Kinoti & 7 others v Chief Magistrates Court Milimani Law Courts & 4 others; Sanga & 2 others (Interested Parties) (Constitutional Petition E495 of 2021) [2022] KEHC 11622 (KLR) (Constitutional and Human Rights) (23 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E495 OF 2021

AC MRIMA, J

MAY 23, 2022

BETWEEN

GEOFFREY KAARIA KINOTI ..... 1ST PETITIONER

SIMON MAUNDU ..... 2ND PETITIONER

KEPHA GITHU GAKURE ..... 3RD PETITIONER

ROBERT THINJI MURITHI ..... 4TH PETITIONER

PETER NJENGA KURIA ..... 5TH PETITIONER

HUMPHREY KARIUKI NDEGWA ..... 6TH PETITIONER

AFRICA SPIRITS LIMITED ..... 7TH PETITIONER

WOW BEVERAGES LIMITED ..... 8TH PETITIONER

AND

CHIEF MAGISTRATES COURT MILIMANI LAW COURTS . 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

KENYA REVENUE AUTHORITY ..... 5TH RESPONDENT

AND

SHEILA SANGA ..... INTERESTED PARTY

PETER MWENDE NTURIBI ..... INTERESTED PARTY

IRENE MUTHEE ..... INTERESTED PARTY

Section 107 of the Tax Procedures Act declared unconstitutional for allowing the Kenya Revenue Authority to be a complainant, investigator and prosecutor

The National Police Service through the officer-in-charge of Muthaiga police station commenced criminal proceedings against the petitioners on charges related to offences under the tax laws. The court declared section 107 of the Tax Procedures Act, which allowed the Kenya Revenue Authority to be a complainant, investigator and prosecutor, unconstitutional. The court held that whereas a complainant could investigate own its complaint, neither a complainant nor an investigator could prosecute any criminal offence arising out of the investigations. The court also held that the National Police Service could neither draft any charge sheet nor sign any such charge sheet.

Reported by Kakai Toili

Constitutional Law *- constitutionality of statutes - constitutionality of section 107 of the Tax Procedures Act - claim that section 107 allowed the Kenya Revenue Authority to be a complainant, an investigator and a prosecutor - whether an investigator could investigate its own complaint - whether investigations and prosecution could be conducted by the same entity - whether section 107 of the Tax Procedures Act was unconstitutional - Tax Procedures Act, No 29 of 2015, section 107.*

Constitutional Law *- Office of the Director of Public Prosecutions - role of the Director of Public Prosecution vis a vis the National Police Service in the investigation and charging of suspected criminals - whether the Office of the Director of Public Prosecution enjoyed prosecutorial powers to the exclusion of all other agencies - what was the nature of a criminal justice system and what was the role of the stakeholders/actors in the criminal justice system - whether the National Police Service or any other investigative agency could on its own motion institute investigations relating to the tax laws - Constitution of Kenya, 2010, articles 157, 238, 239, 243,244 and 245; National Police Service Act, No 11A of 2011, sections 24, 27 and 35; Office of Director of Public Prosecutions Act, No 2 of 2013, section 5.*

Criminal Procedure *- charges - drafting and signing of charges - whether the National Police Service could draft charge sheets or sign charge sheets.*

Constitutional Law *- constitutional violations - claims giving rise to constitutional violations - whether claims of statutory violations could give rise to constitutional violations.*

Words and Phrases *- complainant - definition of complainant - the party who brings a legal complaint against another - Black's Law Dictionary 10th Edition.*

Brief facts

The National Police Service through the officer-in-charge of Muthaiga police station commenced criminal proceedings against the petitioners in Nairobi (Milimani) Chief Magistrate's Court Criminal Case No 1333 of 2019 (the criminal case). The charges in the criminal case related to offences under the tax laws in Kenya. Dissatisfied with the entirety of their prosecution, the petitioners lodged the instant petition. They contended that the charge sheet instituting the criminal charges emanated from the Director of criminal investigations, the 3rd respondent (the DCI) whereas the Constitution of Kenya, 2010 (Constitution) required all criminal prosecutions to originate from the Director of Public Prosecutions, the 1st respondent (DPP).

The petitioners argued that since the charges related to the enforcement and administration of the tax laws of Kenya and the East African Community region, the DCI lacked the mandate and expertise to undertake investigations and/or administer and enforce the tax laws of Kenya and the East African Community region. Simultaneously filed with the petition was an application seeking interim conservatory orders halting any further proceedings of the criminal case pending *inter-partes* hearing of the application as well as the petition. The court stayed proceedings and hearing of the criminal case pending inter-*partes* hearing and determination of the application.

The petitioners posited that the all the evidence collected pursuant to the investigations conducted by the DCI was illegally obtained in contravention of article 50(4) of the Constitution and consequently could not be relied upon by the DPP in charging them. The petitioners claimed that the DPP's purported appointment of public prosecutors from the Kenya Revenue Authority (KRA) vide gazette notice No 3523 of 2021 (the impugned gazette notice) under section 85 of the Criminal Procedure Code was unconstitutional. The petitioners thus sought among others; a declaration that the role of a complainant, an investigator and a prosecutor could not be combined into one hand in the criminal justice system; a declaration that a charge sheet in criminal proceedings could not be instituted by the Kenya police and a charge sheet could not be signed by police officers; and a declaration that section 107 of the Tax Procedures Act, 2015 (the impugned provision) was unconstitutional.

Issues

i. Whether section 107 of the Tax Procedures Act was unconstitutional for allowing the Kenya Revenue Authority to be a complainant, an investigator and a prosecutor in the same matter.
ii. What was the role of the Director of Public Prosecution *vis a vis* the National Police Service in the investigation and charging of suspected criminals?
iii. What was the nature of a criminal justice system and what was the role of the stakeholders/actors in the criminal justice system?
iv. Whether the National Police Service could draft charge sheets or sign charge sheets.
v. Whether the Office of the Director of Public Prosecution enjoyed prosecutorial powers to the exclusion of all other agencies.
vi. Whether investigations and prosecution could be conducted by the same entity.
vii. Whether an investigator could investigate its own complaint.
viii. Whether the National Police Service or any other investigative agency could on its own motion institute investigations relating to the tax laws.
ix. Whether claims of statutory violations could give rise to constitutional violations.

Relevant provisions of the Law

Tax Procedures Act, No 29 of 2015

Section 107 - Authorised officer may appear on prosecution

(1) Despite any other written law, an authorised officer may appear in any court on behalf of the Commissioner in proceedings in which the Commissioner is a party and, subject to the direction of the Director of Public Prosecutions, that officer may prosecute a person accused of committing an offence under a tax law.

(2) An authorised officer conducting a prosecution in accordance with subsection (1) shall have all the powers of a public prosecutor under the Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013).

Held

1. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the *Mutunga* Rules), being a constitutional instrument, provided for the contents of petitions in rule 10. Rule 10 of the *Mutunga* Rules further urged courts to accept even an oral application, a letter or any other informal documentation as long it disclosed denial, violation, infringement or threat to a right or fundamental freedom and treat such as a petition. It was the court's duty to reduce an oral application into writing.
2. Petitions had to be clear on what they sought to challenge. The nexus between the Constitution and the alleged violation ought to be precise, hence, the precision principle. The precision principle emphasized the position that petitions must raise constitutional issues.
3. A constitutional issue was one which confronted the various protections laid out in a constitution. Such protections could be in respect to the bill of rights or the Constitution itself. In any case, the issue had to demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. Claims of statutory violations could not give rise to constitutional violations.

4. The petition had several parts including the description of the parties, the constitutional foundation of the petition, the factual matrix, the violations and the reliefs sought. The petition clearly brought out the alleged violations of the Constitution, the manner the violations were inflicted and the effect of the violations on the petitioners. The petition fully complied with rule 10 of the Mutunga Rules.
5. Generally speaking, a criminal justice system was the network of systems and processes aimed at managing persons accused of committing crimes until when such persons, if found culpable, were eventually released from correctional and rehabilitation institutions. The criminal justice system was comprised of multiple interrelated pillars, consisting of law enforcement, forensic services, the courts and correctional services.
6. Given the nature of a criminal justice system, suffice to say that the overall purpose of a criminal justice system was to prevent crime and to create a peaceful and law-abiding society. It was a system aimed at maintaining law and order and to also maintain the social solidarity of the society.
7. The main pillars in the criminal justice system included investigations, arrest, arraignment before a court of law, trial and sentencing and post-sentence services. The criminal justice system in Kenya was firmly anchored in the Constitution and the law. Both made robust provisions aimed at ensuring that the system remained fair and just to all players. Since the system dealt with persons accused of criminal culpability, a lot of premium was placed on the bill of rights.
8. The Constitution and the law provided for how and by who investigations and prosecutions were to be carried out, the manner in which arrests were to be conducted, court trials and post-sentencing services. Article 238 of the Constitution was on the principles of national security. It defined national security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. It was that protection which formed part of the criminal justice system.
9. The national security was anchored on four principles. They were that national security was subject to the authority of the Constitution and Parliament, that national security would be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms, that in performing their functions and exercising their powers, national security organs would respect the diverse culture of the communities within Kenya and that the recruitment by the national security organs would reflect the diversity of the Kenyan people in equitable proportions.
10. Article 239 of the Constitution was on the national security organs. They were the Kenya Defence Forces, the National Intelligence Service and the National Police Service. The primary objective of the national security organs and security system was to promote and guarantee national security in accordance with the principles in article 238 of the Constitution. The Constitution called upon the organs not to act in a partisan manner, not to further any interest of a political party or cause and not to prejudice a political interest or political cause that was legitimate under the Constitution.
11. Whereas the Kenya Defence Forces were mainly responsible for the defence and protection of the sovereignty and territorial borders and integrity of Kenya, the National Police Service majorly dealt with maintaining law and order within the Kenyan territorial borders. By its nature, the National Police Service was one of key players in the criminal justice system in Kenya. Other players included the DPP, the courts and the correctional services.
12. Article 243 of the Constitution established the National Police Service to be comprised of the Kenya Police Service and Kenya Administration Service. The National Police Service was under the command of the Inspector General. The Inspector General enjoyed operational autonomy in respect to the conduct of any investigation, law enforcement and employment matters. It was only the DPP under article 157(4) of the Constitution who had power to direct the Inspector General to investigate any matter of criminal conduct and the Inspector General had to comply.

13. A key distinction in the functions of the National Police Service and the DPP was that whereas the National Police Service was limited to undertaking investigations on criminal culpability and could even recommend charges against the suspects, the DPP then received and reviewed the evidence from the National Police Service and had the sole discretion over the decision on the way forward. The DPP could agree or disagree with the recommendations made. Further the DPP had the unfettered power to direct the National Police Service over any investigations.
14. Once the National Police Service conducted and completed any investigations and made recommendations then, unless sanctioned by the DPP to arrest suspects or to undertake further investigations over the matter, that was the end of the role of the National Police Service in the criminal justice system. The matter was then taken over by the DPP.
15. It was the DPP to decide on whether or not to prefer any charges against the suspects, if any, since the DPP was not bound by the recommendations made by the National Police Service. Therefore, as long as the DPP was acting within the Constitution and the law, it had the discretion of making any appropriate order in a matter including closure of the police file. The DPP in its Guidelines on the Decision to Charge, 2019 (the Guidelines to charge) also correctly captured the role of the prosecutor once investigations are completed.
16. There was a deliberate constitutional and legislative design to separate investigations from prosecution of those culpable in the criminal justice system in Kenya. The reason was simple. It was to instill fairness and confidence in the criminal justice system by eradicating the possibility of conflict of interest or bias between the two organs. That served as a useful safeguard. Therefore, even though the DPP had the power to direct the National Police Service to investigate any information or allegation of criminal conduct, the manner in which the investigations were to be carried out remained at the sole discretion of the National Police Service unless in the clearest of cases where the directions by the DPP did not usurp the investigative power of the National Police Service.
17. Article 157(12) of the Constitution provided that Parliament could enact legislation conferring powers of prosecution on authorities other than the DPP. It was not only the DPP who could have prosecutorial powers in Kenya. Other entities could be accorded such power by Parliament.
18. Investigations and prosecution could not be conducted by the same entity regardless of whether the prosecution was undertaken by the DPP or by any other entity pursuant to article 157(12) of the Constitution.
19. Investigations could also be undertaken by any of the investigative agencies and was not the preserve of the National Police Service. That was provided for in section 2 of the ODPP Act. Whereas the National Police Service, the Ethics and Anti-Corruption Commission, the Kenya National Commission on Human Rights, the Commission on Administration of Justice, the Kenya Revenue Authority, the Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law were mandated to undertake investigations, then in keeping with the investigative and prosecutorial autonomy, it meant that none of investigative agencies could undertake prosecution of any offences resulting from the investigations it undertook.
20. The Criminal Procedure Code, (the CPC) defined 'complaint' as an allegation that some person known or unknown had committed or was guilty of an offence. The ODPP Act defined an 'offence' to mean an act, attempt or omission punishable by law. The Penal Code defined an 'offence' to mean an act, attempt or omission punishable by law. Broadly speaking, a complainant in the context of a criminal justice system was a party who laid a complaint against another that the other party had committed or attempted to commit an act or omission punishable by law. A complainant could, therefore, be any aggrieved party and could lay any complaint of a criminal nature against any party. According to the charge sheet in the criminal case, the complainant was the Kenya Revenue Authority (KRA).

