspects in court and the mandate of the DPP to institute and undertake criminal proceedings against any person accused or alleged to have committed offences:

73. The DPP submits that in order to determine the boundary between the police powers to investigate and his prosecutorial powers, there is need to distinguish between a suspect and an accused person. The DPP appreciates that two terms are not defined by the Constitution or statute. The DPP relies on Black's Law Dictionary which defines a suspect as a person suspected of a crime or offence, while an accused person is one who has been arrested and brought before a magistrate or who has been formally charged with a crime. Relying on the definition, the DPP submits that it follows that there are no provisions demarcating any functions of the police beyond investigation or reasonable suspicion.

74. According to the DPP, the police have no function or role to charge suspects in any court of law without reference to him. It is argued that the repeated reference to the terms when *'a police officer suspects'* or *'reasonable suspicion'* shows that a 'suspect' is not an actor in the criminal process and it is only *'reasonable suspicion'* of commission of an offence that is the legal standard or threshold to be met by police officers in exercise of their powers and functions. As to what reasonable suspicion is, the DPP cites the decisions in **Emmanuel Suipenu Siyanga v R [2013] eKLR** and **O'hara v Chief Constable of the Royal Ulster Constabulary (1997) A.C. 286** as holding that reasonable suspicion presupposes the existence of facts or information that would make an objective observer conclude the person concerned may have committed the offence.

75. On the place of the arrested person in the criminal justice system, the DPP submits that the rights of arrested persons are well protected under Article 49 of the Constitution. According to the DPP, Article 49(1)(a)-(e) protects the rights of a person from the time of arrest to the time of presentation in court. The DPP agrees with the Petitioner that not all persons arrested by police officers in exercise of their powers and functions are presented in court.

76. The DPP points out that Article 49(1)(f) provides that an arrested person should be presented to court as soon as reasonably possible, but not later than twenty-four hours after being arrested and if the twenty-four hours ends outside ordinary court hours, not later than the end of the next court day. The DPP stresses that Article 49(1)(g) specifically states that an arrested person has the right at the first court appearance to be charged or informed of the reason for the detention continuing or to be released. It is argued that the word *'or'* connotes a disjunctive purpose as opposed to a conjunctive one as held in the cases of **Adrian Kamotho Njenga v Kenya School of Law (citation not provided)** and **Edward Njoroge Mwangi v Francis Muriuki Muragui & another (citation also not provided).** It is accordingly submitted that the police have no audience before courts and cannot on their own commence any criminal proceedings.

77. On the submission by the Petitioner that the DPP has no role to play where the police seek to detain an arrested person beyond twenty-four hours after arrest, the DPP relies on the decisions in the cases of **Michael Rotich v Republic [2016] eKLR** and **Criminal Revision No. 208 of 2020, Sudi Oscar Kipchumba v Republic (through the National Cohesion and Intergrated Commission)** for the submission that a person can only be detained beyond twenty-four hours where there is a charge or a holding charge. The DPP asserts that in light of the above cited decisions, he has a role in the making of applications for the continued detention of an arrested person.

c) The alleged usurpation of police powers by the DPP:

i)Whether the National Police Service has the mandate to charge suspects? And whether charging suspects is an investigative function or a prosecutorial function?

78. It is submitted by the DPP that the charging of suspects and the performance of prosecutorial functions is his sole preserve as per the provisions of Article 157 of the Constitution. According to the DPP, Section 89(1) of the CPC must be read in conformity with the Constitution as required by Clause 7(1) of the Sixth Schedule. It is the DPP's case that the charge or information initiates a prosecution which is his preserve.

79. The DPP contends that the role of the National Police Service is limited to investigation as gleaned from sections 24, 27 and 35 of the National Police Service Act. The DPP refers to Section 49 of the National Police Service Act which requires a police officer who has reason to believe that a violation of law has occurred to report the matter to the superior authorities and where necessary other appropriate authorities vested with reviewing or remedial power. Based on the cited provision, the DPP submits that he is one of the appropriate authorities as he assesses the evidence presented by the investigative agencies to determine whether to initiate criminal proceedings. According to the DPP, agreeing with the Petitioner that the police have the mandate to check the prosecution in making the decision to charge would violate Article 157(10) which insulates him from interference by any person or authority in the exercise of his prosecutorial powers.

ii) What amounts to initiating or instituting criminal proceedings under Article 157 of the Constitution?

80. The DPP states that the Black's Law Dictionary defines investigation as *'to follow a step-by-step patient inquiry of observation. To trace or track, to search into, to examine and to inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry'*, while prosecution is defined as *'a criminal action; a proceeding instituted and carried on by due course of law before a competent tribunal for the purposes of determining the guilt or innocence of a person charged with a crime.'* It is consequently the DPP's argument that investigation involves finding evidence of the crime while prosecution involves both commencement and institution of a proceeding until its conclusion. According to the DPP, the Petitioner lacks understanding of Article 157 of the Constitution and Section 89(1) of the CPC in that a criminal trial cannot be conducted in the absence of a prosecutor. The decision in the case of **Benard Lolimo Ekimat v Republic [2005] eKLR** is cited in support of the assertion.

81. The DPP states that under Section 89(1) of the CPC, the institution of criminal proceedings is commenced by either the making of a complaint or by bringing before a magistrate a person who has been arrested without warrant. It is the DPP's case that based on the decisions in the cases of **Republic v Mwaura [1979] KLR 209** and **Ruhi v Republic [1985] KLR 373,** the complainant is the prosecutor as well as the person described in the particulars of the charge. It is the DPP's position that nowhere in the cited cases is the police stated to be a complainant. Also cited in support of the submission is the decision of the Court of Appeal in **Roy Richard Elirema & another v Republic, Criminal Appeal No. 67 of 2002.** It is argued that Article 49(g) of the Constitution unequivocally places the decision to charge a suspect within the ambit of instituting criminal proceedings and that the interpretation proposed by the Petitioner has the potential to defeat the purpose and spirit of the Constitution and the guiding principles of constitutional interpretation.

82. The DPP cites the decisions in **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR; Tinyefuza v Attorney General of Uganda (1997) UGCC 3;** and **Council of County Governors v Attorney General & another [2017] eKLR** as espousing the principles of constitutional interpretation: that the Constitution must not be interpreted in a narrow, mechanistic, rigid and artificial manner; and, that the Constitution must be read as an integrated whole without any one particular provision destroying the other but with each provision enriching the purpose of the other. The Court is asked to apply the said principles in interpreting Articles 157(6) and 49(1)(g) of the Constitution and Section 89 of the CPC in order to reach the conclusion that the decision to charge a suspect fall within the ambit of instituting criminal proceedings which is a constitutional preserve of the DPP.

iii) Whether the DPP has a role in assessing the evidence collected by the investigator prior to instituting criminal proceedings:

83. The DPP states that Article 157(11) of the Constitution requires that in exercising his powers he "*shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process'*. He contends that it would be impossible to exercise his powers if he is required to determine both the evidential and public interest tests in matters already filed in court by the police. According to the DPP, he cannot be expected to discharge his function if he is to depend on the National Police Service to decide whether charges should be laid or not. This argument is supported by reference to the Mauritius case of **Mohit v The Director of Public Prosecutions of Mauritius (2006) UKPC 20 (25 April 2006)** where it was held that the DPP has wide discretion in making the decision to charge and the decision which is based on policy and public interest considerations is not susceptible to judicial review because it is neither the constitutional function nor the practical competence of the courts to assess the merits of the decision.

84. The DPP submits that the separation of investigative and prosecutorial functions is not accidental but a well thought out intent on redeeming the country from a history of abuse of human rights. The DPP relies on the Court of Appeal decision in **Odhiambo Olel v Republic [1993] eKLR** where it was held that it was the duty of the Chief Magistrate to seek an explanation from the prosecutor as to why the appellant had been kept in custody beyond the period permitted by law. Also cited in support of the contention that the prosecutor has a duty to justify a prosecution is the holding in **Githunguri v Republic [1986] KLR 1** that a prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

85. The DPP additionally submits that the evidence collected by investigative agencies is meant for the prosecutor's reliance as Article 50 requires an accused person to be informed in advance of the evidence the prosecution intends to rely on. Reliance was placed on the Court of Appeal case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** where it was stated that in considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPPs decision is made establishes a *prima facie* case necessitating prosecution. It is thus the DPP's case that the requirement to subject investigation files to

evidential and public interest scrutiny in line with the National Prosecution Policy, General Prosecution Guidelines and the 2019 DPP Guidelines is sanctioned by Article 157(11) of the Constitution.

iv) Whether the DPP has any role to play in initiating and conducting cases that conclude in a plea of guilt:

86. The DPP submits that the Petitioner's suggestion that he has no role to play where an accused person enters a plea of guilty is absurd and illogical. It is the DPP's submission that as was held in **Kelly Kases Bunjika v DPP, Criminal Case No. 53 of 2016,** under Article 157 of the Constitution, he is the constitutional custodian, enforcer and defender of public interest in criminal justice and he also ensures that the criminal justice system is not abused to persecute the innocent, achieve collateral civil purpose or avoid due punishment for crime among other improper uses of the criminal process.

