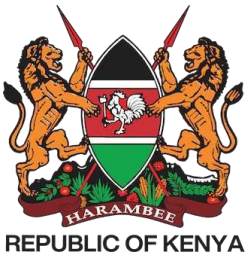

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 430 OF 2015

IN THE MATTER OF A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO ARTICLES 22, 23, 165 (3) (B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATER OF THE ENFORCEMENT OF THE SUPREMACY OF THE CONSTITUTION AS PER ARTICLE 2 (1) & (4) OF THE CONSTITUTION

AND

IN THE MATTER OF THE BREACH OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE IN REGARDS TO ARTICLE 10 OF THE CONSTITUTION

AND

IN THE MATER OF THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27 AND ARTICLE 49 (1) (A), (II) & (III) & (D), 50 (2) (A) & (B) OF THE CONSTITUTION REGARDING THE RIGHT TO A FAIR TRIAL

AND

IN THE MATTER OF DUTIES AND OBLIGATIONS OF STATE AND PUBLIC OFFICERS

AND

IN THE MATTER OF PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

HON. SENATOR JOHNSTONE MUTHAMA.....PETITIONER

VS

DIRECTOR OF PUBLIC PROSECUTIONS.....1STRESPONDENT

THE CABINET SECRETARY FOR INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

JAPHET MURIIRA MUROKO.....INTERESTED PARTY

JUDGMENT

The parties

1. The Petitioner is an adult of sound mind and a citizen of the Republic of Kenya residing in Nairobi and the County of Machakos. At the time of filing this Petition, he was the duly elected Senator of the County of Machakos. He describes himself as a renown local and international businessperson with business interests located nationally and internationally.

2. The first Respondent is the Director of Public Prosecutions (hereinafter referred to at the DPP), established under Article **157** of the Constitution with constitutional mandate to *inter alia* 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.[1] Pursuant to Article 157(4) of the Constitution, the DPP is empowered to direct the Inspector General of the National Police Service (hereinafter referred to as the IG) to investigate any information or allegation of criminal conduct and the IG is required to comply with any such direction.

3. The second Respondent is the Cabinet Secretary in charge of the Ministry of Interior and Co-ordination on National Government appointed under Article 152 (1) (d) of the Constitution. His functions include public administration and internal security.

4. The third Respondent, namely, the Inspector General of Police (IG) is a constitutional office established pursuant to Article 245 (1) of the Constitution. His functions and powers are stipulated in section 10 of the National Police Service Act.[2]

Factual matrix

5. The Petitioner states that on 23rd September 2015, at a Public Rally at Uhuru Park, Nairobi, he made utterances in opposition to policies of the Government of the day. He states that the said utterances were within his rights as a Senator and a citizen, and, were merely an expression of his views on:-

i. The failure of the government of the day to stem the rising tide of insecurity within the Republic and failure of the government to respect public institutions;

ii. The failure of the government to protect public monies being lost through corruption by government officers and refusal by the Government to obey judicial orders;

iii. The failure of the government to resolve the then impasse with teachers union which resulted in a crippling teachers strike and lack of Government's ingenuity to create employment;

iv. The indifference in Government to reduce the widening gap between rich and the poor;

v. The lack of Government's action to improve the Republic's economy; and

vi. Other issues of national importance.

6. The Petitioner states that the late Maj. Gen (Rtd) Joseph Nkaissery, the then Cabinet Secretary for Interior and Coordination of National Government, while on a visit to the City of El Paso in Texas in the United States, released an official statement on 24th September 2015, in defence of the government of the day. The Petitioner states that the said statement was read to mean that the petitioner was a security risk to the Republic as a result of his utterances. Further, the Petitioner states that the said statement read as follows:-

Statement of Hon. Maj. Gen. (Rtd) Joseph Nkaissery, Cabinet Secretary for Interior and Coordination of National Government on 24 September 2015

"My attention has been called to a speech delivered by Senator Johnson Muthama during a rally at Uhuru Park in Nairobi on 23rd September 2015. As the Minister in charge of Security, I wish to observe that the speech brings disrepute to the President, undermines cohesion and stability of the country with the potential to cause uncertainty, tension, thereby threatening national security.