21. A complainant could be its own investigator. There were both constitutional and legislative safeguards to ensure that investigations were fair and the suspect would not be prejudiced. The Constitution specifically secured the rights and fundamental freedoms of any person going through the justice system by making provisions in the bill of rights and by demarcating the clear roles of every sector player in the justice chain including the National Police Service and the DPP.
22. A party who was aggrieved in the manner in which investigations were carried out was always at liberty to seek the court's intervention. That could only be on a case by case basis. The National Police Service being charged with the constitutional and legislative mandate to carry out investigations kept within its mandate in carrying out investigations on the complaints lodged to it by the KRA. The contention by the petitioners that the National Police Service were not qualified officers and did not have any role to play in the investigations leading to the criminal case did not hold and thereby dismissed.
23. Whereas the National Police Service was one of the investigative agencies in law, given the fact that it was the KRA which was charged with the administration and enforcement of tax laws in Kenya, the National Police Service or any other investigative agency could not on its own motion institute investigations relating to the tax laws. As the KRA was one of the investigative agencies in Kenya, then the involvement of any other investigative agency in investigations on tax laws could only be at the invitation of the KRA.
24. If in the eyes of the petitioners the National Police Service, on invitation of the KRA, lacked the capacity to carry out proper investigations, then such were issues to be raised at the trial in attacking the quality of the evidence tendered and the credibility of the witnesses.
25. The role of the investigator ended with the collection of evidence and making recommendations, any other step which followed could not be under the mandate and authority of the National Police Service. Therefore, the National Police Service could not come up with the final charges which a suspect was to answer to before court. That was within the purview of the prosecutor. As such, the National Police Service could neither draft any charge sheet nor sign any such charge sheet.
26. There had been the argument that the CPC mandated the police officers to draft charges and present suspects to court without the involvement of the prosecutor, and in the instant case, the DPP. Whereas the provisions were in place, the CPC was a pre-2010 legislation. Before the promulgation of the Constitution in 2010, the National Police Service had all the powers to conduct investigations into criminal culpability, make decisions to charge, draft charges, stamp them, arrest the suspects and present them to court. That was the permissible law then. However, on the dawn of the Constitution in 2010, there was a paradigm shift in respect to the manner the criminal justice system would operate in Kenya. Of paramount importance was the fact that all laws that were then in place were to be forthwith brought into conformity with the Constitution. As the provisions of the CPC run contra the new constitutional dispensation, they could not stand in the face of the Constitution.
27. The DPP in its guidelines to charge, the DPP in appendix 3 introduced a sample charge sheet it intended to use. The charge sheet was fairly detailed and gave a host of information. It was a departure from the charge sheets generated by the National Police Service. Some of the key changes in the sample charge sheet included the name of the prosecutor who made the decision to charge and drafted the charge(s), the languages spoken by the suspect, whether the suspect was represented, details of the arresting officer, the ODPP date stamp and signature of the prosecutor. The ODPP's charge sheet was more constitutionally-friendly compared to the ones generated by the National Police Service.
28. The court was disappointed that despite court decisions demarcating the investigative powers of the National Police Service and the prosecutorial powers of the DPP, there had been deliberate and sustained resistance by the National Police Service in disregarding the decisions and continued to usurp the prosecutorial powers of the DPP and the prosecutors in general. It was deplorable that 12 years into the Constitution, there was a tag-of-war between the powers of the DPP (or any other prosecutor) and

the National Police Service despite otherwise clear constitutional provisions. The DPP had also and variously acquiesced to the usurpation of its constitutional mandate by the National Police Service.

29. Courts should not sit and watch the deliberate disregard of its orders and the obliteration of the Constitution since the courts were the only custodians of the Constitution. Once courts failed to firmly stand, guard, and enforce the Constitution, then the wishes of the Kenyans as reduced into the Constitution would never be realized.

30. The duty of a court once an allegation of a legislation being unconstitutional was made was to lay the Constitution and the legislation side by side and to decide whether the latter squared with the former. The objective of the impugned provision related to the constitutional and legislative need to have those culpable of committing offences prosecuted. The impugned provision passed the objective test. On the proportionality test, the impugned provision found favour in the position that in balancing the interests of the society with those of the prosecution, there was need to have prosecutors to undertake such functions.

31. A reading of the impugned provision in line with the definitions of 'authorised officer' and 'tax laws' meant that the Commissioner General of KRA could personally appear in court or could appoint any of his/her officers to appear in court in which the commissioner was a party and prosecute such case, but subject to the directions of the DPP. Such an officer would, however, have the full powers of the DPP as conferred in the ODPP Act.

32. The legislative design in terms of enforcing tax laws placed KRA as the complainant. On the other hand, the impugned provision then made KRA, who was the complainant, to be the prosecutor. The effect of the impugned provision was to place KRA as the complainant, the investigator and the prosecutor. Whereas the Constitution did not bar a complainant from investigating its own complaint in instances free from prejudice, such a complainant could not be the prosecutor.

33. Whereas KRA could investigate any offences relating to tax laws, it could not prosecute such offences in court. Therefore, to the extent that the impugned provision allowed KRA to usurp the prosecutorial powers of the DPP, the impugned provision could not stand in the face of the Constitution. The impugned provision was constitutionally infirm.

34. In the impugned gazette notice, the DPP purported to appoint three officers of KRA, who were the interested parties therein, to be prosecutors for purposes of prosecuting several criminal cases under the tax laws. Having deduced the need for separation of powers between the investigative agencies and the prosecution, the impugned gazette notice could not stand. In fact, what the DPP did vide the impugned notice was to willingly and unconstitutionally acquiesce its prosecutorial mandate to KRA which entity was the complainant in the criminal matters. The impugned gazette notice was unconstitutional and the appointments therein were of no legal effect.

Petition and application partly allowed; each party was to bear its own costs.

Orders

i. *Declaration issued that in the criminal justice system in Kenya, a complainant could investigate its own complaint in instances free from prejudice, but such a complainant and/or an investigator could not prosecute any offences arising from the complaint and the investigations.*

ii. *Declaration issued that prosecution of criminal offences in Kenya had to only be undertaken by lawful prosecutors (being either the DPP or such other persons exercising the delegated powers of the DPP under article 157(9) of the Constitution or the entities conferred with powers of prosecution pursuant to article 157(12) of the Constitution) and as long as such prosecutions were in keeping with (i) above.*

iii. *Declaration issued that since the KRA was the complainant in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019 and that the investigations leading to the institution of the criminal case were conducted by the National Police Service through the DCI, then no officers of KRA or the National Police Service could undertake the prosecution of the criminal case whether as special or private prosecutors or at all.*

iv. *Declaration issued that since the National Police Service conducted the investigations leading to the institution of the Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019, then the investigative role of the National Police Service ended once the investigations were completed, recommendations made and matter referred to the DPP for further dealing.*

v. *Declaration issued that the National Police Service did not have the power and authority to make any decision to prefer and institute the charges in the Nairobi Chief Magistrate's Court Criminal Case No. 1333 of 2019 and/or to prepare and sign the charge sheet.*

vi. *Declaration issued that the impugned gazette notice was unconstitutional and that the appointments made therein were illegal.*

vii. *Declaration issued that section 107 of the Tax Procedures Act was unconstitutional.*

viii. *Order of certiorari issued bringing into the court and quashing the decision by the National Police Service to prefer the charges in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.*

ix. *Order of certiorari issued bringing into the court and quashing the charge sheet in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.*

x. *Order of certiorari issued bringing into the court and quashing the impugned gazette notice.*

xi. *Order of prohibition issued prohibiting the respondents from sustaining, proceeding, hearing, conducting or in any manner dealing with the charges laid in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.*

xii. *Order of prohibition issued prohibiting the 1st respondent from presiding and/or conducting the trial of the petitioners in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.*

xiii. *Save for the charge sheets prepared and signed by the lawful prosecutors (being either the DPP or such other persons exercising the delegated powers of the DPP under article 157(9) of the Constitution or the entities conferred with powers of prosecution pursuant to article 157(12) of the Constitution), no court in Kenya should accept, register and in any manner whatsoever deal with any charge sheets not prepared and signed by any of the lawful prosecutors. For avoidance of doubt, given the constitutional and legislative mandates in carrying out investigations, the National Police Service, the Ethics and Anti-Corruption Commission, the Kenya National Commission on Human Rights, the Commission on Administration of Justice, the Kenya Revenue Authority, the Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law, could not draft, sign and/or present any charge sheets in any criminal prosecution.*

xiv. *Given the potential effect of the instant judgment in the criminal justice system in Kenya, the instant judgment would not apply to previously instituted criminal proceedings.*

xv. *The rest of the prayers sought in the petition and the notice of motion were declined and dismissed.*

xvi. *The Deputy Registrar was to transmit copies of the judgment to the Registrar of the High Court and the registrar of Magistrates Courts for implementation.*

Citations

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Kenya

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2. *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR 154; (1976-1980) 1 KLR 1272 - (Mentioned)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
4. *Guantai, Joram Mwenda v The Chief Magistrate, Nairobi* Civil Appeal 228 of 2003; [2003] eKLR - (Explained)
5. *Imana v Ethuro & 2 others* Election Petition 1 of 2003; [2005] KEHC 1292 KLR 417 - (Explained)
6. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] eKLR - (Explained)

7. *Jimbise Ltd & 2 others v Kenya Revenue Authority* Miscellaneous Civil Application 215 of 2017; [2017] eKLR - (Mentioned)
8. *Kathenge, Justus Mwenda v Director of Public Prosecutions & 2 others* Petition 372 of 2013; [2014] eKLR - (Explained)
9. *Kenya Commercial Bank Ltd & 2 others v Commissioner of Police & another* Miscellaneous Civil Application 784 of 2007; [2007] KEHC 1407 (KLR) - (Explained)
10. *Kinyanjui, Kamau John v Republic* crim app 137 of 01; [2010] eKLR - (Explained)
11. *Krystalline Salt Ltd v Kenya Revenue Authority* Judicial Review 359 of 2018; [2019] KEHC 6939 (KLR) - (Mentioned)
12. *Lalji, Diamond Hasham & another v Attorney General & 4 others* Civil Appeal 274 of 2014; [2018] KECA 856 (KLR) - (Explained)
13. *Law Society of Kenya v Attorney General & another* Constitutional Petition E327 of 2020; [2021] eKLR - (Explained)
14. *Mount Kenya Breweries Ltd v Kenya Revenue Authority* Petition E172 of 2021; [2021] KEHC 2526 (KLR) - (Explained)
15. *Mwau, John Harun v Independent Electoral & Boundaries Commission & another* Civil Appeal 112 of 2014; [2019] KECA 86 (KLR) - (Explained)
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17. *National Bank of Kenya Ltd v Anaj Warehousing Ltd* Petition 36 of 2014; [2015] KESC 4 (KLR) - (Explained)
18. *Okoiti, Okiya Omtatah v Director of Public Prosecutions & another & Attorney General (Interested Parties) International Commission of Jurists (Kenya Section) (Amicus Curiae)* Petition E266 of 2020; [2022] KEHC 1165 (KLR) - (Explained)
19. *Okoiti, Okiya Omtatah v Public Service Commission & 73 others* Petitions 33 & 42 of 2018; KEHC 464 (KLR) 2021 eKLR (Consolidated) - (Explained)
20. *Rana Auto Selections Ltd & 2 others v Kenya Revenue Authority & another* Judicial Review Application 9 of 2020; [2021] KEHC 323 (KLR) - (Mentioned)
21. *Republic & 2 v Director of Public Prosecutions 2 others ex-parte Stephen Mwangi Macharia* Judicial Review Miscellaneous Application 20 of 2014; [2014] eKLR - (Mentioned)
22. *Republic v Director of Public Prosecutions & 2 others;Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura* Judicial Review 298 of 2018; [2019] KEHC 8824 (KLR) - (Mentioned)
23. *Republic v Faith Wangoi* Criminal Miscellaneous Application 1 of 2015; [2015] KEHC 643 (KLR) - (Explained)
24. *Republic v Kenya Revenue Authority ex parte Style Industries* Miscellaneous Application 45 of 2019; [2019] eKLR - (Mentioned)
25. *Riley Falcon Security Services Ltd v Samuel Michael Onyango & 5 others* Civil Case 2 of 2017; [2017] KEHC 1803 (KLR) - (Mentioned)
26. *Sang, Geoffrey K v Director of Public Prosecutions & 4 others* Petition 19 of 2020; [2020] KEHC 9213 (KLR) - (Explained)
27. *Shimmers Plaza Ltd v National Bank of Kenya Ltd* Civil Appeal 33 of 2012; [2015] KECA 945 (KLR) - (Explained)
28. *Swaleh, Mohamed Ali v Director of Public Prosecution & anotherEx parte Titus Musau Ndome* Petition 2 of 2017; [2017] KEHC 7460 (KLR) - (Explained)
29. *Turkana County Government & 20 Others v Attorney General & Others* Petition 113 of 2015; [2016] eKLR - (Mentioned)