v) Whether the independence of the Inspector General is absolute:

87. The DPP submits that the Inspector General's independence under Article 245(2)(b) is limited by Article 245(4) & (5) of the Constitution with regard to investigation of an offense and enforcement of the law against any person. Further, that Article 245(5) is clear that the Inspector General can be given directions in writing by the DPP in line with Article 157(4) of the Constitution.

d) Whether the 2019 DPP Guidelines are unconstitutional:

88. The DPP submits that the Statutory Instruments Act does not apply to the 2019 DPP Guidelines as the guidelines are administrative in nature because they concern the functions and duties of prosecutors. It is submitted that the 2019 DPP Guidelines which were made pursuant to the DPP's mandate under sections 5(1)(c) and 50(3) of the ODPP Act are rooted in the National Prosecution Policy. In support of the argument that not all guidelines are legislative instruments, the DPP cites the decisions in the cases of **Republic v Attorney General; Law Society of Kenya (Interested Party); ex parte; Francis Andrew Moriasi [2019] eKLR** and **Okiya Omtatah Okoiti v Attorney General [2020] eKLR.**

e) Public Participation:

89. It is submitted that the 2019 DPP Guidelines were developed through a participatory process led by a task force established by the DPP. The DPP contends that there was dissemination of information, invitation to participate in the process and consultation during the process of the making of the document hence the same complied with the law as stated in **Kiambu County Government & 3 others v Robert N. Gakuru & others [2017] eKLR.** Further, that as was held in **Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others (citation not provided)** and **Nairobi Metropolitan PSV SACCOS Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR** the question as to whether the public was given a reasonable opportunity to participate will depend on the circumstances of each case. It is consequently the DPP's view that he gave members of the public and stakeholders adequate opportunity to participate and share their views in the drafting of the guidelines.

f) The constitutionality of the 2019 DPP Guidelines:

90. The DPP submits that the Petitioner challenges the constitutionality of the 2019 DPP Guidelines without stating the specific sections that are in direct violation of the Constitution. He therefore asserts that the petition fails the test of specificity in constitutional petitions as established in the cases of **Anarita Karimi Njeru v Republic [1979] eKLR** and **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**.

g) Validity of sections 5(2)(b) & 5(3) of the ODPP Act:

91. The DPP submits that one of the principles for interpreting the Constitution is that it ought to be read in context as was stated by the Supreme Court in **Advisory Opinion No.1 of 2012, In the Matter of the Kenya National Human Rights Commission** that the Constitution must be read as one document with each Article giving meaning to the document as a whole. According to the DPP, the Court must look at the historical context and reasoning of the drafters of the Constitution in interpreting the impugned provisions. It is the DPP's case that the constitutional provisions on prosecutorial power were according to the Final Report of the Constitutional Review Commission premised on the questionable independence of the Attorney General.

92. It is the DPP's case that the drafters of the Constitution intended that that the DPP should be able to direct investigations of a criminal nature not just through the I.G. but all investigatory agencies. Further, that although the I.G. has power to carry out the function of investigation and cannot be directed or controlled by any authority on how to carry out this function, he can, however, be directed to investigate as per Article 245(4) of the Constitution.

THE 2nd INTERESTED PARTY'S SUBMISSIONS

93. The 2nd Interested Party through submissions dated 31st May, 2021 identified various issues for the determination of the Court. As to whether the DPP can direct the I.G. on the investigation of offences and arrest of suspects, the Attorney General rejects the Petitioner's submission that the power of the DPP under Article 157(4) of the Constitution is limited to directions to investigate 'intelligence' or 'rumours' that the DPP receives about crimes. It is submitted that Article 157(4), which is re-affirmed by Section 5(1)(a) of the ODPP Act and Section 35(h) of the National Police Service Act, Cap. 84, not only forms the basis of cooperation between the two offices but also expressly vests power on the DPP to issue directions to the I.G.

94. The Attorney General contends that contrary to the Petitioner's allegation, Article 245(2)(b) & (4) (b) of the Constitution does not grant the I.G. absolute independence as the law allows for interference that is limited to the extent provided in the Constitution. It is urged that the

interference provided by the Constitution fosters cooperation and collaboration in line with the holding by the Supreme Court in **Advisory Opinion No. 2 of 2011 In the Matter of Interim Independent Electoral Commission.**

95. It is submitted by the Attorney General that the DPP is empowered by Section 50(2)(b) of the ODPP Act to make regulations providing for directions of carrying out investigations. Further, that under Section 50(2)(a) of the Act, the DPP is authorized to make regulations on cooperation and collaboration with the I.G. and other investigative agencies.

96. On the issue as to whether there is a distinction between the decision to charge a suspect in court and the decision to institute and undertake criminal proceedings, the Attorney General submits that the DPP is constitutionally obligated to institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed. He contends that prosecution commences once a person is presented in court since an arrested person must at the first court appearance be charged or informed of reasons for continued detention as required by Article 49(1)(g) & (h) of the Constitution.

97. It is the Attorney General's argument that a charge sheet forms part of criminal proceedings against a suspect or accused person. He contends that Section 36A of the CPC on custodial orders at the investigative stage must be read in a manner that makes it part of the prosecution process because it is the duty of the prosecution to demonstrate to the court the reason for not releasing an arrested person. It is the Attorney General's submission that the DPP has to satisfy himself beforehand on the legality of the charge sheet. He concludes that the charging of an arrested person or releasing an arrested person on reasonable bail terms pending a charge constitutes criminal proceedings which falls under the docket of the DPP.

98. Another issue identified by the Attorney General is whether the National Police Service has power to charge a suspect in court. On this issue, he submitted that Section 9 of the National Police Service Act requires the I.G. to perform his duty in accordance with Article 245 of the Constitution and sections 10 and 23 of the Act. It is the Attorney General's position that the provisions of sections 10, 23, 24, 27, 34 and 35 of the National Police Service Act are clear that the National Police Service only plays an investigative function. It is accordingly his submission that the I.G. is not constitutionally or statutorily empowered to charge suspects in court without the consent of the DPP. In support of his argument, the Attorney General relied on the decisions in the cases of **Ethics and Anti-Corruption Commission v James Makura M'abira [2020] eKLR; Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR**; **Roy Richard Elirema & another v Republic [2003] eKLR**; and **Benard Lolimo Ekimat v Republic [2005] eKLR.**

99. The Attorney General urges that the decision to charge or not to charge is the most significant decision a prosecutor makes in the handling of criminal cases as it entails discretion on his part. It is submitted that this decision must serve the public interest, engrain fair administration of justice and avoid abuse of the legal process. This Court is asked to take judicial notice of the notoriety of gross violation of fundamental rights and freedoms of the people of Kenya which led to the enactment of the current Constitution. It is the Attorney General's contention therefore that although sections 36A and 89 of the CPC vests power on the police to charge suspects in court, the provision must be read within the context of Article 157.

100. On the question whether the duty to draw, sign, endorse, register, present charge sheets or information sheets in court, and draft miscellaneous criminal applications is an exclusive function of the National Police Service, the Attorney General submits that prior to filing a charge in court, the DPP must satisfy himself as to its form, substance, legality, sufficiency of the evidence in support, public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process as required by Article 157(11) of the Constitution and Section 4 of the ODPP Act. It is pointed out that Section 5(4)(e) of the ODPP Act vests the DPP with the authority to review a decision to prosecute or not to prosecute. It is thus the Attorney General's contention that the Petitioner's claim that the DPP has no legal capacity to draw, sign, endorse, register, and present charges has no legal basis in law and only seeks to illegally confer the powers of the DPP upon the National Police Service.

101. Turning to the question of the alleged unconstitutionality of sections 5(2)(b) & 5(3) of the ODPP Act, the Attorney General contends that in interpreting the impugned provisions, the Court should examine their object and purpose in order to avoid an interpretation that clashes with the Constitution and so as to arrive at an interpretation that promotes the spirit and purpose of the Constitution as was stated in the South African case of **Re Hyundai Motor Distributors (PTY) & others v Social NO & other [2000] ZACC 12.** Further, that as was stated in **Apollo Mboya v Attorney General & 2 others [2018] eKLR,** in interpreting an impugned provision, the court should identify the mischief sought to be remedied by the legislation. This Court is urged to be guided by the other principles of constitutional interpretation as enunciated in the cases of **Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR; Hamdarddawa Khana v Union of India Air (1960) 554;** and **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR.**

102. It is therefore the Attorney General's position that the Petitioner's interpretation of sections 5(2)(b) & 5(3) vis-à-vis Articles 157(4), 245(4)(a) and 245(5) is an isolated interpretation that cannot stand in the face of Article 259 of the Constitution and the principles of constitutional interpretation. Further, that the Petitioner has failed to rebut the presumption of constitutionality of the impugned sections and the provisions are thus constitutional.