In his speech, which is a litany of incitements to Kenyans, Senator Muthama makes serious allegations that calls for prompt investigations. Unfortunately, Mr. Muthama has made a habit of verbally attacking state officers in a manner that is intended to undermine cohesion and national unity for political gain. Such conduct should not be confused with the rights of expression that every Kenyan is guaranteed. It is, therefore, imperative that investigations into the speech and its intent begin in earnest. Senator Muthama should immediately record a statement at the criminal investigations department. The investigations should focus on among others, the following elements:-

i. Pronouncement that calls for unconstitutional change of government calling Kenyans to violence, and readiness to 'die to defend their rights." This call is especially serious because it contravenes the basic tenets of our constitution.

ii. Claims that imply the President interfered with the constitutional dispensation of the Republic of Burundi.

iii. Statements that undermine authority of a Public officer, through insinuating that the President is not protecting the people of Kenya. Respect to the President is constitutional imperative that anchors the legitimacy of government. That an elected official, a member of the senate no less, would choose to unfairly and misleadingly make such inflammatory statement should pass without action.

iv. Pronouncements that are defaming through use of salacious, obscene, indecent, crude, lewd, vulgar language against state officers.

v. Undermining the National Cohesion and Integration Act- Section 13; by describing the President as intent to ensure children of the poor continue to suffer in poverty.

These pronouncements are choreographed to stir up ethnic hatred against the President in view of his purported preferences. Given the implications of these statements for fracturing the society, I expect the National Cohesion and Integration Commission to, as a matter of urgency, commence investigations on each of these and any other claims and allegations made, that impact negatively on the efforts to enhance national cohesion and integration of the Kenya People.

I also take this opportunity to warn anybody who may take advantage of their privileged position to promote negative ethnicity and insecurity. We shall process each and every of such persons through the stipulated process in adherence to the rule of law, without fear or favour."

Maj. Gen. (Rtd) Joseph Nkaissery

Cabinet Secretary

Ministry of Interior and Coordination of National Government

Issued at El Paso, Texas,

U.S.A.

7. The Petitioner states that the second Respondent's statement was widely circulated by print and electronic media thereby ensuring that all and sundry knew his intentions and directives, and, that the statement did not quote him verbatim. In addition, the Petitioner states that the use of the words *"My attention has been called to a speech delivered by Senator Johnson Muthama during a rally at Uhuru Park in Nairobi on 23rdSeptember 2015,"* was an admission by the Cabinet Secretary that he had no first-hand knowledge of the words uttered by the Petitioner. As a result, he states that the Cabinet Secretary's knowledge and interpretation of the contents of his speech was gleaned from third parties thereby admitting that his interpretation of the speech is prejudicial, biased and not objective.

8. The Petitioner also states that on 24th September 2015, Hon. Dennis Waweru, the then Member of Parliament for Dagoretti South Constituency, who was aligned to the ruling political party of the government of the day placed before the 5th (sic) Respondent a complaint demanding that the Petitioner be investigated in connection with the said utterances stating as follows:-

"For a long time the Nation has watched with dismay as institutions bestowed with duty of protecting Kenyans; against abuse of law let Machakos Senator Johnstone Muthama get away with flagrant breaches of law.

During the said rally, the Senator ridiculed key state officers in the most lugubrious and despicable languages. Among other things, the Senator-

- *Referred to Cabinet Secretary Anne Waiguru as President Uhuru Kenyatta's lover despite knowing very well that the President is a happily and committed family man.*
- *Referred to President Uhuru Kenyatta as a careless President who is pre-occupied Waiguru (sic).*
- *Implied that President Kenyatta favors Cabinet Secretary Anne Waiguru more than the other Cabinet Secretaries and for reasons other than her professionalism and diligence.*
- *Imputed improper motive on the part of Kenya's highest office holder President Uhuru Kenyatta in a (sic) far as his dealing with Cabinet Secretaries in concern (sic).*
- *Threatened teachers who agreed to President Uhuru's call to resume teaching will be stoned.*
- *President Uhuru Kenyatta should resign or will be smoked out of State House soon.*

It is hoped that this Petition will be acted upon diligently and with utmost consideration of Kenya's disaffection with Senator Muthama's utterances."

Dated 24thSeptember 2015.