South Africa

1. *Fredricks & others v MEC for Education and Training, Eastern Cape & others* [2002] 23 ILJ 81 (CC) - (Explained)
2. *Minister of Safety & Security v Luiters* (2007) 28 ILJ 133 (CC) - (Explained)

India

1. *Mukesh Sing v State (Narcotic Branch of India)* Criminal Appellate Jurisdiction Special Leave Petition (Criminal) Diary No 39528/2018 - (Explained)
2. *S B Shahane & others v State of Maharashtra & another* (1995) Supp (3) SCC 37 - (Explained)

Texts

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Statutes

Kenya

1. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya 2010 Sub Leg) rule 10 - (Interpreted)
2. Constitution of Kenya, 2010 articles 2(1); 3(1); 10; 19; 20; 21; 22; 23; 25; 27; 28; 29; 31; 50(4); 73; 156; 157(11); Chapter 14; Schedule sixth; section 7(1) - (Interpreted)
3. Criminal Procedure Code (cap 75) sections 85(1); 89(4); 193(A) - (Interpreted)
4. Excise Duty (Excisable Goods Management System) Regulations, 2017 (Act No 23 of 2015 Sub Leg) regulation 30(1)(e)(g)(2) - (Interpreted)
5. Excise Duty Act, 2015 (Act No 23 of 2015) sections 28, 40 - (Interpreted)
6. Income Tax Act (cap 470) In general - (Cited)
7. Kenya Revenue Authority Act, 1995 (Act No 2 of 1995) section 13(3) - (Interpreted)
8. Miscellaneous Fees and Levies Act, 2016 (Act No 29 of 2016) In general - (Cited)
9. National Police Service Act, 2011 (Act No 11A of 2011) sections 24, 27, 35(b); 64 - (Interpreted)
10. Office of the Director of Public Prosecutions Act, 2013 (Act No 2 of 2013) sections 2, 5, 6, 20(1); 23, 26, 29, 50, - (Interpreted)
11. Penal Code (cap 63) section 2 - (Interpreted)
12. Tax Procedures Act, 2015 (Act No 29 of 2015) sections 4, 7, 95, 97(a); 104(1)(3); 105; 107; part II, VII - (Interpreted)
13. Tax Procedures Act, 2015 (Act No 29 of 2015) section 107 - (Unconstitutional)
14. Value Added Tax Act, 2013 (Act No 35 of 2013) In general - (Cited)

Regional Court

East Africa Community Customs Management Act, 2004 sections 4, 5(3); 7 - (Interpreted)

Advocates

Mr Paul Muite, Mr Kioko Kilukumi, Miss Gladys Mwangi for Petitioners
Miss Mwasao for 1st, 3rd, 4th Respondents
Mr Victor Mule, Miss Kihara, Miss Sigei for 2nd Respondents
Mr Ochieng, Mrs Kithinji, Mr Nyaga, Miss Mburugu for 5th Respondent
Miss Sheila Sanga for Interested Parties

JUDGMENT

Introduction:

1. The 1st to 6th petitioners, Geoffrey Kaaria Kinoti, Simon Maundu, Kepha Githu Gakure, Robert Thinji Murithi, Peter Njenga Kuria and Humphrey Kariuki Ndegwa respectively described themselves as Kenyan citizens.

2. The 7th and 8th petitioners, Africa Spirits Limited, Wow Beverages Limited respectively are limited liability companies carrying on business in Kenya.

3. Through an amended charge sheet, the National Police Service through the officer-in-charge of Muthaiga police station commenced criminal proceedings against the petitioners in Nairobi (Milimani) Chief Magistrate's Court Criminal Case No 1333 of 2019 (hereinafter referred to as 'the criminal case').

4. The charges in the criminal case related to offences under the tax laws in Kenya. The offences are as follows: -

Count i

Charge

Being in possession of excise stamps acquired without the authority of the commissioner contrary to sections 40, 28 of the *Excise Duty Act, 2015*, and regulation 30(1)(e) as read with regulation 30(2) of the *Excise Duty (Excisable Goods Management System) Regulations, 2017*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4 Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited 8. Wow Bevarages limited: between January 31, 2019 and February 7, 2019 within Thika town in Kiambu county, being the directors of Africa Spirits limited and Wow Beverages limited, tax manager, assistant production manager and limited liability companies respectively, jointly were found with possession of eight hundred and ninety-four (894) reels of counterfeit excise stamps acquired without the authority of the commissioner.

Count ii

Charge

Being in possession of excisable goods affixed with counterfeit excise stamps contrary to sections 40, 28 and regulation 30(1)(g) as read with regulation 30(2) of the *Excise Duty (Excisable Goods Management System) Regulations, 2017*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited 8. Wow Bevarages Limited: between January 31, 2019 and February 8, 2019 at Africa Spirits limited and WOW Beverages within Thika town in Kiambu county, being the directors of Africa Spirits limited and WOW Beverages limited, tax manager, assistant production manager and limited liability companies respectively, jointly were found in possession of one million, two hundred and fifty-one thousand and

ninety (Kshs 1,251,090) bottles of assorted alcoholic beverages affixed with counterfeit excise stamps packed in forty-one thousand seven hundred and three (41,703) cartons.

Count iii

Charge

Fraud in relation to tax contrary to section 97(a) as read with section 104(3) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited: Between the tax periods covering January 1, 2016 and December 31, 2016 being the directors of Africa Spirits limited a registered taxpayer chargeable to excise duty, tax manager, assistant production manager and limited liability company respectively, knowingly omitted from the return of excise for Africa Spirits limited an amount of two billion, twenty-two million, three hundred and forty thousand, two hundred ten Kenya shillings (Kshs 2,022,340,210.00) which ought to have been included in the said returns.

Count iv

Charge

Fraud in relation to tax contrary to section 97(a) as read with section 104(3) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3 Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6 Simon Maundu 7. Africa Spirits Limited: between the tax periods covering January 1, 2016 and December 31, 2016 being the directors of africa spirits limited a registered taxpayer chargeable to value added tax, tax manager, assistant production manager and limited liability company respectively, knowingly omitted from the VAT returns of Africa Spirits limited an amount of eight hundred and thirty-two million, forty-eight thousand, five hundred and forth three Kenya shilling (Kshs 832,048,543.00), which ought to have been included in the said returns.

Count v

Charge

fraud in relation to tax contrary to section 97(a) as read with section 104(3) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited: between the tax periods covering January 1, 2017 and December 31, 2017 being the directors of Africa Spirits limited a registered taxpayer chargeable to excise duty, tax manager, assistant production manager and a limited liability company respectively, knowingly omitted from the return of excise of Africa Spirits limited an amount of five billion, nine hundred eight-one million, eight hundred forty thousand, twenty-five Kenya shillings (Kshs 5,981,840,025.00) which ought to have been included in the said tax.

Count vi

Charge

fraud in relation to tax contrary to section 97(a) as read with section 104(3) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited: between the tax periods covering January 1, 2017 and December 31, 2017 being the directors of Africa Spirits limited a registered taxpayer chargeable to value added tax, tax manager, assistant production manager and limited liability company respectively knowingly omitted from the VAT returns of Africa Spirits limited an amount of two billion, one hundred eighty-eight million, six hundred twenty-four thousand, three hundred four Kenya shillings (Kshs 2,188,622,304.00) which ought to have been included in the said returns.

Count vii

Charge

Fraud in relation to tax contrary to section 97(a) as read with section 104(3) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited: between January 1, 2018 and December 31, 2018 the directors of Africa Spirits limited a registered taxpayer chargeable to excise duty, tax manager, assistant production manager and limited liability company respectively knowingly omitted from the return of Excise of Africa Spirits limited an amount of five billion, six hundred and seventy-three million, eight hundred twenty-nine thousand Kenya shillings (Kshs 5,673,829,000.00) which ought to have been included in the said returns.

Count viii

Charge

fraud in relation to tax contrary to section 97(a) as read with section 104(3) and 105 of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits limited between the tax periods covering January 1, 2018 and December 31, 2018 being the directors of Africa Spirits Limited a registered taxpayer chargeable to value added tax, tax manager, assistant production manager and limited liability company receptively knowingly omitted from the VAT returns of Africa Spirits Limited an amount of two billion, forty-two million, five hundred seventy-eight thousand, four hundred forty Kenya shillings (Kshs 2,042,578,440.00) which ought to have been included in the said returns.

Count ix

Charge

Aiding the commission of a tax offence contrary to section 101 as read with section 104(3) of the *Tax Procedures Act, 2015* .

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited 8. wow Bevarages limited: between January 31, 2019 and February 7, 2019 at Africa Spirits Limited premises within Thika town in Kiambu county, being the directors of WOW Beverages limited, tax manager, assistant production manager and limited liability company respectively, aided Africa Spirits limited to commit a tax offence namely fraud in relation to tax contrary to section 97(a) of the *Tax Procedures Act, 2015* by concealing eight hundred and ninety four (894) reels of excise duty stamps acquired without the authority of the commissioner.

Count x

Charge

Aiding the commission of a tax offence contrary to section 101 as read with section 104(3) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. wow Beverages Limited: between January 31, 2019 and February 7, 2019 at Africa Spirits limited and WOW Beverages limited premises within Thika town in Kiambu county, being the directors of wow Beverages limited, tax manager, assistant production manager and limited liability company respectively, aided Africa Spirits limited to commit a tax offence namely fraud in relation to tax contrary to section 97(a) of the *Tax Procedures Act, 2015* by unlawfully concealing one million, two hundred and fifty one thousand and ninety (1,251,090, bottles of assorted alcoholic beverages affixed with counterfeit excise stamps packed in forty one thousand, seven hundred and three (41,703) cartons.

Count xi

Charge

Failure to pay taxes by the due date contrary to section 95 as read with section 104(1) of the *Tax Procedures Act, 2015*.

Particulars of the offence

1. Humphrey Kariuki Ndegwa 2. Peter Njenga Kuria 3. Robert Thinji Murithi 4. Geoffrey Kaaria Kinoti Mbobua 5. Kepha Githu Gakure 6. Simon Maundu 7. Africa Spirits Limited: between the tax periods February 1, 2016 and December 31, 2018 being the directors of Africa Spirits Limited a licensed excise duty manufacturer and registered taxpayer chargeable tax to wit, excise duty and value added tax, tax manager, assistant production manager and limited liability company respectively, failed to pay taxes amounting to seventeen billion, seven hundred eighty-two million, five hundred fifty-three thousand, eighty-five Kenya shillings (Kshs 17,782,553,085.00) payable to the commissioner of domestic taxes by the due dates as required under the *Excise Duty Act*

5. Dissatisfied with the entirety of their prosecution, the petitioners lodged the instant petition primarily on three fronts.

6. Firstly, they contended that the charge sheet instituting the criminal charges emanated from the director of criminal investigations, the 3rd respondent herein, (hereinafter referred to as 'the DCI') whereas the *Constitution* requires all criminal prosecutions to originate from the director of public prosecutions, the 1st respondent herein.

7. The petitioners further challenged their prosecution on the basis that since the charges relate to the enforcement and administration of the tax laws of Kenya and the East African Community region, the DCI lacked the mandate and expertise to undertake investigations and/or administer and enforce the tax laws of Kenya and the East African Community region.

8. The petitioners contended that the tax investigations solely undertaken by the DCI was tantamount to the DCI arrogating itself the duty of enforcing and administering tax laws, an action outside their mandate.

9. The petitioner's position was that it is the commissioner general of Kenya Revenue Authority, the 5th respondent herein, who, in accordance to section 4 of the *East Africa Community Customs Management Act 2004*, (hereinafter referred to as "the EACMA 2004") is vested with the powers to appoint officers to manage and administer customs and coordinate and monitor the enforcement of customs law.

10. The petitioners further asserted that according to section 5(3) of the *EACMA 2004*, section 4 and 7 of the *Tax Procedures Act* No 29 of 2015, section 7 of the *EACMA* 2004 and the decision in High Court Misc Criminal Application No 407 of 2019, *African Spirits Limited v Director of Public Prosecutions & another*, it is only the commissioner general who may administer tax laws or authorize any officer to exercise any of the powers conferred to him by the law.

11. On the foregoing, the petitioners claimed that impropriety of their prosecution arose from the fact that the DCI officers who undertook investigations were never appointed or given authorization by the commissioner general to enforce any of the provisions of the tax laws they purported to enforce. As such their actions were illegal *ab initio*.

The Petition

12. Through the petition dated November 22, 2021, supported by two affidavits of Geoffrey Kaaria Kinoti deposed November 22, 2021 and December 10, 2021, the petitioners impugned their prosecution and sought to have this court stop the proceedings in the criminal case.