103. Finally, on the issue as to whether the 2019 DPP Guidelines are constitutional, the Attorney General cites the South African cases of **Minister of Health v New Clicks South Africa (PTY) Ltd (2006) (2) SA 311 (CC)** and **Land Access Movement of South Africa Association for Rural Development & others v Chairperson of the National Council of Provinces and others [2016] ZACC 22** as providing the baseline for sufficient public participation. According to the Attorney General, the DPP had demonstrated through the replying affidavit to the petition that there was sufficient public participation on the impugned guidelines.

104. On the allegation that the 2019 DPP Guidelines are illegal for failing to comply with the Statutory Instruments Act, the Attorney General submits that the guidelines are internal administrative control tools aimed at ensuring accountable, efficient and effective delivery of services by the DPP and the document is therefore an exempted statutory instrument as per the provisions of Section 16 of the Act. Further, that the power to determine whether a document is a statutory instrument is vested in the Attorney General under Article 156(4)(a) and Section 22(2) of the Statutory Instruments Act. The Court is consequently urged to find the petition without merit and dismiss it with no order as to costs.

THE SUBMISSIONS OF THE AMICUS CURIAE:

105. In line with this Court's directive of 12th November, 2020, the *Amicus Curiae* filed submissions dated 2nd March, 2021 limited to comparative jurisprudence on the issues raised in the petition.

106. It is the submission of the *Amicus Curiae* that *'The Guidelines on the Role of Prosecutors'* adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba require prosecutors to perform an active role in criminal proceedings including institution of prosecution and, where authorized by law or consistent with local practice, in the investigations of crime, supervision over the legality of the investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

107. The *Amicus Curiae* also referred to the *'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors'* set by the International Association of Prosecutors and submitted that the standards require prosecutors to play an active role in criminal proceedings including exercise of authority over the police or other investigators; ensuring respect of legal precepts and fundamental human rights by investigators; that a prosecution is only based upon well-founded evidence which is reasonably believed to be reliable and admissible; and, exercise supervisory function in relation to court decisions and always act in the public interest. Counsel pointed out that the Standards were in 2008, through the *Commission of Crime Prevention and Criminal Justice Resolution 17/2* recognized by the United Nations as being complementary to the *'The Guidelines on the Role of Prosecutors'* and member States invited to consider them in their own countries.

108. The *Amicus Curiae* also relied on *'Opinion No.10 of 2015'* prepared for the Committee of Ministers of the Council of Europe by the Consultative Council of European Prosecutors on the Role of Prosecutors in Criminal Investigations which recommended that where the police is independent as it conducts investigations, the legal systems should have in place supervisory procedures to ensure lawfulness of investigations and to ensure that the police and other investigative authorities act professionally, fairly and expeditiously. Further, that prosecutors should be able to take effective measures to promote suitable and functional co-operation with investigative bodies.

109. According to the *Amicus Curiae,* the role of prosecutors in criminal proceedings varies depending on the legal system of each State. It is submitted that in most civil and some common law systems, the prosecutor has control over the entire investigation and directs the police on the course of action they should take in their investigations and the charges to be brought against an accused person. The *Amicus Curiae* states that this is a recent development since previously the police investigated crime and decided whether charges should be laid against the suspect whereas the prosecutor decided whether the evidence gathered was sufficient to prove the alleged crime, and if so, present the case to court for adjudication. The *Amicus Curiae* submits that strict adherence to the old system proved problematic and today the prosecutor intervenes in police investigations and greater cooperation now exists between the two. It is stated that this close cooperation has been necessitated by the emergence of complex crimes forcing the police to seek prosecutorial involvement in investigations.

110. The *Amicus Curiae* also made comparative analysis of the applicable law and practice in various jurisdictions. In regard to the United Kingdom, the *Amicus Curiae* stated that there has been an attempt over the years to clarify the relationship between the Crown Prosecution Service (CPS) and the police and to establish a closer cooperation between the two services during the stage before a charge. Reference was made to Lord Justice Auld's *'Review of the criminal courts of England and Wales Report, London: The Lord Chancellor's Department, 2001'* where it was noted that one contributor of discontinuances in prosecutions was the overcharging by the police and the CPS's failure to remedy the situation at an early stage. It was observed that this was due to the fact that the police were the ones who initiated prosecutions leaving the CPS to review the charge at a later stage while applying a more stringent test than that of the police. It was thus recommended that the CPS should be involved earlier in the process and be given power to determine the charge and initiate the prosecution to resolve these problems. According to the *Amicus Curiae,* these suggestions formed part of the Criminal Justice Act, 2003 which introduced changes to UK's criminal justice system.

111. In regard to South Africa, it was pointed out that the National Prosecution Authority (NPA) was established under Section 179 of the Constitution and effected through the National Prosecuting Authority Act, 1998. It was stated that the NPA has power to institute and conduct criminal proceedings on behalf of the State, carry out any necessary functions incidental to instituting and conducting such criminal proceedings including investigation and discontinuation of criminal proceedings. According to the *Amicus Curiae,* the prosecutors and investigators in South Africa work closely even though the final determination on whether a case should be prosecuted lies on the NPA and as a result the police understand that they are answerable to the courts for how they conduct the investigations.

112. In regard to Canada, the *Amicus Curiae* stated that the Public Prosecution Service reports to Parliament through the Attorney General and its role is to prosecute federal offences, provide legal advice and assistance to law enforcement. It was submitted that the Director of Public Prosecutions acts on behalf of the Attorney General and does not have investigative powers. The Canadian Director of Public Prosecutions cannot therefore order, direct or supervise a police investigation. The *Amicus Curiae* cited the decisions in **Krieger v Law Society of Alberta, (2002) 3 SCR 372; R v Reagan (2002) 1 SCR 297** and **R v Beaudry (2007) 1 SCR 190** as recognizing the benefits of the independence of the investigative and prosecutorial functions. Further, that several commissions of inquiry into wrongful convictions such as '*the Royal Commission on the Donald Marshall Prosecution'* have insisted that a demarcation line be drawn between the two functions.

113. In conclusion, the *Amicus Curiae* submits that drawing from various jurisdictions, the relationship between prosecutors and investigators is important and exists interdependently with the limits of the respective offices clearly defined in law. The *Amicus Curiae* closed its opinion by observing that there is need to strike a balance between the independence of the investigator and prosecutor and the necessity for cooperation between the two offices.

THE PETITIONER'S SUPPLEMENTARY SUBMISSIONS:

114. The Petitioner responded to the submissions of the Respondent and Interested Parties through supplementary submissions dated 11th September, 2021. The Petitioner points out that unlike in continental Europe where the prosecutor is given expansive powers in the

investigation of crime, the Kenyan Constitution rejects this expansive conception of the prosecutor's office and clearly defines the boundaries between the various actors in the criminal justice system. The Petitioner accuses the DPP of avaricious and insatiable craving for limitless and unbound power within the criminal justice system. According to the Petitioner, most police officers who investigate serious crimes are well trained and have the capacity to make a decision to charge.

115. The Petitioner rejects the DPP's suggestion that his petition has not been brought in the public interest. He reiterates his position that he has *locus standi* under Articles 22 and 258 of the Constitution to file the petition. He cites the decisions in **John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012**, and submits that public interest litigation is anchored on the Constitution and absence of bad faith grants him the *locus standi* to file the petition. According to the Petitioner, the test for constitutional pleadings set in **Anarita Karimi Njeru v Republic [1979] eKLR** is no longer good law as has been held in **Peter M. Kariuki v Attorney General [2014] eKLR** and **John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR.**

116. The Petitioner restates that there is a clear distinction in law between a suspect and an accused person. He submits that this distinction can be gleaned from the fact that Article 49 deals with suspects in police custody while Article 50(2) deals with accused persons in the custody of trial courts. It is additionally the Petitioner's assertion that a reading of Article 51 shows that the police detain persons they arrest while courts hold people in custody during trial or imprison them upon conviction.

117. The Petitioner downplays the power granted to the DPP by Article 157(4) of the Constitution to direct the I.G. to investigate any information or allegation of criminal conduct and submits that the power is not unique as it is available to every citizen who is under an obligation to inform the police of any criminal conduct.

118. It is the Petitioner's position that there was no effective public participation on the 2019 DPP Guidelines. According to him, Section 12(2) of the Public Service (Values and Principles) Act, 2015, requires the public to be given adequate opportunity to review a draft policy; adequate opportunity to make comments on a draft policy; an opportunity to be heard by the makers of a policy; and, notification of the final draft of the policy and whether or not it incorporates their views. The Petitioner submits that the claim by the DPP that the members of the public were notified through the daily newspapers of the draft guidelines is not supported by any evidence. The Petitioner therefore rejects the DPP's averment that the draft guidelines were published in the newspapers.