Hon, Dennis Waweru-MP Dagoretti South (For and on behalf of Central caucus and Nairobi MP's).

9. It should be noted that the reference of the 5th Respondent in the above statement is misleading because there is no 5th Respondent in this Petition. Further, it is not clear to whom the Petition in the statement was being addressed to.

10. The Petitioner further states that on the same day i.e. 24th September 2015, at the same press conference, the Member of the National Assembly for Gatundu South Constituency, the Hon. Moses Kuria also aligned to the ruling party of the government of the day uttered the following:-

> *"Since Senator Muthama mentioned my constituency during the Uhuru Park Rally, I initiated a plan to go to his Gigiri home. But I have been promised that there are plans to have him arrested today. On Saturday will have a major rally at Uhuru Park, the same venue where CORD held theirs yesterday. During that rally, if senator Muthama will not have been arrested we will use citizen power to arrest him whenever he would be. I am also waiting for Senator Muthama here in Parliament so as to square it out with him."*

11. In addition, the Petitioner states that on the same day Hon. Johnstone Sakaja demanded all security agencies to immediately arrest Senator Johnstone Muthama stating:-

> *"The Director of Public Prosecutions to take immediate action today on Senator Muthama. We are demanding immediate arrest of Senator Muthama and if not in future we can institute citizen's arrest on him. He must apologize immediately. We are planning a major rally in Nairobi this weekend."*

12. The Petitioner states that on 25thSeptember 2015, the second Respondent issued a Press Statement to the effect that on 24th September 2015 the first Respondent declared that under his command and authority a Multi-Agency Team was created to investigate speedily and expeditiously the public utterances made by the Petitioner at the public rally held at Uhuru Park on 23rdSeptember 2015. The Multi-Agency Team comprised of officers from the third Respondent and the Criminal Investigations Directorate and National Cohesion and Integration Commission.

13. The Petitioner states that the DPP's statement dated 5thOctober 2015, purported to make a decision or determination to have the Petitioner and a one Japheth Murira Muroko (the Interested Party herein) charged with the offence of incitement to violence contrary to Section **96 (a)** of the Penal Code.[3] The Petitioner states that the said statement read as follows:-

> *"On perusal of the above mentioned file, the DPP is satisfied that there is sufficient evidence to sustain a charge of incitement to violence contrary to section 96 (a) of the Penal Code against Senator Johnstone Muthama and Japheth Murira Muroko in relation to statement and utterances he allegedly made during the Uhuru Park Rally held by CORD on 23rd September, 2015. The DPP has therefore directed that they be charged accordingly."*

14. The Petitioner further states that the sequence of events seems to have been well choreographed to culminate into a decision by the DPP to arrest and charge him because:-

> *i. On the 24th September, 2015, one day after the press conference by the Hon. Denis Waweru and Hon. Moses Kuria, the Petitioner's advocate Dr. Khaminwa wrote to the officer commanding station in Gigiri and Runda requesting the Petitioner's security to be enhanced on account of threats he had received following ultimatums issued by Members of Parliament from the ruling coalition in particular Hon. Moses Kuria; No action has been taken based on the recorded statement.*
>
> *ii. On Friday 25th September, 2015, the Petitioner received a telephone call directing him to appear before the Nairobi County Criminal Investigations office ostensibly to record a statement.*
>
> *iii. On Friday 25thSeptember, 2015, the DPP issued a press statement communicating his decision to form a multi- agency team to investigate utterances and statements allegedly made during the Uhuru Park rally by CORD on 23rd September, 2015.*
>
> *iv. On 25thSeptember, 2015, the Petitioner's Advocate Dr. Khaminwa wrote a letter to the DPP bringing to his attention (that) the second Respondent's statement (is) in breach of the Constitution.*
>
> *v. On 26thSeptember, 2015, the Petitioner attended to the summons only to find that a charge sheet had been prepared to charge him under Police case No.* ***111/2015****. The charge sheet provided or suggested that the accused was arrested and in custody giving the impression that the decision had already been made to arrest, detain and charge him. He stated that the said charge sheet, though unsigned disclosed the Respondents real intention.*
>
> *vi. On 28thSeptember, 2015, the Petitioner received summons to appear before the National Cohesion and Integration Commission (NCIC), and, that, he appeared before the Commission on 30th September, 2015, but the Commission discharged him of the alleged claim of ethnic incitement.*