13. Simultaneously filed with the main petition was the notice of motion application dated November 22, 2021 brought under certificate of urgency and supported by the affidavit of Geoffrey Kaaria Kinoti, deposed to even date.

14. The application sought to interim conservatory orders halting any further proceedings of the criminal case pending *inter-partes* hearing of the application as well as the main petition.

15. In its ruling of November 16, 2021, this court stayed proceedings and hearing of the criminal case pending inter-partes hearing and determination of the application. It further ordered that the application be subsumed in the main petition and be heard together.

16. As has been elaborated in the introductory part of this judgment, the petitioners were variously accused of being in possession of excise stamps acquired without the authority of the commissioner general of Kenya Revenue Authority, being in possession of excisable goods affixed with counterfeit excise stamps, failing to pay taxes, fraud in relation to tax and aiding in commission of a tax offence in violation of *Tax Procedures Act* No 29 of 2015 and the *Excise Duty Act*, No 23 of 2015.

17. They impugned the criminal trial on the grounding that the investigations leading to their prosecution was conducted by "unauthorized" or "improper" officers.

18. The petitioners pleaded that the only officers of the DCI mandated to enforce and administer the tax laws are those seconded to the Kenya Revenue Authority Investigation and enforcement department by the DCI and who are specially trained in tax related matters and have become revenue protection services (RPS) officers of Kenya Revenue Authority.

19. They posited that under section 64 of the *National Police Service Act* No 11A of 2011, the DCI are required to exercise jurisdictional deference to other authorities that have been established by statute to fulfil their mandates.

20. On the foregoing, the petitioner posited that the all the evidence collected pursuant to the investigations conducted by the DCI was illegally obtained in contravention of article 50(4) of the *Constitution* and consequently could not be relied upon by the DPP in charging them.

21. The petitioners claimed that the DPP's purported appointment of public prosecutors from the KRA *vide* gazette notice No 3523 of 2021 (hereinafter 'the gazette notice') under section 85 of the *Criminal Procedure Code* was unconstitutional was in violation of article 156 of the *Constitution* which mandates it objectively evaluate evidence gathered by the investigators and consequently, violated their right to fair trial under article 50 since the DPP appointed the complainant, a partisan and conflicted person as prosecutor.

22. The petitioners averred that their prosecution was in contravention with the edicts of article 157(11) which requires prosecution to be conducted in public interest and in the interest of administration of justice.

23. The petitioner averred that their prosecution was not in consonance with article 31 of the *Constitution* and paragraph 4(B)(1) & (2) of the National Prosecution Policy which requires that the evidence available is admissible and sufficient and that it is in public interest that prosecution is conducted.

24. The 1st petitioner contended that despite being a director, he had no role in the management of the 7th respondent, and as such should not be held liable for actions committed in the course of its business.

25. In further expounding their inability to get fair trial, the petitioners pleaded that when the trial court visited the 7th petitioner's premises on July 21, 2020, July 24, 2020 and September 8, 2020, the 3rd and 5th respondents had carted away and or destroyed all exculpatory evidence.

26. While seeking to further buttress impropriety and illegality of the criminal case, the petitioners pleaded that there was already in existence Tax Appeals Tribunal No 83 of 2019 between the 7th petitioners and the 5th respondent in respect of contested variance between the 7th petitioner's actual production and the monthly returns.

27. It was their case that the decision of the 2nd and 3rd respondents to charge petitioners seeking the recovery of a sum of Kshs 17 billion is malicious, unconstitutional and without any legal backing as the tax assessment issued to the 7th petitioner after a comprehensive audit was Kshs 1,086,339,226.69.

28. The petitioners pleaded that the charges against them were instituted at the behest of the 2nd 3rd and 4th respondent. It was their contention that section 107 of the *Tax Procedures Act 2015* subdue the *Constitution*.

29. It was their case that the 3rd respondent's purported enforcement and administration of tax laws was arbitrary and *ultra vires* its powers since such mandate is for the 5th respondents.

30. They reiterated that investigations undertaken by the 3rd respondent were illegal and failed to follow due process as envisaged under part VII of *Tax Procedures Act 2015* and the *East African Community Customs Management Act 2004*.

31. They pleaded that the arrest and charges on the 4th, 6th and 8th petitioners by the 2nd and 3rd respondents was illegal and in violation of article 10 and 73 of the *Constitution* since they are not directors of the 7th petitioners.

32. In sum the petitioners contended that the decision to investigate charge and prosecute them was unconstitutional, illegal, unreasonable, arbitrary, unlawful and without justification and in violation of articles 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 & 260 of the *Constitution*. They sought the following orders;

    a. A declaration that with the destruction and or carting away of all the exculpatory evidence by the 3rd and 5th respondents, a fair trial within the meaning of article 50(2) of the *Constitution* has been irretrievably rendered impossible as against all the petitioners.

    b. A declaration that the role of a complainant, an investigator and a prosecutor cannot be combined into one hand in the criminal justice system designed by article 50 and 157 of the *Constitution*.

    c. A declaration that a complainant cannot be appointed a private prosecutor because such prosecutor will lack the essential and critical independence required by article 157(10) of the *Constitution*.

    d. A declaration that a charge sheet in criminal proceedings cannot be instituted by the Kenya police and a charge sheet cannot be signed by police officers, for to do so is to violate article 157(6)(a) of the *Constitution*.

    e. A declaration that the evidence intended to be presented at the trial was illegally obtained in violation of article 31 of the *Constitution*, thereby rendering a fair trial under article 50(2) of the *Constitution* impossible.

    f. A declaration that the 1st, 2nd and 3rd respondents violated articles 27, 50, 73 and 157(11), as well as the provisions of chapter six of the *Constitution of Kenya 2010*.

    g. A declaration that the 2nd, 3rd and 5th respondents violated the petitioners' right under article 27 of the *Constitution* regarding the right to equality and freedom from discrimination by unlawfully, illegally, selectively and discriminately pursuing investigations and prosecution against the petitioners.

    h. A declaration that the actions of the respondents have violated the provisions of sections 2(1) and (2), and part II and VII of the *Tax Procedures Act* No 29 of 2015.

    i. A declaration that the 2nd respondent in making a decision to charge the petitioners abdicated his constitutional duty by failing to prevent and avoid the abuse of the legal process in instituting Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.

    j. A declaration do issue that the prosecution of the petitioners in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019 in the manner proposed and so far undertaken is unfair, discriminatory, an abuse of the process of the court, irrational, unreasonable, malicious, vexatious, oppressive and therefore unconstitutional and unsustainable.

k. An order be issued prohibiting the respondents from sustaining, proceeding, hearing, conducting, or in any manner dealing with the charges laid or proceedings conducted in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019 or instituting any other charges in any other court or tribunal against the petitioners over or arising from the same investigation, facts or subject matter.

l. An order be issued quashing and or setting aside the 5th respondent's assessment and demand contained in the letter dated January 17, 2019 addressed to Africa Spirits limited.

m. An order prohibiting the 5th respondent from issuing any assessment and demand against or to the petitioners over or arising from the period 2016 to 2019, the same investigation, facts or subject matter.

n. An order prohibiting the 1st respondent from presiding and or conducting the trial of the petitioners in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.

o. A declaration do issue that the charges and proceedings in the Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019 are unconstitutional and an abuse of the legal process and the same should be terminated forthwith; stopped and/or quashed.

p. A declaration that the 2nd respondent violated the petitioners' right under article 27(2) of the *Constitution* in that the prosecution was discriminatory and failed to treat the petitioners equally with other taxpayers by not affording them equal protection and equal benefit of the law.

q. A declaration that section 107 of the *Tax Procedures Act, 2015*, is unconstitutional.

r. A declaration that the gazette notice No 3523 published on April 15, 2021 is unconstitutional and that the appointments made thereunder are illegal.

s. An order prohibiting the 8th, 9th & 10th interested parties from prosecuting any of the cases listed under gazette notice No 3523/2021.

t. Damages to be assessed by the court for violation of the bill of rights.

u. Any other relief that court may deem just and expedient in the circumstances.

v. That the costs of this petition be borne by the respondents.

33. The petitioners further urged their case through written submissions dated January 11, 2022. It was their case that this court has the mandate to intervene and issue prohibition orders where the prosecution is demonstrated to have exceeded their mandate. To that end the Court of Appeal decision in *Joram Mwenda Guantai v Chief Magistrate, Nairobi* was relied on. It was observed;

> ...the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression

34. In demonstrating incidence of lack of independence, the petitioners submitted that none of the interested parties was appointed under section 20(1) of the ODPP Act as a prosecution assistant. Reliance was placed on the decision in *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (interested party); ex parte James M Kahumbura* where it was observed that The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the DPP and police demand nothing less.

35. The petitioners submitted that the institution of the criminal case pending hearing and determination of the tax appeal dispute between eh 7threspondent and the 5th respondent was a demonstration of incidence of malicious prosecution to intimidate and oppress the 7th petitioner and its ability to prosecute the tax tribunal case. To that end the decision in *Rana Auto Selection Limited & 2 others v Kenya Revenue Authority & another* [2021] eKLR was relied upon.

36. It was submitted that they will not get fair trial after the respondents had carted away and destroyed all exculpatory evidence.

37. On a different facet of the criminal case, the petitioners submitted that their right to equal treatment of the law as guaranteed under article 27 of the *Constitution* was violated as the 2nd 3rd and 5th respondents selectively and discriminately pursued investigations and prosecution against them. It was their case that there are many taxpayers whose tax disputes are pursued through the tax appeal tribunal without concurrent criminal prosecutions.

38. Reliance was placed on the decision in *Jimbise Limited & 2 others v Kenya Revenue Authority*, *Republic v Kenya Revenue Authority ex parte Style Industries*, *Krystalline Salt Limited v Kenya Revenue Authority* to fortify the position that actions by the respondents were discriminatory as there was no basis for institution of criminal proceedings against the petitioners when there was a tax law disputes are resolved in the tax appeals tribunal.

39. The petitioners further submitted that their right privacy were violated when the 3rd and 5th respondents accessed the premises of the 7th petitioner on January 30, 2019 without search warrants. Reference was made to the statement of Teresa Wangari Wanjagua recorded on March 21, 2019.

40. As a result of the foregoing, the petitioners submitted that the evidence was illegally obtained in violation of article 50(4) of the *Constitution* and the decision in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (amicus curiae)* [2019] eKLR where it was observed;

> (116) . . .Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged

41. On the limb of the charge sheet originating from the Kenya police instead of the director of public prosecutions, the petitioners submitted that the consolidated charge sheet was signed by the officer in charge Muthaiga police station.

42. To emphasize the fact that the DPP cannot claim the charge sheet to be their document, it was submitted that parole evidence rule bars them from claiming orally that the charge sheet is theirs whereas the amended sheet shows to have been authored by the police.

43. The authorship of the charge sheet was faulted for being in contradiction of guidelines on the decision to charge, 2019 on July 28, 2020 which places the duty upon the prosecutor at paragraph 4.3 to "draft the charges, stamp and sign then place their initials and rank on the charge sheet..."

44. In claiming that their prosecution was without probable cause, the petitioners submitted that the criminal case was a proper one for the honourable court to examine and satisfy itself if there were reasonable causes to prosecute the petitioners in light of the evidentiary test laid down by the ODPP.

Support was found it eh decision in *Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others* where it was observed;

Where a prosecution is based on a complete misapprehension of the facts and the applicable law and where a suspect is being lumped together with others for no credible reason, that is what is called abuse of the process of the court.

45. In submitting that their prosecution was against public interest, it was submitted that the respondents' seizure of the premises of the 7th petitioner and their refusal to release the same to date, despite a court order, led to massive job losses. Further that 5th respondent had denied itself the revenue it ordinarily collected from the 7th and 8th petitioners. Support was found in the case of *Mount Kenya Breweries Limited v Kenya Revenue Authority* where it was observed;

> "When the respondent proceeds to kill businesses in the guise of collecting taxes, it becomes an undertaker and will itself eventually die since its survival depends on the existence of income generating businesses from which it can collect taxes"

46. In the end, the petitioner submitted that their prosecution by the 2nd and 3rd respondent was an example of jurisdictional overreach on a matter that belonged to eh 5th respondents and the organs therein to deal with the tax disputes. Court was referred to the decision in *Africa Spirits Limited v Director of Public Prosecutions & another (interested party) WOW Beverages Limited & 6 others* where it was observed;

> "In performance of his duties, the directorate of criminal investigations must exercise jurisdictional deference to other authorities that have been established by statute to fulfill their mandates (see section 64 of the *National Police Service Act*). In this case, it is evident that there was an element of jurisdictional overreach by the directorate of criminal investigations on matters which are statutorily under the jurisdiction of the asset recovery authority and the Kenya Revenue Authority."

47. On totality of the foregoing submissions, the petitioners urged the court to allow the petition as prayed.

1st And 4th Respondents' Case:

48. The 1st and 4th respondents, the Chief Magistrate's Court Milimani Law Courts and the Hon Attorney General respectively) opposed the petition through grounds of opposition dated November 26, 2021. They urged their case as follows;

1. That the 1st respondent participation in these proceedings will create an impression of bias and therefore prejudicing the parties' right to a fair hearing as provided in the *Constitution of Kenya*.