119. Commenting on the authorities cited by the DPP and the Interested Parties, the Petitioner asserts that the authorities are at variance with the Constitution. The Petitioner contends that the decision of **Michael Rotich v Republic [2016] eKLR,** which introduced the requirement for a holding charge for a person whose detention should continue, is at variance with the Constitution which does not provide for a holding charge. According to the Petitioner, a holding charge is a charge and the drafters of the Constitution were clear that an arrested person be *"informed of the reason for detention continuing"* as an alternative to being charged. The Petitioner holds a similar position in respect of the decision in **Criminal Revision No. 208 of 2020, Sudi Oscar Kipchumba v Republic (Through the National Cohesion and Integration Commission).**

120. The Petitioner asserts that the decisions in **Bernard Lolimo Ekimat v Republic [2005] eKLR** and **Director of Public Prosecutions v Kudlip Madan & another [2019] eKLR** actually support his argument that the prosecutor does not file the charge sheets but only calls witnesses. He stresses that it is indeed the holding in **Kudlip Madan** (supra) that it is the police officer who reduces a charge into writing.

121. The Petitioner urged this Court not to rely on the decision of **Mohit v Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20 (25 April 2006)** stating that the decision was based on the constitutions of Mauritius and Fiji which are not similar to the Kenyan Constitution. Further, that the case deals with the conduct of the prosecution after the suspect has been charged and not with the filing of charges.

122. It is the Petitioner's submission that the decisions in **Thuita Mwangi & 2 others v Ethics and Anti-Corruption Commission & 3 others [2013] eKLR; Githunguri v Republic [1986] KLR 1;** and **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** are irrelevant to this case as they do not address the decision to charge but the decision to prosecute a charged person.

123. The Petitioner opposes reliance on the decision in **Ethics and Anti-Corruption Commission v James Makura M'abira [2020] eKLR** and submits that the EACC is not part of the National Police Service. Further, that the decision did not distinguish between charging suspects in court and prosecuting them (putting them on trial) after they have been charged.

124. The Petitioner goes ahead to seek a declaration that Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 is unconstitutional for fusing investigations and prosecution. According to the Petitioner, the provision offends the doctrine of checks and balances which informs separation of the investigative and prosecutorial organs of the criminal justice system. Further, that the provision is unconstitutional for usurping the exclusive mandate of the police to prevent corruption and promote transparency and accountability under Article 244(b) of the Constitution.

125. The Petitioner concedes that the unconstitutionality of Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 was not pleaded in the petition but nevertheless submits that since the parties have canvassed the issue, the Court should make a decision on the same. The Petitioner cites the decisions in **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] E.A. 885** and **Housing Finance Company of Kenya v J.N. Wafubwa [2014] eKLR** in support of the proposition that where parties have canvassed an issue and left it to the court, the court can pronounce judgement on it even though it was not pleaded.

126. In respect to the decision in **Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR,** the Petitioner contends that the decision is of no consequence to these proceedings as it did not distinguish between the powers of the police to process (investigate incidents and draw, sign and file charge sheets) and present suspects in court, and the mandate of the DPP to take over and institute and undertake criminal proceedings in court against any persons accused of or alleged to have committed offences. According to the Petitioner, the most disturbing thing about **Geoffrey K. Sang** (supra) is the failure by the Judge to distinguish Article 157(4) of the Kenyan Constitution

and Article 120(3)(a) of the Ugandan Constitution, 1995 in that unlike the Kenyan Constitution, the Ugandan Constitution requires that any directive issued by the Ugandan Director of Public Prosecutions into the investigation of any alleged crime must be acted upon and reported to him or her expeditiously. It is the Petitioner's position that nowhere in the Kenyan Constitution is the I.G. required to report to the DPP on any direction to investigate any information or allegation of criminal conduct. According to the Petitioner, the Court in **Geoffrey K. Sang** erred by relying on the decision in **Uganda v Jackline Uwera Nsenga, Criminal Session Case No. 0312 of 2013** which was based on Article 120(3)(a) of the Ugandan Constitution. It is the Petitioner's position that unlike the Kenyan Constitution, the Ugandan Constitution does not have the concept of an independent police service.

127. The Petitioner reiterates his submission that the police have the capacity to investigate and charge suspects. He specifically singles out the Directorate of Criminal Investigations (DCI) as the lead investigative agency with the capacity to investigate various crimes and draw appropriate charges. The Petitioner contends that a criminal case ordinarily starts when the police receive a complaint of a crime and commence investigations. He states that the matter progresses to court when the investigating officer draws a charge, signs and presents it to court and the magistrate admits the charge, and a court file is opened. According to the Petitioner, it is only once this is done that the DPP takes over the criminal proceedings for prosecution.

128. The Petitioner contends that Article 245(4)(a) and (b) of the Constitution protects the I.G. from being given any direction by any person with respect to the investigation of any particular offence or offences and the enforcement of the law against any particular person or persons. It is the Petitioner's submission that Article 157(4) of the Constitution which authorizes the DPP to direct the I.G. to investigate any information or allegation of criminal conduct is not equivalent to the enforcement of the law against any person since an offence is not information or allegation. He stresses that information or allegation is a matter which has not been investigated or reached the attention of the police to be established whether or not it is an offence.

129. It is therefore the Petitioner's firm position that the decision to charge falls directly and squarely under the ambit of Article 245(4)(b) of the Constitution. According to the Petitioner, the fact that the DPP has no role whatsoever in drawing, signing and presenting a charge sheet in court is cemented by Section 89(4) of the CPC. The Petitioner asserts that the DPP has no power to approve or reject charge sheets by signing and stamping them.

130. The Petitioner submits that Article 245(2)(a) of the Constitution is an absolute bar to the DPP issuing any directions to the police on how to conduct or undertake investigations. The Petitioner contends that the DPP has no authority to close police files and that Article 157(6)(c) of the Constitution requires that any closure of police files by the DPP should be done with the consent of the court. The Petitioner stresses that acquittal or discharge is the prerogative of the court and only the police can close their file after establishing that there is no *prima facie* case to prefer a charge before a court of law.

131. The Petitioner submits that there is no provision in the Constitution or any written law that an arrested person shall or may be presented to court through the DPP. Relying on Section 36A(1) of the CPC, the Petitioner contends that the power to present an arrested person to court is vested in the police and the power to order for continued detention of an arrested person is vested in the court. According to him, the issue of miscellaneous criminal applications is between the police and the court and the DPP has nothing to do with such applications. The Petitioner argues that the police may make miscellaneous applications in matters that do not involve prosecution like where they seek warrants to investigate suspects.

ANALYSIS AND DETERMINATION

a) Issues for the Determination of the Court:

132. A review of the pleadings and submissions of the parties discloses that the Petitioner seeks a determination of the constitutionality of sections 5(2)(b) and 5(3) of the Office of the Director of Public Prosecutions Act, 2013; a declaration that the DPP's 'Guidelines on the Decision to Charge, 2019' are unconstitutional; and a delineation of the constitutional and statutory roles and functions of the DPP and the IG. Any other issue arising is a sub-issue of the core issues and will be dealt with under the identified issues.

b) The Jurisdiction of the Court:

133. Before delving into the core issues that I have just identified, I need to address a jurisdictional question raised by the Respondent as to whether there is a proper petition before this Court. The Petitioner submits that the petition is brought in the public interest whereas the Respondent is of the contrary opinion that the matter is not founded on public interest but is a veiled cover to the Petitioner's motive for personal gain, private profit and other oblique considerations. It is consequently the Respondent's position that the Petitioner lacks the *locus standi* to institute and prosecute the case.

134. The Constitution specifically legislates on the issue of *locus standi* in Articles 22 and 258. These provisions allow persons with or without direct interest in a matter to approach the courts to protect rights and fundamental freedoms of individuals or to protect the Constitution itself.

135. In the instant case, the Petitioner alleges contravention of the Constitution and Article 258 automatically grants him the standing to approach this Court in the public interest on the claim that the Constitution has been contravened or is threatened with contravention by the Respondent. I need not say more in order to arrive at the obvious conclusion that the Petitioner has *locus standi* to institute this petition. The Respondent's objection to the petition on the ground that the Petitioner lacks the *locus standi* is therefore without merit and the same is rejected and dismissed.

c) Whether sections 5(2) (b) and 5(3) of the Office of the Director of Public Prosecutions Act, 2013 are unconstitutional:

136. Answering the question of the unconstitutionality of certain provisions of the ODPP Act will involve interpreting those provisions

against the provisions of the Constitution that are said to be violated by the impugned law. It is therefore necessary to bear in mind the principles that guide the interpretation of the Constitution and statutes.

137. In considering the principles of constitutional interpretation, the starting point is to appreciate the requirement that the spirit of the Constitution preside and permeate the process of judicial interpretation and judicial discretion. This foundational interpretation principle springs from Article 259 which calls for the interpretation of the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the rule of law; and, contributes to good governance. This principle is reinforced by the command in Article 159(2)(e) that in exercising their judicial authority, the courts should protect and promote the purposes and principles of the Constitution.