15. The Petitioner states that the Respondents are selective, punitive, discriminatory and targeted him on account of his political affiliation and persuasion because:-

> *i. The DPP has been seized of alleged offences by Hon. Moses Kuria for allegedly inciting his constituents to cut those opposed to the National Youth Service Empowerment programs with pangas contrary to the NCIC Act. In spite of the alleged offences taking*

place in July 2015, more than three months later, the second Respondent took no action on account only of the political persuasion and leanings of Hon. Moses Kuria.

ii. That the DPP has been aware of Hon. Moses Kuria inciting statement made on the 24th September, 2015 at a press conference in Parliament Building to the effect that:-

> *"Since Senator Muthama mentioned my constituency during the Uhuru Park rally, I initiated a plan to go to his Gigiri home. But I have been promised that there are plans to have him arrested today. On Saturday will have a major political rally at Uhuru Park, the same venue where CORD held theirs yesterday. During that rally, if Senator Muthama will not have been arrested we will use citizen power to arrest him whenever he would be. I am also waiting for Senator Muthama here in Parliament so as to square it out with him."*

iii. In spite of the alleged offences taking place on 24th September, 2015, more than two weeks later, and in spite of the same having been reported to the Gigiri and Runda police stations and to the IG, he has not moved with similar speed to take action against Hon. Moses Kuria purely on account of his political affiliation.

iv. That the DPP was aware of alleged offences committed by a Prof. Godfrey Mutahi Ngunyi relating to ethnic contempt contrary to section 62 (1) of the NCIC Act. The offences arose from his messages posted on his twitter account directed against the Rt. Hon. Raila Amollo Odinga, and the Luo community, but the Cabinet Secretary took no action because of his political persuasion and leanings.

v. That the DPP has in handling the cases involving Hon. Moses Kuria practiced and exhibited open bias and favoritism and in spite of the very open, clear and public pronouncement while in a gathering of panga/weapon wielding youth in his Gatundu South Constituency, the DPP has referred back the file to the Director of Criminal Investigations for further investigations.

vi. That the DPP is aware of other offences by other state/public officers, namely, the Senator for Uasin Gishu County Hon. Isaac Melly who was alleged to have taken part in a riotous demonstration against the (Vice) Chancellor of Eldoret University; during which property/buildings belonging to the University was maliciously destroyed. In spite of the alleged offences taking place on 12th February, 2015, the second Respondent has to date taken no action.

vii. That the action of the DPP are punitive, selective and discriminatory contrary to provisions of the Constitution.

16. The Petitioner also states that the second Respondent reacted to his criticism of the government of the day in violation of Article 28 of the Constitution. And it was also meant to intimidate and harass him. He also states that the creation of a Multi-Agency team to investigate him offends section 26(2) (a) of the National Cohesion and Integration Act,[4] which requires the Commission to act independently in the discharge of its functions under section 25 of the Act.

17. The Petitioner also states that the DPP breached the independence of the National Cohesion and Integration Commission by using the phrase *"…I expect the National Cohesion and Integration Commission to, as a matter of urgency, commence investigations on each of these…"* The Petitioner states that the DPP gave the National Cohesion and Integration Commission direction on how the investigative process under its mandate was to be conducted contrary to the provisions of section 26 (2) (a) of the Act.

18. The Petitioner states that Hon. Dennis Waweru MP was not entitled to lodge a complaint to the National Cohesion and Integration Commission concerning the Petitioner because he was not personally affected and this offends the provisions of section 44 of the Act. Furthermore, the Commission did not have jurisdiction to act on such complaint.

Legal foundation of the Petition

19. The Petitioner states that the Respondents are State officers as defined in Article 260 of the Constitution, hence, they are bound by Article 10 of the Constitution to adhere to the National Values and Principles of Governance and the principles stipulated in Article 73 (1) (a) (iv) of the Constitution.