2. That there are available avenues provided by the law for the petitioners to pursue if the petitioners are dissatisfied with the orders/rulings made by the 1st respondent in allowing the application for the consolidation of the criminal cases.

3. That the 4th respondent's office, pursuant to its role under article 156 in particular sub-article 4(b), is to represent the national government in court or any other legal proceedings other than criminal proceedings. Thus, the petitioners' allegation in paragraph 81 of their petition is misdirected and unsubstantiated.

4. That other particularising the articles of the *Constitution*, the petitioners have not demonstrated how the 1st and 4th respondent have violated their constitutional rights.

5. That there is no cause of action competently raised against the 1st and 4th respondents.

The 2nd Respondent's Case:

49. The 2nd respondent opposed the petition through written submissions dated November 3, 2021.

50. It lodged its first attack on the petition claiming that the petitioners failed to demonstrate how have their fundamental rights enshrined in the *Constitution* been violated by the respondents as to entitle them to reliefs sought, a requirement established by the long standing case of *Anarita Karimi Njeru v the Republic* (1976-I980) KLR 1272.

51. On propriety of the gazette notice appointing special prosecutors, it was submitted that based on the provision of section 2 of the ODPP Act, that defines a public prosecutor, article 157(9) of the *constitution* on powers of the prosecutor, section 20 of ODPP Act on delegation of powers by the ODPP as read with section 85(1) of the *Criminal Procedure Code*, it was submitted that the delegation was done in accordance with the law.

52. To buttress the foregone, the decision in *Kenya Commercial Bank Limited & 2 others v Commissioner of Police and another*, was relied upon where it was observed that;

> The office of the director of public prosecution and inspector general of the national police service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law.

53. In making its case that the criminal case was founded on reasonable suspicion and was prosecuted in public interest, reliance was sourced from the decision in *Mohamed Ali Swaleh v Director of Public Prosecution & Another*- High Court Mombasa Petition No 2 of 2017 where it was stated that;

> the decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in o court of law.

54. In pleading with the court to abide by the doctrine of separation of powers, it was submitted that the court should allow the various organs of government to operate independently. It was its case that too much superintendence by one organ could render the other arms of government dysfunctional, is a threat of the rule of law and could lead to a constitutional paralysis or crises in government.

55. This court was urged to exercise judicial deference and dismiss the petition.

The 3rd Respondent's Case:

56. The 3rd respondent urged its case through the affidavit of No 67707, PC Shem Gichuki the police officer attached to the economic and commercial crimes unit of the directorate of criminal investigations, deposed to on December 8, 2021.

57. In reference to article 243, 238, 238, 239,244 and 247 that give effect to the *National Police Service Act*, he deposed that section 28, 35 of the NPS Act give the DCI the mandate to investigate and collect intelligence on all criminal matters.

58. He deposed that fraudulent or unlawful failure to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.

59. He stated that according to section 35 of the NPS Act, the 3Rd Respondent undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others.

60. He deposed that section 64 of the *National Police Service Act* is permissive thus allowing the police to approach the court for purposes of gaining orders to carry our investigations.

61. It was his deposition that the search warrant was obtained by the authority of the court as provided for under section 118, 120 and 121(d).

62. On the foregoing, he stated that he evidence acquired as not illegally obtained and as such is admissible in court.

63. In justifying the sustained holding of the 7th petitioner's premises, he deposed that the premises was a scene of crime even before the application for release of the premises was made.

64. With respect to the clam by the petitioner that he 1st petitioner was separate from the 7th entity, he deposed that they are one since the petitioner cannot be formed nor function without directors who are the decision makers.

The 1st 3rd & 4 Respondents' Submissions:

65. In its joint written submissions dated February 1, 2022, the 1st and 4th the respondent urged its case as in the grounds of opposition.

66. The 3rd respondent opposed the petition by submitting that it is the directorate of criminal investigation that has the mandate under section 28 and 35 of the *National Police Services Act* as the investigative agency of all criminal matters.

67. It was its submission that tax related offences are economic crimes in nature and fall within the mandate of the 3rd respondent and specifically under section 35(b) of the *National Police Service Act* No 11A of 2011.

68. It submitted that directorate worked in a multi-agency framework with the 5th respondent and according to section 35(b) of the *National Police Service Act* there is no special training required for police officers to suspect excise stamps to be counterfeit and carry out an investigation to establish the same.

69. In rebutting the fact that exculpatory evidence was taken away, it was submitted that the only items removed from the scene of crime are those to be used for evidence and that an inventory was prepared and signed appropriately.

70. While relying on section 89(4) of the *Criminal Procedure Code*, it was submitted that a police officer is empowered to draw, sign and file a criminal complaint before a court of law.

71. The 3rd respondent drew the distinction of the mandate of the 3rd and 5th respondent by submitting that the criminal charges were as result of suspected criminal acts out of a criminal investigation by the 3rd respondent whilst the tax dispute was as a result of administering tax laws by the 5th respondent.

72. In asserting propriety of the gazette notice appointing prosecutors, it was submitted that under section 29 of the *Director of Public Prosecution Act* the 2nd respondent has the discretion to appoint the

interested parties as prosecutors. To this end, the Court of Appeal decision in *Kamau John Kinyanjui v Republic* [2010] eKLR where it was observed *inter alia* that;

> " all criminal prosecutions in Kenya, whether they be instituted by a private person or by the Attorney-General, are always headed: - "Republic, ie the Republic of Kenya v the accused person." It is the republic which undertakes the prosecution for a crime on behalf of the victim of the crime and in doing so, the republic is acting on behalf of all Kenyan
>
> We repeat that except in those rare cases where the court has allowed a private prosecution, the complainant envisaged in the various provisions of the Criminal Procedure Code is always the republic."

73. In stating that the charge sheet was not defective the 3rd respondent submitted that section 89(4) of the *Criminal Procedure Code*, cap 75 (the "CPC") authorises the police officers to sign and present charge sheets while instituting proceeding. It was their case that there is no provision under the *Constitution* or any other written law that provides that a charge sheet can only be signed by the office of the director of public prosecution.

74. It was its case that since no court has declared section 89 of the CPC unconstitutional and no prayer prays for such, he police have authority to sign and present a charge sheet.

75. In response to the claim that the criminal case was illegal on account of existence of tax appeal before the tax tribunal, it was submitted that the criminal case and the tax appeal are two different jurisdictions. Reliance was placed on the decision in *Rana Auto Selection Limited & 2 others v Kenya Revenue Authority & another* [2021] eKLR, where it was observed;

> " Therefore, the tax appeals tribunal and the Magistrates Court have different jurisdictions when it comes to civil and criminal aspect of tax matters respectively and both have competent concurrent jurisdictions to hear and determine matters within their respective jurisdictions"

76. In the end it was the 3rd respondent's case that the petition and application is an abuse of the court process. It stated that the criminal case is properly before the magistrate court and the issues raised by the petitioners can be competently dealt with by the trial court.

The 5th Respondent's Case:

77. The 5th respondent opposed the petition and the notice of motion through the replying affidavit of Dennis Kibara deposed to on December 7, 2021.

78. The deposed that in order to ensure everyone pays their share of taxes the *excise duty Act*, the *Value Added Tax Act Income Tax Act* and the *Tax Procedures Act* provide for criminal prosecution of persons who evade tax.

79. It was his case that the gazettement of interested parties does not make the complainant the investigator and prosecutor in the case since the 5th respondent's role in the criminal case is to provide witnesses.

80. He deposed that the republic is the complainant in the criminal case and the 2nd respondent is the institution prosecuting the criminal case and under section 29 of the *ODPP Act*, the director may appoint any qualified person to prosecute on his or her behalf a person who shall be known as public prosecutor.

81. He deposed further that under section 107 of *Tax Procedures Act*, KRA has the authority to prosecute tax offences under tax laws and also exercise such authority under the direction of the 2nd respondent.

82. As regards propriety of the charge sheet he deposed that the same were brought by the Kenya police upon multi-agency investigations being done and were subsequently registered by the 2nd respondent who upon reviewing the investigations preferred charges in the impugned criminal case.

83. In response to the tax appeal case he deposed that the criminal case has no relationship with it since what is before the tax tribunal relates to variance between electronically filed excise return and data from the electronic goods management system. He deposed that in the criminal case, what is before the court is tax evasion scheme.

84. In the end, he urged the court to dismiss the petition for lack of merit.

The Submissions:

85. The 5th respondent further urged its case through amended written submissions dated February 4, 2022.

86. It was its case that appointment of the interested parties was done in accordance to section 85(1) of the *Criminal Procedure Code* a position ratified by article 157(9) of the *Constitution*.

87. It was its case that the interested parties were qualified to be appointed as public prosecutors and since the petitioner's criminal case was technical in nature it needed experts in its prosecution.

88. It submitted that the petitioners will be accorded fair hearing since the role of the 5th respondents in the criminal case is to only provide testimony, as such there is no conflict of interest. To buttress independence of the prosecution the Court of Appeal case in *Republic v Faith Wangoi*[2015] eKLR where it was observed that the complainant in every criminal case is the republic.

89. To dispel the allegation of conflict of interest, reliance was placed in the decision in *Riley Falcon Security Services Limited v Samuel Michael Onyango & 5 others* [2017] eKLR and the decision in *Imena v Ethuro* 2005 1 KLR 417 where the following was said respectively;

> " each case must turn on its own facts to establish whether real mischief and real prejudice will result."
>
> "An advocate will only be barred from acting only where it is demonstrated that a real mischief and real prejudice will in all human probability occur."

90. In respect to carting away exculpatory evidence the 5th respondent largely reiterated the 1st, 2nd & 3rd respondents case. It was its case that the allowing the prayers sought in the petition in relation to any handling of evidence will be akin to inviting the court to assume the role of the trial court and evaluate the defence and prosecution case in advance and or usurp the powers of the 2 respondent to prosecute. To that end support was found in the case of *Republic & 2 v Director of Public Prosecutions others ex-parte Stephen Mwangi Macharia* [2014] eKLR.

91. In denying any incidence of discrimination, it was submitted that the petitioner failed to point out based on which ground envisaged under article 27(4) that they are discriminated. It was their case that they did not pointed out which class of persons of similar group as them is treated preferentially.

92. The 5th respondent further submitted that the existence of both the tax appeal and the criminal proceedings was allowable in law. Reference was made to section 193(A) of the *Criminal Procedure Code* that permit concurrent criminal and civil proceedings.

93. In the end, the 5th respondent submitted that prosecution of the petitioners was in public interest and was arrived at with reasonable and probable cause, it urged the court to dismiss the petition.

Interested Parties' Case:

94. The 1st 2nd & 3rd interested parties opposed the petition through the replying affidavit of Sheila Sanga deposed to on December 7, 2021. She generally reiterated their case as made by the respondents.

95. On propriety of their appointment as public prosecutors, the deponent stated that at the time of their gazettement, they were employees of the KRA under section 13(3) of the KRA Act.

96. She deposed that according to section 26 of the *ODPP Act* and article 157(9) of the *Constitution*, the DPP is bestowed with state power to prosecute and may appoint any qualified person to that end.

The Submissions:

97. In their written submissions dated January 26, 2022, it was submitted that this court should not interfere with the criminal case because the director of public prosecutions did not exceed its mandate or acted in contravention of the law. Support was found in the Court of Appeal decision in of *Diamond Hasham Lalji & another v Attorney General and 4 others* [2018] eKLR where it was observed;

> " Thus, the exercise of prosecutorial discretion enjoys some measures 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"

98. On the question of the 2nd interested party not having a practising certificate, it was submitted that the criminal case will not be rendered illegal. The Supreme Court authority in *National Bank of Kenya Ltd v Anaj Warehousing Limited* [2015] eKLR was relied on where it was observed;

> The position in law now is that an advocate without a practicing certificate can draw and file documents but even as he does so, he commits a professional misconduct. This amendment was necessitated by the judgment of the Supreme Court referred to above. What remains clear though as held by the Supreme Court, is that other categories of unqualified persons such as an advocate whose name has been struck off the roll of advocates cannot draw or sign legal documents since those documents are void for all purposes.

99. In conclusion, the interested parties submitted that there was no demonstrable conflict of interest and that the petitioner had failed to avail evidence to show that their prosecution should be stopped.

100. They urged the court to dismiss the petition with costs.

Issues for Determination:

101. Having carefully considered the materials filed in this matter, I will, in the first instance, deal with four issues. Depending on the outcome of the four issues, the court will, thereafter, determine whether to generate further issues for determination.