138. Another principle of constitutional interpretation is that the Constitution should be interpreted holistically. In this regard, the Supreme Court in its decision **In The Matter of Kenya National Commission on Human Rights [2014] eKLR** spoke thus:

> **"[26] In his written and oral submissions, Mr. Kitonga has persistently urged us to holistically, broadly and robustly interpret the Constitution, so as to find that Article 163(6) means *all persons*, and not just the entities mentioned therein, can apply for advisory opinions. Counsel is, in effect, asking us to find that Article 163(6) of the Constitution does not mean what it says, through *"a holistic interpretation"*. But what is meant by a *'holistic interpretation of the Constitution'"* It must mean interpreting the Constitution *in context*. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."**

139. One of the principles to be borne in mind in determining whether an Act of Parliament violates the Constitution, is the general presumption that Acts of Parliament are enacted in conformity with the Constitution. This principle was enunciated by the Court of Appeal of Tanzania in **Ndyanabo v Attorney General [2001] EA 495** as follows:

> **"…until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative…the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption…where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction."**

140. When a court is called upon to decide on the constitutionality of a statute or its provisions, its duty is to check whether the challenged provision aligns with the provision of the Constitution said to have been violated by the impugned law. The duty of the court was expressed in the United States case of **U.S. v Butler 297 U.S. 1 [1936]** as follows:

> **"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."**

141. In interpreting an Act of Parliament, the intention of the legislator should be taken into account. This position was affirmed in **Isaac Robert Murambi v Attorney General & 3 others [2017] eKLR** as follows:

> **"A statute should be construed according to the intention expressed in the statute itself as confirmed by the Court of Appeal case of County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR when it stated that:**
>
> **"The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context…""**

142. Further, in the case of **Council of County Governors v Attorney General & another [2017] eKLR**, the Court highlighted another principle to be taken into account in determining the constitutionality of a statute by stating as follows:

> **"A law which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.**
>
> **Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution."**

143. The principles for interpretation of constitutions and statutes have been summarized in several cases. For instance, in the case of **Susan**

Kigula & 416 others v Attorney General [2005] UGCC 8 the Ugandan Constitutional Court stated that:

> **"(1) It is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used. (The Republic vs EL manu (1969) EA 357)**
>
> **(2) The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other (Paul K. Ssemogerere and 2 others vs A.G Const. Appeal No 1 of 2002.)**
>
> **(3) All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument (South Dakota vs North Carolina, 192, US 268 (1940) LED 448.)**
>
> **(4) A Constitution and in particular that part of it which protects and entrenches Fundamental Rights and Freedoms are to be given a generous and purposive interpretation to realise the full benefit of the right guaranteed.**
>
> **(5) In determining constitutionality both purpose and effect are relevant [Attorney General vs Salvatori Abuki, Constitutional Appeal No 1 of 1998].**
>
> **(6) Article 126(1) of the Constitution of the Republic of Uganda enjoins courts in this country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people (emphasis added.)".**

144. In Kenya, the Court of Appeal condensed the principles of constitutional interpretation in the case of **Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR** as follows:

> **"[21] …. Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus:-**
>
> **· that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.**
>
> **· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.**
>
> **· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.**
>
> **· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).**
>
> **These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest–meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."**

145. Having outlined the applicable principles, I now turn to consider the constitutionality of the impugned law being sections 5(2)(b) and 5(3) of the ODPP Act. Section 5(2)(b) states:

> **(2) The Director shall exercise State powers of prosecution and may—**
>
> **a) …**
>
> **b) direct that investigations be conducted by an investigative agency named in the direction.**

146. On its part Section 5(3) provides that:

> **(3) Without prejudice to other provisions of this Act or any other law in force, the Director may assign an officer subordinate to him to assist or guide in the investigation of a crime and every investigative Agency shall give effect to that direction.**

147. According to the Petitioner the impugned provisions violate Article 245(4)(a) & (b) of the Constitution which read as follows:

> **245. (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to--**
>
> **a) the investigation of any particular offence or offences;**
>
> **b) the enforcement of the law against any particular person or persons; or**
>
> **c) …**

148. The Petitioner submits that drawing from Article 245(4) of the Constitution the roles of the police and the Respondent are clear. He argues that Section 5(2)(b) of the ODPP Act is null and void for contravening Article 245(4)(a) of the Constitution, which insulates the I.G. from being directed in respect to the investigation of any particular offence or offences. In addition, the Petitioner submits that the expression *'an investigative agency named in the direction'* used in Section 5(2)(b) of the Act expands the mandate of the Respondent beyond that which is given to him under Article 157(4) of the Constitution.

149. It needs to be observed that the provisions of the constitutional independence of the I.G. cannot be read in isolation. Reference must be made to other constitutional provisions among them Article 157 of the Constitution which establishes the office of the DPP and gives the DPP certain functions. The relevant clauses of Article 157 provide as follows:

> **(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**
>
> **(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—**
>
> > **(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
> >
> > **(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
> >
> > **(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).**
>
> **(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**
>
> **(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**
>
> **(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.**

150. Article 157 is operationalized by the ODPP Act which at Section 5 (1) states that:

Pursuant to Article 157 of the Constitution the Director shall—

> **a) have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;**
>
> **b) exercise State powers of prosecution and may—**
>
> **i) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
>
> **ii) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
>
> **iii) subject to Article 157 (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions.**

151. Section 6 of the ODPP Act broadcasts the independence granted to the DPP in the performance of his duties by stating that:

Pursuant to Article 157(10) of the Constitution, the Director shall—

a) not require the consent of any person or authority for the commencement of criminal proceedings;

b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

c) be subject only to the Constitution and the law.

152. The courts have in various cases recognized and appreciated the DPP's constitutional independence. In the case of **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others [2014] eKLR** the Court while discussing the mandate of the Respondent under Article 157 of the Constitution observed that:
"8. It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process.

9. These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent."

153. Similarly, the Court of Appeal in the case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** opined as follows:

"[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases..."

154. As for the 1st Interested Party, the National Police Service Act, 2011 operationalizes the National Police Service which is established under Article 243 of the Constitution. Section 24 of the Act provides the functions of the police as:

a) provision of assistance to the public when in need;

b) maintenance of law and order;

c) preservation of peace;

d) protection of life and property;

e) investigation of crimes;

f) collection of criminal intelligence;

g) prevention and detection of crime;

h) apprehension of offenders;

i) enforcement of all laws and regulations with which it is charged; and

j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

155. Further, under Section 35 of the Act the office of the Director of Criminal Investigations, which is established under Section 28, is given the following functions:

a) collect and provide criminal intelligence;

b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;

c) maintain law and order;

d) detect and prevent crime;

e) apprehend offenders;

f) maintain criminal records;

g) conduct forensic analysis;

h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;

i) co-ordinate country Interpol Affairs;

j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

k) perform any other function conferred on it by any other written law.

156. The courts have extensively discussed the powers and functions of the National Police Service. In **Republic v Commissioner of Police & another Ex-Parte Michael Monari & another [2012] eKLR** the Court held that:

> **"It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime."**

157. Further, in the case of **Pauline Adhiambo Raget v Director of Public Prosecutions & 5 others [2016] eKLR** the National Police Service's role was affirmed as follows:

> **"46. … The Respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the Interested Party in this case. In so doing, it is a legal mandate they would be undertaking."**

158. The Court of Appeal in **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR,** however, cautioned that:

> **"…while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith."**

159. The Petitioner argues that Section 5(2)(b) is unconstitutional for violating Articles 245(4)(a) and (b). It is, however, clear that the DPP's power to direct the I.G. to conduct investigations arises from Article 157(4) of the Constitution which empowers DPP **"to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct".** The same provision is clear that **"the Inspector-General shall comply with any such direction."**

160. The Petitioner alleges that Section 5(2)(b) of the ODPP Act is unconstitutional for allowing the DPP to "**direct that investigations be conducted by an investigative agency named in the direction"** thereby expanding the scope of the power given to him by Article 157(4) of the Constitution **"to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct."** It is important to appreciate that Article 157(4) gives supervisory jurisdiction to the DPP over the I.G. in circumstances where the I.G. has for one reason or another failed to investigate any information or allegation of criminal conduct. That the DPP is given a supervisory role is confirmed by the fact that the Constitution commands the I.G. to **"comply with any such direction."**

161. In the case of **Development Bank of Kenya Ltd v Director of Public Prosecutions & another; Giriama Ranching Company Limited (Interested Party) [2020] eKLR,** I understood the power given to the DPP as follows:

> **"35. The Director of Public Prosecutions is therefore given leeway by the Constitution to direct the Inspector-General to investigate any alleged criminal conduct. That power, in my view, does not include the power to give directions on how the investigations should be carried out or what the outcome of the investigations should be…The office of the Inspector–General is therefore an independent office when it comes to investigation of crimes."**

162. The context in which the power is granted to the DPP must be appreciated. The power given to the DPP is narrowed to the investigatory role of the I.G. Section 2 of the ODPP Act defines an investigative agency as:

> **…the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law.**

163. What the impugned Section 5(2)(b) of the ODPP Act has simply done is to extrapolate the power to all investigative agencies including those outside the I.G.'s command like the Ethics and Anti-Corruption Commission. Reading the provision as suggested by the Petitioner to mean that the DPP can only direct the I.G. would limit and constrict the constitutional power granted to the DPP by the Constitution. In my view, Parliament did not violate the Constitution by authorizing the DPP to direct all the investigative agencies to conduct investigations into information or allegation of criminal conduct. The power granted to the DPP must be extrapolated and read to include all investigative

agencies whether in existence at the time of the promulgation of the Constitution or established thereafter. The Petitioner's contention that Section 5(2)(b) of the ODPP Act is unconstitutional therefore fails.

164. As regards Section 5(3) of the ODPP Act, the Petitioner argues that empowering the DPP to "**assign an officer subordinate to him to assist or guide in the investigation of a crime"** and requiring "**every investigative agency"** to "**give effect to that direction"** violates Article 245(4)(a) & (b) of the Constitution which provides that "**no person may give a direction to the Inspector-General with respect to the investigation of any particular offence or offences"** or "**the enforcement of the law against any particular person or persons."** Further, that the power granted to the DPP by the impugned provision allows him to intermeddle with the investigatory power expressly reserved for the police by the Constitution.

165. In my view, the power granted to the DPP to embed a prosecutor in an investigation stem from his prosecutorial authority. The provision is clear that the role of the prosecutor is to assist or guide the investigation and nothing more. The investigatory power remains with the investigative agency. The impugned provision is therefore meant to ensure that the outcome of a particular investigation meets the test for launching a prosecution. This will stop the back-and-forth exchange of files between the prosecutor and investigator.

166. I would, however, caution that the power given to the DPP by Section 5(3) of the ODPP Act is one that should be exercised sparingly and with great circumspection. When the DPP assigns a prosecutor to an investigation, the clear line between an investigator and a prosecutor is likely to be blurred. An impression might be created that the DPP is interfering with the powers of the investigative agency. It will also be difficult for the DPP to decline to prosecute a case in which his agent assisted or guided the investigation. Assigning a prosecutor to assist or guide in an investigation may end up having the negative effect of interfering with the DPP's discretion on the decision to charge. Nevertheless, the power donated to the DPP by the impugned provision falls within his constitutional prosecutorial mandate and the provision cannot be said to be unconstitutional. It clearly aligns with the DPP's prosecutorial authority.

167. From the foregoing analysis two things are clear, the drafters of the Constitution intended that the roles of the Respondent and 1st Interested Party be distinct, specific and separate with necessary safeguards. Secondly, they were desirous to have the two work in cooperation to facilitate the fair administration of justice while safeguarding public interest and realizing the rule of law. It can also be discerned from the legislative purpose and intent that the drafters sought to ensure that the two would remain interdependent while exercising distinct constitutional mandates.

168. I am therefore convinced that the impugned provisions were intended to give legislative effect to constitutional provisions and are legally sound and thus constitutional.

d) <u>Whether the 2019 DPP Guidelines are unconstitutional</u>:

169. It is the Petitioner's contention that the 2019 DPP Guidelines are unconstitutional for violating Article 245(4)(a) & (b) of the Constitution as they allow the Respondent to usurp the constitutional and statutory powers of the National Police Service to investigate crimes and charge suspects. Further, that the guidelines are unconstitutional for being non-complaint with sections 11(1), 22 and 23 of the Statutory Instruments Act, 2013 and for not being subjected to public participation.

170. The question as to whether the 2019 DPP Guidelines violate Article 245(4)(a) & (b) will be answered when I address the issue of the roles of the investigator and the prosecutor. I will therefore proceed to address the other two arguments of the Petitioner in support of his assertion that the 2019 DPP Guidelines are unconstitutional.

171. The Petitioner contends that the 2019 DPP Guidelines should be voided for failure to comply with the Statutory Instruments Act, 2013. The question that needs to be answered is whether the provisions of the Statutory Instruments Act, 2013 were applicable to the 2019 DPP Guidelines. If the answer is in the affirmative, then the next question is whether the provisions of the Act were complied with.

172. A reading of the introduction to the 2019 DPP Guidelines discloses that the guidelines are meant to set out the core functions and duties of a prosecutor in relation to the decision to charge and the conduct of criminal proceedings so that prosecutors can properly exercise their functions. In essence the guidelines aim to guide prosecutors on the standards expected of them, their duties in the administration of justice, and the factors that should be considered in the exercise of prosecutorial discretion in criminal proceedings.

173. Although the Respondent and the Interested Parties argued that the guidelines were made pursuant to the authority granted to the Respondent by Section 5(1)(c) of the ODPP Act to formulate and keep under review public prosecution policy and by Section 50 to make regulations for the effecting of the Act, the guidelines don't expressly refer to any of those provisions. Indeed, in the introduction, the DPP clearly states that the guidelines are anchored on Article 157 of the Constitution, the National Prosecution Policy and the General Prosecution Guidelines.

174. In view of the fact that the 2019 DPP Guidelines were not promulgated pursuant to a specific authority granted by the law to the DPP, they cannot be termed a statutory instrument which is clearly defined by Section 2 of the Statutory Instruments Act, 2013 to mean:

> **"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."**

175. Any of the instruments mentioned in the above definition only become a statutory instrument if it is "**issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."** The impugned guidelines cannot be traced to any particular provision of the ODPP Act. In my view, the guidelines are mere internal rules as they were not issued under any statutory authority granted to the DPP. The guidelines are an

operation manual meant to assist prosecutors in the discharge of their day-to-day duties.

176. The guidelines can be equated to a memo issued by the head of a State organ to guide the performance of duties by the persons working for the State organ. This fact can be discerned by the clear statement in Clause 1.1 that the guidelines do not create any rights or obligations on the part of any third party including any defence counsel. As expressly stated in Clause 1.2, they are only binding on prosecutors.

177. Importantly, it is expressly stated that the guidelines are not intended to modify a prosecutor's obligations under applicable existing law, regulations, policy and other relevant guidelines and must be read together with those instruments. It therefore follows that the 2019 DPP Guidelines did not fall into the definition of a statutory instrument as defined by the Statutory Instruments Act, 2013 and the Act was therefore not applicable to them. The Petitioner's assertion that the guidelines are void for not complying with the Statutory Instruments Act, 2013 is therefore without merit. It therefore follows that the question as to whether the 2019 DPP Guidelines complied with the Statutory Instruments Act, 2013 does not arise in the circumstances of this case.

178. Another ground upon which the Petitioner attacks the 2019 DPP Guidelines is that they were not subjected to public participation hence violating the Constitution. Participation of the people is one of the national values and principles of governance provided in Article 10(1)(a) of the Constitution. As per that provision, public participation must be conducted by all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; and makes or implements public policy decisions. The importance of adequate and sufficient public participation has been expressed in several judicial decisions-see **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** and **Robert N. Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR**.

179. The Petitioner contends that there was no public participation in the making of the impugned guidelines. The Respondent and the Interested Parties are of the contrary view.

180. An examination of the evidence presented to this Court reveals that the Respondent invited the public and stakeholders to submit comments and views during the making of the guidelines. Specifically, advertisements were made in national newspapers and the Kenya Gazette. Through the publications, members of the public and stakeholders were invited to give feedback in form of comments, recommendations or suggestions on the draft guidelines. In addition, numerous meetings were held with various stakeholders, including the National Police Service, to deliberate on the draft guidelines.

181. There is also evidence on record that a task force on the decision to charge was appointed by the Respondent through the Kenya Gazette. The public, individual public officers and the Law Society of Kenya, among other stakeholders, were invited through media advertisements to make submissions and comments on the draft guidelines prepared by the task force. There is an unrebutted averment by the Respondent that the task force went around the country sensitizing stakeholders on the draft guidelines and that the draft guidelines were piloted by prosecutors across Kenya during a service week from 18th to 22nd March, 2019.

182. From the evidence adduced by the Respondent, it is clear that the threshold for public participation was met during the making of the guidelines. The constitutional imperative of public participation was therefore met, notwithstanding the fact that the Respondent was working on an internal administrative document. The Petitioner's assertion that the guidelines were not subjected to public participation is therefore found to be without merit and dismissed.

183. The Petitioner was also of the view that the 2019 DPP Guidelines are unconstitutional because of the statement made therein to the effect that the DPP is the repository of prosecutorial power. According to the Petitioner, the statement clearly contravenes the Constitution as there are other prosecutors apart from the DPP and Article 157(12) of the Constitution clearly mandates Parliament to enact legislation conferring powers of prosecution on other authorities other than the DPP.

184. The Petitioner did not tell the Court whether Parliament had exercised the power granted to it by Article 157(12) and established another prosecution authority. It is therefore safe to presume that for now the DPP is the only prosecution authority in this country. That being the case, there is nothing wrong in the statement in the guidelines that the DPP is the holder of prosecutorial power in Kenya, for indeed he is. He commences prosecutions, takes over private prosecutions and terminates prosecutions. He also reviews the decision to prosecute or not to prosecute. Although the discontinuation of a prosecution can only be done with the sanction of the court, the fact remains that the prosecutor is the one who makes the decision to terminate a prosecution. This aligns with the holding by the Supreme Court of Canada in **Krieger v Law Society of Alberta, (2002) 3 SCR 372** that **"the original power of the Attorney General was and is of initiating, managing and terminating both private and public prosecutions."**

185. There was also the allegation by the Petitioner that the 2019 DPP Guidelines are generally unconstitutional. The only observation I can make on this averment is that the attack on the guidelines is too generalized as the Petitioner has failed to state any specific provision that is in direct conflict with the Constitution or the manner in which such provision violates the Constitution.