102. The initial four issues for discussion are as follows: -

a. Whether the petition has attained the precision test so as to properly invoke the jurisdiction of the court.

b. In the event issue (a) above is answered in the affirmative, whether the criminal justice system designed under articles 50 and 157 of the *Constitution* allows the role of a complainant, an investigator and a prosecutor to be undertaken by a single person or entity.

c. Whether under article 157(6)(a) of the *Constitution* a charge sheet in criminal proceedings can be instituted by the Kenya police and a charge sheet be signed by police officers.

d. Whether section 107 of the *Tax Procedures Act, 2015* is unconstitutional and whether the gazette notice No 3523 published on April 15, 2021 is unconstitutional and that the appointments made thereunder are illegal.

103. I will deal with the above issues *in seriatim.*

analysis and determination:

a. Whether the petition has attained the precision test so as to properly invoke the jurisdiction of the court:

104. This issue was raised by the 2nd respondent.

105. This court has, many a times, dealt with the issue of precision of pleadings. Be that as it may, courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position.

106. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (commonly referred to as 'the Mutunga Rules'), being a constitutional instrument, provides for the contents of petitions in rule 10.

107. The said rule 10 of the Mutunga Rules further urges courts to accept even an oral application, a letter or any other informal documentation as long it discloses denial, violation, infringement or threat to a right or fundamental freedom and treat such as a petition. It is the court's duty to reduce an oral application into writing.

108. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR had the following in the manner in which constitutional petitions ought to be presented before court for adjudication: -

> although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic,* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

109. Petitions, therefore, must be clear on what they challenge. The nexus between the *Constitution* and the alleged violation ought to be precise, hence, the precision principle.

110. The precision principle basically emphasizes the position that petitions must raise constitutional issues. I will, therefore, albeit briefly look at what constitutional issues are.

111. In *Fredricks & others v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a constitutional court as follows: -

> The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the bill of rights. If regard is had to this and to the wide scope and application of the bill of rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

112. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

113. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a constitution. Such protections may be in respect to the bill of rights or the *Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC): -

> ... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...

114. Whereas it is largely agreed that the *Constitution of Kenya, 2010* is transformative and that the bill of rights has been hailed as one of the best in any constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal v Manjit Singh Amrit* case (*supra*) '... courts must interpret it with all liberation they can marshal...'

115. Resulting from the above discussion and the definition of a constitutional issue, this court is in agreement with the position in *Turkana County Government & 20 others v Attorney General & others* (2016) eKLR where a multi-judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

116. I have perused the petition. It has several parts including the description of the parties, the constitutional foundation of the petition, the factual matrix, the violations and the reliefs sought.

117. The petition clearly brings out the alleged violations of the *Constitution*, the manner the violations were inflicted and the effect of the violations on the petitioners.

118. It is this court's position that the petition fully complied with rule 10 of the Mutunga Rules as well as the requirements in Communications Commission case (*supra*). I must, therefore, find and hold, which I hereby do, that the submission that the petition is devoid of clarity that it fails to properly invoke the jurisdiction of this court cannot be maintained. The same is for rejection.

119. As the first issue is answered in the affirmative, this court will now deal with the next issue.

b. Whether the criminal justice system designed under articles 50 and 157 of the *Constitution* allows the role of a complainant, an investigator and a prosecutor to be undertaken by a single person or entity:

120. To enable a better discussion on this issue, it is imperative to understand what a criminal justice system is.

121. Generally speaking, a criminal justice system is the network of systems and processes aimed at managing persons accused of committing crimes until when such persons, if found culpable, are eventually released from correctional and rehabilitation institutions. The criminal justice system is comprised of multiple interrelated pillars, consisting of law enforcement, forensic services, the courts and correctional services.

122. An American scholar had the following to say about a criminal justice system: -

> Criminal justice is a process, involving a series of steps beginning with a criminal investigation and ending with the release of a convicted offender from correctional supervision. Rules and decision making are at the centre of this process.

123. Menrado Valle-Corpuz, a state prosecutor with the National Prosecution Service, Department of Justice, Philippines in a paper entitled The Role and Function of the Prosecution in the Philippine Criminal Justice System had the following to say on the criminal justice system: -

> The criminal justice system, essentially, is the system or process in the community by which crimes are investigated, and the persons suspected thereof are taken into custody, prosecuted in court and punished, if found guilty, provisions being made for their correction and rehabilitation.

124. Given the nature of a criminal justice system, suffice to say that the overall purpose of a criminal justice system is to prevent crime and to create a peaceful and law-abiding society. In other words, it is a system aimed at maintaining law and order and to also maintain the social solidarity of the society.

125. In Kenya, the main pillars in the criminal justice system include investigations, arrest, arraignment before a court of law, trial and sentencing and post-sentence services.

126. The criminal justice system in Kenya is firmly anchored in the *Constitution* and the law. Both make robust provisions aimed at ensuring that the system remains fair and just to all players. Since the system deals with persons accused of criminal culpability, a lot of premium is placed on the bill of rights.

127. The *Constitution* and the law provides for how and by who investigations and prosecutions are to be carried out, the manner in which arrests are to be conducted, court trials and post-sentencing services.

128. Chapter 14 of the *Constitution* elaborately provides for national security.

129. Article 238 is on the principles of national security. It defines 'national security' as 'the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. It is that protection which forms part of the criminal justice system.

130. The national security is anchored on four principles. They are that national security is subject to the authority of the *Constitution* and parliament, that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental

freedoms, that in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya and that the recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

131. Article 239 of the *Constitution* is on the national security organs. They are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.

132. The primary objective of the national security organs and security system is to promote and guarantee national security in accordance with the principles in article 238. In line with that,the *Constitution* calls upon the organs not to act in a partisan manner, not to further any interest of a political party or cause and not to prejudice a political interest or political cause that is legitimate under the *Constitution*.

133. Whereas the Kenya Defence Forces are mainly responsible for the defence and protection of the sovereignty and territorial borders and integrity of our republic, the National Police Service majorly deals with maintaining law and order within the Kenyan territorial borders.

134. By its nature, the National Police Service is one of key players in the criminal justice system in Kenya. Other players include the director of public prosecutions, the courts and the correctional services.

135. Having said so, I will now look at the National Police Service as established in the *Constitution* and the law.

136. Article 243 of the *Constitution* establishes the National Police Service to be comprised of the Kenya Police Service and Kenya Administration Service. The National Police Service is under the command of the Inspector General.

137. The Inspector General enjoys operational autonomy in respect to the conduct of any investigation, law enforcement and employment matters. It is only the director of public prosecutions under article 157(4) of the *Constitution* who has power to direct the Inspector General to investigate any matter of criminal conduct and the Inspector General must comply.

138. There is also the cabinet secretary responsible for police services who may give the Inspector General direction with respect to any matter of policy.

139. Article 243(4) of the *Constitution* empowered parliament to legislate to give full effect to the article. As a result, parliament enacted the *National Police Service Act*, No 11A of 2011 (hereinafter referred to as 'the Police Act') as an act of parliament to give effect to articles 243, 244 and 245 of the *Constitution*; to provide for the operations of the national police service; and for connected purposes.

140. The Police Act provides the functions of *inter alia* the Kenya Police Service, the Administration Police Service and the director of criminal investigations under sections 24, 27 and 35 respectively.

141. The functions are as follows: -

> 24. The functions of the Kenya police service
>
> The functions of the Kenya police service shall be the-
>
> 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.

27. The functions of the Administration Police Service

The functions of the Administration Police Service shall be the-

(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) provision of border patrol and border security;

(f) provision of specialized stock theft prevention services;

(g) protection of government property, vital installations and strategic points as may be directed by the Inspector-General;

(h) rendering of support to government agencies in the enforcement of administrative functions and the exercise of lawful duties;

(i) co-ordinating with complementing government agencies in conflict management and peace building;

(j) apprehension of offenders;

(k) 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.

35. Functions of the director:

the director shall-

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

142. The Director of Public Prosecutions (hereinafter referred to as 'the DPP') is also a key stakeholder in the criminal justice system. The office is established under article 157 of the *Constitution*.

143. The powers of the DPP are specifically provided for in sub-articles 4, 6 and 10 as under: -

(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 clauses (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.

144. The powers of the DPP are further dealt with under the Office of Director of Public Prosecutions Act, No 2 of 2013 (hereinafter referred to as 'the ODPP Act').

145. Section 5 of the ODPP Act provide the powers and functions of the DPP whereas section 6 is on the independence of the DPP.

146. On control of prosecutions, section 23 of the ODPP Act provides as follows: -

23. Control of prosecutions

(1) Notwithstanding the provisions of any other law, it shall be the function of the director to —

(a) decide to prosecute or not to prosecute in relation to an offence;

(b) institute, conduct and control prosecutions for any offence;

(c) carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and

(d) take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority.

147. Section 50 of the *ODPP Act* gives powers to the DPP to make regulations. One of such set of regulations is in respect of giving guidance and regulation in the submission of information and carrying out of investigations.

148. Flowing from the foregoing, a key distinction in the functions of the National Police Service and the DPP is that whereas the National Police Service is limited to undertaking investigations on criminal culpability and may even recommend charges against the suspects, the DPP then receives and reviews the evidence from the National Police Service and has the sole discretion over the decision on the way forward. The DPP may agree or disagree with the recommendations made. Further the DPP has the unfettered power to direct the National Police Service over any investigations.

149. In other words, once the National Police Service conducts and completes any investigations and makes recommendations then, unless sanctioned by the DPP to arrest suspects or to undertake further investigations over the matter, that is the end of the role of the National Police Service in the criminal justice system. The matter is then taken over by the DPP.

150. It is the DPP to decide on whether or not to prefer any charges against the suspects, if any, since the DPP is not bound by the recommendations made by the National Police Service. Therefore, as long as the DPP is acting within the *Constitution* and the law, it has the discretion of making any appropriate order in a matter including closure of the police file.

151. The above finds favour in the candid discussion by Odunga, J in *Engineer Geoffrey K Sang v Director of Public Prosecutions & 4 others* (2020) eKLR where in laying the basis that an entity must strictly operate within its constitutional and legislative limits stated thus: -

> 122. In this petition, one of the challenges taken by the petitioner revolves around the prosecutorial powers. It is clear that neither the concerned the Directorate of Criminal Investigations nor the Inspector General of police has any prosecutorial powers.
>
> 123. The law is very clear that powers must be expressly conferred; they cannot be a matter of implication. In testing whether a statute has conferred jurisdiction on a person or authority, wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a statutory tribunal created statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore, where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See *Chogley v The East African Bakery* [1953] 26 KLR 31 at 33 and 34; *Re: Hebtulla Properties Ltd* [1979] KLR 96; [1976-80] 1 KLR 1195; *Choitram v Mystery Model Hair Salon* (*supra*); *Warburton v Loveland* [1831] 2 DOW & CL (HL) at 489; *Lall v Jeypee Investments Ltd* [1972] EA 512 at 516; *Attorney General v Prince Augustus of Hanover* [1957] AC 436 AT 461.
>
> 124. It is therefore clear that statutory power must be conferred by the statute establishing an entity which statute must necessarily set out its powers expressly since such entities have no inherent powers. Unless its powers are expressly donated by the parent statute, the authority or person cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic v Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 others* [2004] 2

KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

125. Therefore, where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative or executive bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See *Re Hardial Singh and others* [1979] KLR 18; [1976-80] 1 KLR 1090.

152. Further, in demarcating the limits of the National Police Service and the DPP in respect to the power to undertake prosecutions, the court stated as follows: -

126. In this case in terms of prosecutorial powers, the Director of Public Prosecutions may pursuant to article 157(4) of the Constitution, 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. Upon receipt of such directions, pursuant to section 35(h) of the National Police Service Act, the Inspector General of Police may direct the Directorate of Criminal Investigations to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to article 157(4) of the Constitution. Clearly therefore there is a clear chain of command set out hereinabove. When it comes to the exercise of prosecutorial powers, as between the three entities, the Director of the Public Prosecutions has the last word. In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.

127. What the foregoing provides is that each of the three entities must of necessity stay on their respective lanes. Any attempt by any of them to trespass onto the other's lane can only end up disastrously. In simple terms an attempt by the Directorate of Criminal Investigations to charge a person with a criminal offence without the consent of the Director of Public Prosecutions is *ultra vires* the power and authority of the Director of Criminal Investigations and amounts to abuse of his powers. It is therefore null and void *ab initio*.

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".

129. Under article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words, the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under article 157(11) of the Constitution, enjoined to 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. In other words, the DPP ought not to exercise his/her constitutional mandate arbitrarily.

153. The court further remarked that: -

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.

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

154. In the end, the learned judge stated that: -

143. Orderliness requires that the holders of the offices of the Director of Public Prosecution, the Inspector General of Police and the Director of Criminal Investigations properly understand their powers and their limits. They must not through administrative or other craft or by innovation conjure imaginary powers which they in fact do not possess.

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.

155. In a like decision recently rendered by Korir, J in Nairobi High Court Constitutional Petition No E266 of 2020 *Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & Hon Attorney General (interested parties); International Commission of Jurists (Kenya Section) amicus curiae (unreported)* delivered on 24th March, 2022 the court in discussing the rubric 'who between the DPP and the Inspector-General of Police is mandated to make the decision to charge?' partly stated as follows: -

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 SCR 565, at paras 27 to 36, and *R v Regan*, [2002] 1 SCR 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 SCR 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, RSC 1985, c C-46, ss 579 and 5791; (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 CCC (2d) 405 (NBCA); and (e) the discretion to take control of a private prosecution: *R v Osiowy* (1989), 50 CCC (3d) 189 (Sask CA). 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 v 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 v 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 & another v 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 v Republic* (*supra* at p100), 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."

156. The learned judge went on to state that: -

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."

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.

157. In the end, the learned judge summed up the discussion as follows: -

> 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.

158. This court agrees with the above arguments and findings.

159. The foregoing was also vouched by the Supreme Court of India in *S B Shahane and Others v State of Maharashtra and another* 1995 Supp (3) SCC 37 where the apex court stated as follows: -

> In other words, the law commission strongly felt the need of prosecutors conducting the prosecutions in courts independently of the police department that had investigated the cases in respect of which prosecutions were launched or of officers of the police department who were very much interested in such investigations so as to conform to the basic salutary

rule of prosecution of criminal cases that the prosecutors must conduct the prosecutions fairly and impartially.

160. Further, the DPP in its guidelines on the Decision to Charge, 2019 (hereinafter referred to as 'the Guidelines to charge') also correctly captured the role of the prosecutor once investigations are completed. It states as follows: -

> 3.1 The decision to charge
>
> The decision to charge is the prosecution counsel's determination as to whether evidence availed by an investigator or investigative agencies is sufficient to warrant the institution of prosecution proceedings against an accused person in a court of law..... it is the most important decision that is made by any prosecution.... Prosecutors are required to, and must exercise, due care in making the decision to charge.

161. From the foregoing, it is apparent that there is a deliberate constitutional and legislative design to separate investigations from prosecution of those culpable in the criminal justice system in Kenya. The reason is simple. It is to instil fairness and confidence in the criminal justice system by eradicating the possibility of conflict of interest or bias between the two organs. This serves as a useful safeguard.

162. Therefore, even though the DPP has the power to direct the National Police Service to investigate any information or allegation of criminal conduct, the manner in which the investigations are to be carried out remain at the sole discretion of the National Police Service unless in the clearest of cases where the directions by the DPP do not usurp the investigative power of the National Police Service.

163. There is, however, a point which must be well understood. It hinges on article 157(12) of the *Constitution* which provides as follows: -

> parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecution.

164. The plain reading of the above provision has it that it is not only the DPP who may have prosecutorial powers in Kenya. Other entities may be accorded such power by parliament.

165. Be that it may, the fact remains that investigations and prosecution cannot be conducted by the same entity regardless of whether the prosecution is undertaken by the DPP or by any other entity pursuant to article 157(12) of the Constitution.

166. On a similar footing, investigations may also be undertaken by any of the investigative agencies and is not the preserve of the National Police Service. That is provided for in section 2 of the ODPP Act which defines an investigative agency as under: -

> " Investigative agency" in relation to public prosecutions means 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;

167. It, therefore, means that whereas the National Police Service, the Ethics and Anti-Corruption Commission, the Kenya National Commission on Human Rights, the Commission on Administration of Justice, the Kenya Revenue Authority, the Anti-Counterfeit Agency or any other government entity mandated with criminal investigation role under any written law are mandated to undertake investigations, then in keeping with the investigative and prosecutorial autonomy, it

means that none of investigative agencies can undertake prosecution of any offences resulting from the investigations it undertakes.

168. Having so found, the next consideration is whether a complainant may investigate its own complaint.

169. First, is an exploration of some definitions. The Criminal Procedure Code, cap 75 of the Laws of Kenya (hereinafter referred to as 'the CPC') define some terms as follows:

'complaint' is defined as an allegation that some person known or unknown has committed or is guilty of an offence.

170. The ODPP Act has the following definitions: -

> An 'offence' is defined to mean an act, attempt or omission punishable by law

171. The *Black's Law Dictionary* 10th edition defines a 'complainant' as follows: -

> The party who brings a legal complaint against another.

172. The *Penal Code*, cap 63 of the Laws of Kenya defines an "offence" to mean: -

an act, attempt or omission punishable by law;

173. Broadly speaking, a complainant in the context of a criminal justice system is a party who lays a complaint against another that the other party has committed or attempted to commit an act or omission punishable by law.

174. A complainant can, therefore, be any aggrieved party and can lay any complaint of a criminal nature against any party.

175. According to the charge sheet in the criminal case, the complainant is the Kenya Revenue Authority.

176. There has been debate on whether a complainant may investigate its own complaint.

177. In dealing with this issue, I came across a decision by the Supreme Court of India where the court comprised of five Justices, in dealing with a reference made to the court for the consideration of the two divergent positions, elaborately dealt with the matter. The court combed through its own decisions which, some, were in favour of the position and others were to the contrary.

178. The court reconciled the two positions by coming up with some two main guidelines. The decision was rendered in Criminal Appellate Jurisdiction Special Leave Petition (criminal) Diary No 39528/2018 *Mukesh Sing v State (Narcotic Branch of India)* on August 31, 2020.

179. The court held as follows: -

> I. That the observations of this court in the cases of *Bhagwan Singh v State of Rajasthan* (1976) 1 SCC 15; *Megha Singh v State of Haryana* (1996) 11 SCC 709; and State by *Inspector of Police, NIB, Tamil Nadu v Rajangam* (2010) 15 SCC 369 and the acquittal of the accused by this court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;
>
> II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of

bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this court in the case of *Mohan Lal v State of Punjab* (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.

180. The apex court specifically overruled its earlier decisions which held that a complainant cannot be its own investigator and termed such decisions as bad law.

181. This court agrees with the position in the *Mukesh* case (*supra*). Adding onto it, I wish to point out that there are both constitutional and legislative safeguards to ensure that investigations are fair and the suspect will not be prejudiced. The *Constitution* specifically secures the rights and fundamental freedoms of any person going through the justice system by making provisions in the bill of rights and by demarcating the clear roles of every sector player in the justice chain including the National Police Service and the DPP.

182. A party, therefore, who is aggrieved in the manner in which investigations are carried out is always at liberty to seek the court's intervention. That can only be on a case by case basis.

183. At this point in time, I must make it clear that the National Police Service being charged with the constitutional and legislative mandate to carry out investigations kept within its mandate in carrying out investigations on the complaints lodged to it by the Kenya Revenue Authority. The contention by the petitioners that the National Police Service are not qualified officers and did not have any role to play in the investigations leading to the criminal case does not hold and is hereby dismissed. However, whereas the National Police Service is one of the investigative agencies in law, given the fact that it is the Kenya Revenue Authority which is charged with the administration and enforcement of tax laws in Kenya, the National Police Service or any other investigative agency cannot on its own motion institute investigations relating to the tax laws. As the Kenya Revenue Authority is one of the investigative agencies in Kenya, then the involvement of any other investigative agency in investigations on tax laws can only be at the invitation of the Kenya Revenue Authority.

184. If in the eyes of the petitioners the National Police Service, on invitation of the Kenya Revenue Authority, lacked the capacity to carry out proper investigations, then such are issues to be raised at the trial in attacking the quality of the evidence tendered and the credibility of the witnesses.

185. Coming to the end of the consideration of the issue as to whether in the criminal justice system in Kenya, the roles of a complainant, investigator and a prosecutor may be undertaken by one party, this court now finds and hold as follows: -

i. An investigator can investigate its own complaint unless otherwise prejudice is demonstrated.

ii. The role of an investigator does not include carrying out any prosecutorial duties.

iii. The work of an investigator ends upon completion of investigations and making recommendations and it is the prosecutor to review the evidence and make its own independent decision on whether or not to charge any suspect including the nature of the charges to be preferred, if any.

iv. The recommendations by the investigator are not binding on the prosecutor.

v. Whereas a complainant may investigate own its complaint, neither a complainant nor an investigator can prosecute any criminal offence arising out of the investigations.

186. I will now consider the next issue.

(d) Whether under article 157(6)(a) of the *Constitution* a charge sheet in criminal proceedings can be instituted by the National Police Service and a charge sheet be signed by police officers:

187. This issue has been largely dealt with in the preceding issue. Having found that the role of the investigator ends with the collection of evidence and making recommendations, then any other step which follows cannot be under the mandate and authority of the National Police Service.

188. It goes without say, therefore, that the National Police Service cannot come up with the final charges which a suspect is to answer to before court. That is within the purview of the prosecutor. As such, the National Police Service can neither draft any charge sheet nor sign any such charge sheet.

189. This issue was also, and elaborately, dealt with by the learned judge in *Okiya Omtatah Okoiti v The Director of Public Prosecutions* case (*supra*). The judge presented thus: -

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.

190. There has been the argument that the CPC mandates the police officers to draft charges and present suspects to court without the involvement of the prosecutor, and in this case, the DPP.

191. Whereas the provisions are in place, it must be remembered in the first instance that the CPC is a pre-2010 legislation. Before the promulgation of the *Constitution* in 2010, the National Police Service had all the powers to conduct investigations into criminal culpability, make decisions to charge, draft charges, stamp them, arrest the suspects and present them to court. That was the permissible law then.

192. However, on the dawn of the *Constitution* in 2010, there was a paradigm shift in respect to the manner the criminal justice system would operate in Kenya. Of paramount importance is the fact that all laws that were then in place were to be forthwith brought into conformity with the *Constitution*.

193. Section 7(1) of the sixth schedule to the *Constitution* provided as follows: -

> 7. Existing laws
>
> (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

194. Further, the provisions of the CPC are surbodinate to the *Constitution*. Article 2(4) of the *Constitution* has it that any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid.

195. As the provisions of the CPC run contra the new constitutional dispensation, they cannot stand in the face of the *Constitution*.

196. The court in *Okiya Omtatah Okoiti v Director of Public Prosecutions* case (*supra*) aptly captured the foregoing as under:

> 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.

197. The DPP seems to have been holding to the foregoing position. I say so because in its guidelines to charge, the DPP in appendix 3 introduced a sample charge sheet it intends to use. The charge sheet is fairly detailed and gives a host of information. It is, in fact, a departure from the charge sheets generated by the National Police Service. Some of the key changes in the sample charge sheet include the name of the prosecutor who made the decision to charge and drafted the charge(s), the languages spoken by the suspect, whether the suspect is represented, details of the arresting officer, the ODPP date stamp and signature of the prosecutor. The ODPP's charge sheet no doubt is more constitutionally-friendly compared to the ones generated by the National Police Service.

198. There has also been some fear that the Office of the Director of Public Prosecutions, unlike the National Police Service, has no adequate human resource to be able to be at the centre of all prosecutions in Kenya and as such there will be delay in availing the suspects before court in line with article 49(1)(f) of the *Constitution*.

199. Whereas that may have been the position prior to 2010, once the Office of the Director of Public Prosecutions was constitutionally unveiled the office has gradually and steadily grown in stature and presence such that there are prosecutors in every court house in Kenya. The fear is, hence, perfectly taken care of.

200. It is on the basis of the foregoing that this court finds and hold that it is constitutionally-impermissible for the National Police Service to either draft any charge sheets or to sign them. That is part of the prosecutorial duties of the prosecutor and in the present case the DPP.

201. As I come to the end of the discussion on this issue, this court expresses utter disappointment in that despite court decisions demarcating the investigative powers of the National Police Service and the prosecutorial powers of the DPP, there has been deliberate and sustained resistance by the National Police Service in disregarding the decisions and continues to usurp the prosecutorial powers of the DPP and the prosecutors in general. It is deplorable that 12 years into the new constitution there still is a tag-of-war between the powers of the DPP (or any other prosecutor) and the National Police Service despite otherwise clear constitutional provisions.

202. Conversely, the DPP has also and variously acquiesced to the usurpation of its constitutional mandate by the National Police Service.

203. Courts must not sit and watch the deliberate disregard of its orders and the obliteration of the *Constitution* since the courts are the only custodians of the *Constitution*. Once courts fail to firmly stand, guard and enforce the *Constitution*, then the wishes of the Kenyans as reduced into the *Constitution* will never be realized.

204. As once said by the 26th president of the United States of America, one Theodore Roosevelt: -

> No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.

205. The Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR stated as follows: -

> The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .....

206. Perhaps, this is an opportunity for this court to take more decisive steps in ensuring that the *Constitution* is respected and all sector players in the justice system remain within their respective constitutional and legislative confines.

(e) Whether section 107 of the *Tax Procedures Act, 2015* is unconstitutional and whether the gazette notice No 3523 published on April 15, 2021 is unconstitutional thereby rendering the appointments made thereunder are illegal:

207. Section 107 of the *Tax Procedures Act*, No 29 of 2015 (hereinafter referred to as 'the impugned provision') states as follows: -

> 107. Authorised officer may appear on prosecution

(1) Despite any other written law, an authorised officer may appear in any court on behalf of the commissioner in proceedings in which the commissioner is a party and, subject to the direction of the Director of Public Prosecutions, that officer may prosecute a person accused of committing an offence under a tax law.