186. In conclusion on this issue, I find that the 2019 DPP Guidelines did not violate any constitutional provision. The generation and implementation of the guidelines expressly fell under the ambit of the DPP as the person in charge of the Office of the Director of Public Prosecutions. It is therefore my finding that the Petitioner has failed to prove that the guidelines were established in excess of the Respondent's constitutional mandate or violated any constitutional provision.

e) <u>Who between the DPP and the Inspector-General of Police is mandated to make the decision to charge</u>?

187. It has been discussed in the previous paragraphs that the Respondent and the 1st Interested Party exercise distinct constitutional mandates notwithstanding the need for cooperation. The question then is; who between the two makes the decision to charge?

188. The role of the 1st Interested Party in the criminal justice system is an investigative role. This is clear from a reading of Article 245(4)(a)

of the Constitution and sections 24(e) and 35(b) of the National Police Service Act. Section 26 of the ODPP Act provides that once the investigations are done the 1st interested Party is to submit the findings to the Respondent. It reads as follows:

> **(1) The Inspector-General or any other investigative agency shall disclose to the Director all material facts and information collected in the course of an investigation that may be reasonably expected to assist the case of prosecution or defence.**
>
> **(2) The Inspector-General or any other investigative agency shall—**
>
> **a) conduct thorough investigations;**
>
> **b) compile all evidence; and**
>
> **c) submit all relevant information in relation to any investigation undertaken.**
>
> **(3) The duty of disclosure under this section shall—**
>
> **a) include privileged information; and**
>
> **b) continue until the determination of the case.**

189. The prosecutorial role of the Respondent is clearly defined in Article 157(6) of the Constitution. The role of the prosecutor in criminal proceedings is also spelt out under the *Guidelines on the Role of Prosecutors* (*Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, (1990*)). Through those guidelines, prosecutors are required to **"perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest."**

190. Once a person is accused of a crime and arrested, the Constitution at Article 49(1)(a)(i) requires that the person be informed of the reason for the arrest. This information can be reasonably inferred to have been obtained during the investigation stage by the police. Moreover, clause (g) of Article 49(1) entitles an arrested person **"at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released."**

191. My understanding of the Constitution and the relevant statutes is that the role of the 1st Interested Party ends once investigations are concluded and a decision made to charge. From this point the Respondent takes over. This is made clear by Article 157(6) which reveals that the decision to initiate criminal proceedings against a person rest on the Respondent who according to Clause (10) of the Article does not require the consent of any person or authority for the commencement of criminal proceedings.

192. In order to appreciate the roles of the investigator and the prosecutor, it is necessary to understand the meaning of the words 'investigate' and 'prosecute'. The 9th Edition of Black's Law Dictionary at page 902 defines the term 'investigate' as follows:

> **"1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry… 2. To make an official inquiry…"**

The same dictionary at page 1340 defines the term 'prosecute' as:

> **"1. To commence and carry out a legal action… 2. To institute and pursue a criminal action against (a person) …"**

193. It is thus clear that an investigator tries to establish the truth about an alleged crime and to discover the perpetrator. The prosecutor on the other hand institutes criminal proceedings against a person identified through investigations as the perpetrator of an offence known in law. The institution of criminal proceedings starts with the filing of a charge sheet or information sheet. It therefore follows that the prosecutor takes over once the investigator has formed the opinion that a particular person has committed a disclosed offence and ought to be prosecuted. The prosecutor is the one who determines the charge, drafts the charge or information and decides on the witnesses to be called.

194. In the criminal justice system, the investigator is the collector of evidence and the prosecutor is the one granted power to determine whether the evidence is sufficient to mount a prosecution.

195. Indeed, the prosecutor may, in accordance with the powers granted to him by Article 157(11) of the Constitution, decide that even though a crime was committed and the evidence collected may result in a conviction, the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process discourages the commencement or continuation of a prosecution. This statement finds support in the opinion of **Sir Elwyn Jones in *Cambridge Law Journal* – April 1969 at page 49** (as cited in **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**) that:

> **"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."**

196. The Supreme Court of Canada in the cases of **Krieger v Law Society of Alberta, (2002) 3 SCR 372** and **R v Beaudry (2007) 1 SCR 190** laid down the separate and distinct powers and functions of investigators and prosecutors. In **Beaudry** the distinct roles of the investigator and the prosecutor were emphasized as follows:

> **"48 …In my opinion, the proper functioning of the criminal justice system requires that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person. The police have a particular role to play in the criminal justice system, one that was initially founded in the common law, and it is important that they remain independent of the executive branch: *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at paras. 27 to 36, and *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12. Doyon J.A.'s hierarchical vision according to which a police officer's discretion is limited by the discretion of the Crown prosecutor should therefore be rejected. In discharging their respective duties, both the police officer and the prosecutor have a discretion that must be exercised independently of any outside influence: *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65. The limits of each official's discretion are inherent in that person's role and duties. However, the responsibilities of Crown prosecutors do not serve to limit the scope of police discretion."**

197. In **Krieger,** the Court stressed the importance of prosecutorial discretion as follows:

> **"*43* "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.**
>
> **46 Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.**
>
> **47 Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum."**

198. The issue of the delineation of the operational areas of the investigator and the prosecutor is not a novel one in our jurisdiction as the Petitioner appears to suggest. In **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**, the Court clearly explained the roles of the investigator and the prosecutor as follows:

> **"36. In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See *The International and Comparative Law Quarterly* Vol. 22 (1973).**
>
> **37. A reading of Article 157(4) of the Constitution leads me to associate myself with the decision of the High Court of Uganda in the case of Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013, to the effect that:**
>
> **"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously…Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP…such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."**
>
> **38. This position was similarly appreciated in Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR in which Mumbi Ngugi, J held that:**
>
> **"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word**

with regard to the prosecution lies with the 4th Respondent (DPP) …".

39. It was pursuant to the foregoing that Majanja, J expressed himself in Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013 as hereunder:

"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)…These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013…In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed…The Attorney General of Kenya…is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do… this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy…"

40. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the *Office of Public Prosecutions Act,* No. 2 of 2013.

41. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP…

42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations."

199. Likewise, in **Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR,** a decision which the Petitioner vehemently disagrees with, the Court delineated the roles of the investigator and the prosecutor as follows:

"128. In this case it was contended which contention was not denied that there was a futile attempt by the 2nd Respondent herein to levy charges against the Petitioner without the consent of the 1st Respondent. That action was clearly unconstitutional, unlawful, illegal, null and void. This court is under a constitutional mandate to direct the 2nd Respondent back to his lane by directing him to refrain from running amok onto the 2nd Respondent's lane. The 2nd Respondent, the Director of Criminal Investigations, must keep to its lawful lane and must desist from the temptation to overlap even where he believes that those who are constitutionally empowered to take action are dragging their feet. Once he is done with its mandate he must hand over the button to the next "athlete" and must not continue with the race simply because he believes that the next athlete is "a slow footed runner" …

132. In my view, the mere fact that those entrusted with the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See *The International and Comparative Law Quarterly* Vol. 22 (1973) …

136. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the *Office of Public Prosecutions Act,* No. 2 of 2013.

144. Accordingly, I must make it clear that the 2nd Respondent herein, the Director of Criminal Investigations has no powers at all under our current legal frame work to present any charges before a court of law particularly where the Director of Public Prosecutions, the 1st Respondent has not consented to the same."

200. The Petitioner contended that the decision in the just cited case was not relevant because the Judge relied on the Ugandan case of **Uganda v Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013,** yet the Ugandan and Kenyan constitutions are dissimilar on the power granted to the chief prosecutor to direct the chief investigator to carry out investigations into information of a criminal activity. The Petitioner contends that the Ugandan Constitution expressly provides that the police shall report back to the prosecutor the outcome of the investigations while the Kenyan Constitution has no similar provision and the I.G. doesn't have to report back to the DPP on the outcome of the investigations commenced on the directive of the DPP.

201. The argument of the Petitioner is not persuasive. The Constitution could not have given the DPP the power to order the I.G. to investigate criminal activity without giving him the power to receive feedback on the outcome of the investigations. He who has the power to ask for something to be done has the commensurate power to receive the results of what he has asked to be done. The I.G. or any investigative agency directed by the DPP to investigate alleged criminal activity is therefore under a duty to submit a report to the DPP on the outcome of the investigations ordered by the DPP.

202. That the DPP has discretion on the decision to charge was indeed affirmed by the Court of Appeal in **Diamond Hasham Lalji &**

another v Attorney General & 4 others [2018] eKLR when it stated at Paragraph 30 that:

> **"…The DPP has formulated "The National Prosecution Policy" 2015 which repealed the 2007 prosecution policy. The policy, amongst other things, stipulates the factors to be taken into account before a decision to prosecute or not to prosecute is taken including the application of evidential test and public interest test and also the factors to be considered before a review of the decision to prosecute or not to prosecute is made."**

203. I agree with the findings in the cited decisions that the investigating officer cannot under whatever circumstances usurp the role of the prosecutor.

204. The Petitioner raised other arguments in support of his position that police officers have the power to charge suspects in court. It is necessary to consider those arguments.

205. One of the arguments put forward by the Petitioner in his spirited attempt to convince this Court to find that police officers have prosecutorial powers was based on the claim that allowing the DPP to approve the charge sheet or information would result in non-compliance with Article 49(i)(h) which requires suspects to be presented in court within twenty-four hours after being arrested. This argument has no merit at all. In the first place, every court house has a prosecutor appointed by the DPP. Secondly, where the timeline of presenting an accused person in court is not likely to be met, the investigator has the constitutional mandate to release the suspect on bail unless there are compelling reasons for not doing so.

206. It also follows that the argument by the Petitioner that the prosecutor has no mandate to sign or stamp every charge sheet or information flies in the face of the fact that the prosecutor is the one mandated by the Constitution and statute to initiate prosecutions. Once the investigator recommends the charging of a suspect, the matter leaves his hands and where the prosecutor directs that the suspect be charged, the investigator has a duty to arrest and present the suspect in court. The investigator cannot at that stage say he no longer recommends the prosecution of the suspect for to do so would amount to usurpation of the power of the prosecutor to decide whether or not to prosecute a suspect.

207. The prosecutor is mandated to direct the police or an investigative agency to arrest and present a suspect in court. This is a power derived from the prosecutorial discretion of a prosecutor. The DPP was therefore within his mandate when he disclosed to the public that he had recommended the prosecution of the Masai Mara and Migori County suspects. He was also acting within his constitutional and statutory mandate when he directed those who had investigated the matter to arrest the suspects. In the circumstances, the provisions of Article 245(4) (a) & (b) of the Constitution were not violated because investigations had been concluded and prosecution recommended by an investigative agency.

208. Still determined to wrest the prosecutorial discretion from the DPP, the Petitioner through his supplementary submissions asked this Court to declare Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 unconstitutional. He argued that by allowing the Ethics and Anti-Corruption Commission to recommend to the DPP that a person be prosecuted for corruption or economic crimes, the provision usurps the exclusive mandate of the police to prevent corruption and promote transparency and accountability under Article 244(b) of the Constitution.

209. Aware that he had not pleaded this issue, the Petitioner relied on the decisions in **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] E.A. 885** and **Housing Finance Company of Kenya v J.N. Wafubwa [2014] eKLR** and argued that where parties have canvassed an issue that has not been pleaded and left it to the court for determination, the court can pronounce judgement on the issue.

210. The prayer by the Petitioner through supplementary submissions to have a statutory provision declared unconstitutional cannot succeed for various reasons. It is observed from the outset that the Respondent and the Interested Parties were not given an opportunity to have their say on the issue of the alleged unconstitutionality of Section 35 of the Anti-Corruption and Economic Crimes Act.

211. The Petitioner's prayer to have Section 35 of the Anti-Corruption and Economic Crimes Act declared unconstitutional arose from the Attorney General's reliance on the case of **Ethics and Anti-Corruption Commission v James Makura M'abira [2020] eKLR** in support of the argument that the I.G. only plays an investigative function and is not constitutionally or statutorily empowered to charge suspects in court without the consent of the DPP. The Attorney General therefore did not raise the issue of the constitutionality of Section 35 of the Anti-Corruption and Economic Crimes Act and the Petitioner's submission on the constitutionality of the provision was a solo performance which cannot be entertained.

212. It is also observed that submissions are not pleadings and the court cannot use them to provide relief to a party. On this point, the Court of Appeal held in **Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR,** held that:

> **"Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."**

213. That a court cannot make a determination on issues that are not in the pleadings was recently reiterated by the Court of Appeal in **Kibeh v Waibara & another [2022] KECA 388** where it held that:

> **"[47] As was held in Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000) EA 885, in any litigation the dispute between the parties is circumscribed by the parties through their pleadings and statement of agreed issues, if any."**

214. The issue of the alleged unconstitutionality was therefore raised at the tail end of the case by the Petitioner who decided to run away

with it and the other parties were never given any opportunity to say anything on the issue. The Respondent and Interested Parties did not therefore make any submission on the constitutionality of the provision. The authorities referred to by the Petitioner, in an attempt to persuade this Court to tackle an unpleaded issue, are therefore not helpful to the Petitioner in the circumstances of this case.

215. In view of what has been stated above, the issue of the alleged unconstitutionality of Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 is therefore not a matter for determination in this judgment.

216. The Petitioner also faulted the finding and holding by the courts in **Michael Rotich v Republic [2016] eKLR** and **Criminal Revision No. 208 of 2020, Sudi Oscar Kipchumba v Republic (Through the National Cohesion and Integration Commission)** that where an arrested person is to be detained in line with Article 49(1)(g) of the Constitution a holding charge should be presented to the court.

217. In **Michael Rotich**, the Court held as follows:

> **"In compliance with Article 49(1)(f)(i) of the Constitution, the Applicant was brought before the court within 24 hours of his arrest. However, contrary to Article 49(g) of the Constitution, the Applicant was neither charged nor informed of the reasons for his continued detention. As stated earlier in this Ruling, the recent trend where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek extension of time to continue to detain such person, without any charge or holding charge being preferred against such person is unconstitutional. The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have *prima facie* evidence which can enable such person to be charged with a disclosed offence. The fact that the prosecution has a *prima facie* evidence of a disclosed offence can be presented in court in form of a holding charge setting out the particular offence. Such holding charge will enable an accused person to know of the reason for his arrest as provided under Article 49(1)(a) of the Constitution. It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the Constitution was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have *prima facie* evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the Constitution says so."**

218. I am in total agreement with the stated legal principle. The police can only arrest a person where an offence known in law has been disclosed. When presenting a person in court and seeking additional time to conclude investigations, the police, through the prosecutor, should be clear of the offence that is alleged to have been committed by the person. That is what forms the holding charge and that is what the prosecutor presents to the court.

219. Being placed in police cells, taken to court or remanded/jailed in prison is not a small matter. A person cannot be picked and taken through the criminal justice system just for the sake of it. There must be a basis for making a person a suspect or an accused person. The Kenyan Constitution recognizes that liberty is very important by elaborately providing in Articles 49, 50 and 51 for the rights of arrested persons, accused persons, persons detained or held in custody or imprisoned. The police, any State organ or anybody else for that matter cannot, without justifiable reasons arrest a person and take them into custody. The police can only take action once it is satisfied that an offence has been committed. In prosecution matters, the prosecutor is the interlocutor between the court and the investigator. The prosecutor must be satisfied that there is legitimate reason for obtaining certain orders before moving the court.

220. Finally, there was the claim by the Petitioner that the prosecutor should not touch an investigator's file. The question is; how does the prosecutor form the opinion whether to charge or not to charge without access to the witness statements and documentary exhibits? Agreeing with the Petitioner that the prosecutor should not access investigation files will mean that no prosecution will take place at all. The suggestion by the Petitioner that the prosecutor cannot touch an investigation file is rejected for its absurdity.

221. From the foregoing analysis, it is proper to conclude that the decision to charge is not vested in the 1st Interested Party but the Respondent as stipulated in the Constitution, the ODPP Act and the National Police Service Act. The ODPP Act, 2013 and the National Police Service Act, 2011 were passed after the promulgation of the Kenyan Constitution, 2010 and they therefore supersede any provision of the Criminal Procedure Code, Cap. 75 which may give the impression that police officers are the persons to draft charge sheets and present them directly to courts. I therefore disagree with the Petitioner's argument that police officers or investigative agencies have the authority to draft charge sheets and present them to courts thereby by-passing prosecutors. In my view, the Petitioner's arguments are based on an erroneous interpretation of the Constitution and the applicable laws.

f) <u>Conclusion and Disposal</u>:

222. From the discussions in this judgement, it becomes obvious that the Petitioner has not established any ground for grant of any of the orders sought in the petition. The petition therefore fails in its entirety.

223. This being a matter of public interest, I direct each party to meet own costs of the proceedings. The principle in support of my decision on the issue of costs is found in **Director of Public Prosecutions v Attorney General & 12 others [2022] KECA 397 (KLR)** where the Court of Appeal held that:

> **"67. …It has become common that in cases involving public interest and aimed at furthering the rule of law, costs are usually not awarded. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of Rights and *the***

Constitution **for fear of being condemned to pay costs.”**

224. The summary of it all is that the petition dated 3rd September, 2020 is found to be without merit and dismissed with no order as to costs.

Dated, signed and delivered virtually at Kabarnet this 24th day of March, 2022.

W. Korir,

Judge of the High Court