(2) An authorised officer conducting a prosecution in accordance with subsection (1) shall have all the powers of a public prosecutor under the Office of the Director of Public Prosecutions Act, 2013 (No 2 of 2013).

208. To enable this court ascertain the constitutionality of the impugned provision, there is need to have a brief look at the principles of constitutional and statutory interpretation.

209. The *Constitution* is a document *sui generis*. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.

210. In Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (consolidated) *Okiya Omtatah Okoiti v Public Service Commission & 73 Others* (2021) eKLR, this court discussed the principles of constitutional interpretation at length. It observed as follows: -

54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).

55. Article 20(4) requires courts while interpreting the bill of rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the bill of rights. article 259(1) command courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on December 21, 2011 in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -

(86) .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern bill of rights, that envisions a human-rights based, and social-justice oriented state and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

(87) In article 259(1) the Constitution lays down the rule of interpretation as follows: "This constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the bill of rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the courts, in interpreting the bill of rights, to promote: (a) the values that underlie an open and democratic society

based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the bill of rights.

(88) ..... article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

> This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -

...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.

59. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the constitution should be read as an integrated whole. The court observed as follows: -

.... the entire constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. this is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation 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.

63. In Advisory Opinion Application No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

64. The court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R v Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the charter was a purposive one. The meaning of a right or freedom guaranteed by the charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is 'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'

66. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S v Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8. 11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

211. In discussing how constitutionality of impugned Acts of parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR remarked as follows: -

> [I]n determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & others* Nairobi Petition No 3 of 2011 [2011]eKLR, *Samuel G Momanyi v Attorney General & another* (*supra*)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd,* [1985] 1 SCR 295 enunciated this principle as follows: -
>
> Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.
>
> [59] fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in Re The Matter of the *Interim Independent Electoral Commission* Constitutional Application (*supra*) at para 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;
>
> The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in *The Speaker of the Senate & Another v Attorney-General & another & 3 others* - Advisory Reference No 2 of 2013 [2013] eKLR.

212. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v Attorney General & another* (2021) eKLR this court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

> 110. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the respondent was in possession of a narcotic, the respondent brought a motion challenging the constitutional validity of s. 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the charter and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(d) of the charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the charter.
>
> 111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a seven-judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
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> 120. On the objective test, the Supreme Court stated as follows: -
>
> > 67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ... the objective, which the measures responsible for a limit on a charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd*, *supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic

society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

113. On the proportionality test, the Supreme Court stated that: -

> 70. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd*, *supra*, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd*, *supra*, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom, and the objective which has been identified as of "sufficient importance".

114. On the third test, that is the effect of the limitation, the Supreme Court stated that: -

> 71. With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the infringement of a right or freedom guaranteed by the charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

213. Lastly, the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR had the following to say on the constitutionality of statutes: -

> 27. Here the question we have to answer is whether the learned judge erred by not declaring section 10 of the Political Parties Act unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, *US v Butler*, (*supra*) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -
>
> 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. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

Also in *The Queen v Big M Drug Mart Ltd*, 1986 LRC (Const) 332, the Supreme Court of Canada stated that;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, parliament is mandated under article 92 to make legislation to provide inter alia for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution.....

214. The foregoing general discussion on the manner in which courts ought to deal with the interpretation of the *Constitution* and the constitutionality of statutes suffices as a basis of the consideration of the issue at hand.

215. Flowing from the above, the duty of a court once an allegation of a legislation being unconstitutional is made is to lay the *Constitution* and the legislation side by side and to decide whether the latter squares with the former.

216. To discharge such a duty, the three-pronged criteria developed in *R v Oakes* case (*supra*), being the objective test, the proportionality test and the effect test, comes to play. In this matter, I will look at the impugned provision under the lenses of *R v Oakes*.

217. On the objective test, it is the position that the objective of the impugned provision relates to the constitutional and legislative need to have those culpable of committing offences prosecuted. The impugned provision passes the objective test.

218. On the proportionality test, the impugned provision finds favour in the position that in balancing the interests of the society with those of the prosecution, there is need to have prosecutors to undertake such functions.

219. I now look at the effect of the impugned provision. Section 3 of the *Tax Procedures Act*, defines an 'authorised officer' and 'tax law' as follows: -

'authorised officer' in relation to a tax law, means the commissioner or an officer appointed by the commissioner under the *Kenya Revenue Authority Act, 1995* (No 2 of 1995);

"tax law" means—

(a) this act;

(b) the *Income Tax Act*, *Value Added Tax Act*, *Excise Duty Act*, 2015 and *Miscellaneous Fees and Levies Act*, 2016 (No 29 of 2016); and

(c) any regulations or other subsidiary legislation made under this Act or the *Income Tax Act*, *Value Added Tax Act*, *Excise Duty Act*, 2015 and *Miscellaneous Fees and Levies Act, 2016* (No 29 of 2016);

220. A reading of the impugned provision in line with the definitions of 'authorised officer' and 'tax laws' means that the commissioner general of Kenya Revenue Authority may personally appear in court or may appoint any of his/her officers to appear in court in which the commissioner is a party and prosecute such case, but subject to the directions of the DPP. Such an officer shall, however, have the full powers of the DPP as conferred in the ODPP Act.

221. The *Kenya Revenue Authority Act*, No 2 of 1995 (hereinafter referred to as 'the KRA Act') is an act of parliament to establish the Kenya Revenue Authority as a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to provide for connected purposes.

222. The functions of the Kenya Revenue Authority (hereinafter referred to as 'the KRA') are in section 5 of the KRA Act. They are as follows: -

5. Functions of the authority

(1) The authority shall, under the general supervision of the minister, be an agency of the government for the collection and receipt of all revenue.

(2) In the performance of its functions under subsection (1), the authority shall—

(a) administer and enforce—

(i) all provisions of the written laws set out in part i of the first schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;

(ii) the provisions of the written laws set out in part ii of the first schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;

(b) advise the government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the first schedule; and

(c) perform such other functions in relation to revenue as the minister may direct.

(3) The minister may, by notice in the gazette, amend the first schedule.

223. On one hand, the legislative design in terms of enforcing tax laws places KRA as the complainant. On the other hand, the impugned provision then makes KRA, who is the complainant, to be the prosecutor.

224. It, hence, comes to the fore that the effect of the impugned provision is to place KRA as the complainant, the investigator and the prosecutor.

225. In an earlier discussion in this judgment, this court found that whereas the *Constitution* does not bar a complainant from investigating its own complaint in instances free from prejudice, such a complainant cannot be the prosecutor.

226. Drawing the above finding to the impugned provision, it means that whereas KRA can investigate any offences relating to tax laws, it cannot prosecute such offences in court. Therefore, to the extent that the impugned provision allows KRA to usurp the prosecutorial powers of the DPP, the impugned provision cannot stand in the face of the *Constitution*. The impugned provision is, hence, constitutionally infirm.

227. I have perused the impugned gazette notice No 3523 contained in Kenya gazette vol CXXIII-No 74 dated April 15, 2021. The notice was issued by the DPP and is dated April 1, 2021.

228. In the impugned gazette notice, the DPP purported to appoint three officers of KRA, who are the interested parties herein, to be prosecutors for purposes of prosecuting several criminal cases under the tax laws.

229. Having deduced the need for separation of powers between the investigative agencies and the prosecution, the impugned gazette notice cannot stand. In fact, what the DPP did *vide* the said notice was to willingly and unconstitutionally acquiesce its prosecutorial mandate to KRA which entity is the complainant in the criminal matters.

230. The upshot is that the impugned gazette notice is unconstitutional and the appointments therein are of no legal effect.

231. Coming to the end of this issue, this court finds and hold that section 107 of the *Tax Procedures Act, 2015* is unconstitutional, that the gazette notice No 3523 published on April 15, 2021 is also unconstitutional and that the appointments made under the impugned gazette notice are illegal.

232. Having dealt with the four issues for determination I initially identified, I will now render the way forward.

Way Forward

233. From the foregoing discussion, it is apparent that the criminal case lacks any legal leg to stand on since the decision to charge was made by the National Police Service who was the investigator. Further, the charges were also drafted by the same investigator and that the prosecution was undertaken by the complainant.

234. Given that the criminal case cannot stand in law, a consideration of the rest of the issues which are largely on the constitutionality of the trial and the manner in which the evidence intended to be adduced at the trial was obtained, will not yield any value or at all. In fact, the court will be dealing with issues whose substratum is non-existent.

235. Any further analysis of issues in this matter will only eat into the limited judicial time. I, therefore, opt to bring this matter to an end at this point in time.

236. In the event the appropriate prosecutor institutes other charges against the petitioners based on the facts and circumstances in this matter, the petitioners will be availed with the evidence in support of those charges and they will be at liberty to challenge the same, if need be.

Disposition:

237. As I come to the end of this judgment, I must thank counsel for their diligence and thorough research on the issues at hand. This court has greatly benefitted from their input. Further, the court apologizes for the delay in the delivery of this judgment which was caused by the influx of election-related petitions in the division. The court appreciates the understanding extended by counsel and parties.

238. In the end, this court makes the following final orders on the petition and the notice of motion: -

a. A declaration hereby issues that in the criminal justice system in Kenya, a complainant may investigate its own complaint in instances free from prejudice, but such a complainant and/or an investigator cannot prosecute any offences arising from the complaint and the investigations.

b. A declaration hereby issues that prosecution of criminal offences in Kenya must only be undertaken by lawful prosecutors (being either the director of public prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under article 157(9) of the *Constitution* or the entities conferred with powers of prosecution pursuant to article 157(12) of the *Constitution*) and as long as such prosecutions are in keeping with (a) above.

c. A declaration hereby issues that since the Kenya Revenue Authority was the complainant in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019 and that the investigations leading to the institution of the said criminal case were conducted by the National Police Service through the Director of Criminal Investigations, then no officers of Kenya Revenue Authority or the National Police Service could undertake the prosecution of the said criminal case whether as special or private prosecutors or at all.

d. A declaration hereby issues that since the National Police Service conducted the investigations leading to the institution of the Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019, then the investigative role of the National Police Service ended once the investigations were completed, recommendations made and matter referred to the Director of Pubic Prosecutions for further dealing.

e. A declaration hereby issues that the National Police Service did not have the power and authority to make any decision to prefer and institute the charges in the Nairobi Chief Magistrate's *Court Criminal Case No 1333 of 2019* and/or to prepare and sign the charge sheet.

f. A declaration hereby issues that the gazette notice No 3523 published on April 15, 2021 is unconstitutional and that the appointments made therein are illegal.

g. A declaration hereby issues that section 107 of the *Tax Procedures Act* is unconstitutional.

h. An order of *certiorari* hereby issues bringing into this court and quashing the decision by the National Police Service to prefer the charges in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.

i. An order of certiorari hereby issues bringing into this court and quashing the charge sheet in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.

j. An order of certiorari hereby issues bringing into this court and quashing the gazette notice No 3523 published on April 15, 2021.

k. An order of prohibition hereby issues prohibiting the respondents from sustaining, proceeding, hearing, conducting or in any manner dealing with the charges laid in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.

l. An order of prohibition hereby issues prohibiting the 1st respondent from presiding and/or conducting the trial of the petitioners in Nairobi Chief Magistrate's Court Criminal Case No 1333 of 2019.

m. Save for the charge sheets prepared and signed by the lawful prosecutors (being either the director of public prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under article 157(9) of the *Constitution* or the entities conferred with powers of prosecution pursuant to article 157(12) of the *Constitution*), no court in Kenya shall forthwith accept, register and in any manner whatsoever deal with any charge sheets not prepared and signed by any of the lawful prosecutors. For avoidance of doubt, given the constitutional and legislative mandates in carrying out investigations, the National Police Service, the Ethics and Anti-Corruption Commission, the Kenya National Commission on Human Rights, the Commission on Administration of Justice, the Kenya Revenue Authority, the Anti-Counterfeit Agency or any other government entity mandated with criminal investigation role under any written law, cannot draft, sign and/or present any charge sheets in any criminal prosecution.

n. Given the potential effect of this judgment in the criminal justice system in Kenya, this judgment shall not apply to previously instituted criminal proceedings.

o. The rest of the prayers sought in the petition and the notice of motion are hereby declined and dismissed.

p. The Honourable Deputy Registrar of this division shall immediately transmit copies of this judgment to the registrar of the High Court and the registrar of Magistrates Courts for implementation.

q. Each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF MAY, 2022

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Paul Muite, SC, Mr. Kioko Kilukumi, SC and Miss. Gladys Mwangi, Learned Counsel for the Petitioners.

Miss. Mwasao, Learned Counsel for the 1st, 3rd and 4th respondents.

Mr. Victor Mule, Miss. Kihara and Miss. Sigei, Learned Counsel for the 2nd respondent.

Mr. Ochieng, Mrs. Kithinji, Mr. Nyaga and Miss. Mburugu, Learned Counsel for the 5th respondent.

Miss. Sheila Sanga, Learned Counsel for the Interested Parties.

Jared Otieno – Court Assistant