20. The Petitioner also states that he is being charged with the offence of incitement to violence contrary to section **96 (a)** of the Penal Code[5] which provision offends the right to fair trial as guaranteed under Article **50(1)** of the Constitution and the right to be presumed innocent at the commencement of the trial as guaranteed under Article **50(2) (a)** of the Constitution. The Petitioner also states that the above section of the Penal Code shifts the burden of proof from the prosecution to the accused to establish that the alleged utterances did not amount to incitement.

21. The Petitioner also states that the said section shifts the burden of proof to an accused person, thereby, subjected him to pleading to a defective charge contrary to Article **50(2) (b)** that requires an accused person to be informed of the charge with sufficient detail to answer it. In addition, the Petitioner states that the offence created under section **96 (a)** would be in breach of Article **50 (2) (i) & (l)** of the Constitution.

22. The Petitioner further contends that his right as an arrested person was offended as he was required to record a statement in such a case when such request offends his right to remain silent under Article **49 (1) (a) (ii) & (iii).**

23. The Petitioner further states that the preamble to the Constitution demands that all the people of Kenya work towards a government and a society based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Further, the Petitioner states that Article **2(1)** of the Constitution declares the supremacy of the Constitution, which is binding on all persons including State Organs,

and, that Article 3**(1)** requires all persons to protect and defend the Constitution.

24. The Petitioner urged that he brought the proceedings under Article **22(2)** of the Constitution for the enforcement of the Bill of Rights, and by virtue of Article **50(1),** which grants him the right to have any dispute resolved by the application of the law in a fair and public hearing before a court. The Petitioner also states that Article **258** grants him the right to institute legal proceedings to defend the values and principles of the Constitution when they are contravened or threatened.

25. The Petitioner also states that Articles **1(3) (c), 10, 22, 23, 50(1), 159, 165, 258** and **259** of the Constitution vests jurisdiction in the High Court to hear any question regarding the violation of rights, and to determine if acts or omissions are constitutional and the interpretation of the Constitution. The Petitioner also anchored his Petition on the provisions of Articles 19, 20, 21, 22, 23, 24, 25, 27, 33 (1), 49, 50, 157 (4), (10), (11), 245 (2) (b) (4) of the Constitution and the "Ram Doctrine" which prohibits a Cabinet Minister from directing the DPP.

26. The Petitioner also states that the second Respondent by issuing a public statement implying that he is a threat to National Security violated his right to privacy and dignity.

The Reliefs sought

27. The Petitioner prays for the following orders:-

a. A declaration that the provisions of section 96 (a) of the Penal Code on incitement to violence and the law are in breach of Articles 25 (c), 49 (1) (ii) & (iii), (b), (d) and 50(1), (2) (a)(b), (i) & (l) and therefore unconstitutional.

b. A declaration that the arrest, charge and prosecution of the Petitioner Senator Johnstone Nduya Muthama is selective, punitive, discriminatory contrary to Article 10(2) (b), 27 (1) (2) & (4) of the Constitution and therefore unconstitutional.

c. A declaration that the statement issued by the second Respondent dated 24th September, 2015 is ultra vires and a breach of the provisions of Article 245 (4) (a) of the Constitution.

d. A declaration that the acts and omissions herein stated above by the Respondents is in breach of the Constitution of Kenya and infringe on the fundamental rights of the Petitioner.

e. A declaration that any prosecution by the first Respondent against the Petitioner in respect of the utterances made by the Petitioner on the 23rd September 2015 at Uhuru Park in Nairobi would be based on the directions given by the second Respondent to the third Respondent.

f. A declaration that any prosecution by the first Respondent against the Petitioner in respect of information received by the first Respondent from the Multi-Agency Team created and controlled by the second Respondent would be based on information and analysis illegally collected and would render any prosecution flawed.

g. A declaration that as a result of the unconstitutional act of the first, second and third Respondents the Petitioner would not be granted a fair trial under the provisions of Article 49 and 50 of the Constitution.

h. A declaration that the Petitioner's rights as afforded under the Constitution have been violated and or will be violated as a result of the acts and omissions of the Respondents.

i. A declaration that the alleged and or intended offences and prosecution on account of the statements said to have been uttered by the Petitioner do not disclose a criminal offence or at all and may only be amenable to litigation in the Civil Division of the High Court by the concerned and or affected parties, if at all.

j. A declaration that the Petitioner is entitled to damages as a result of the breach of his constitutional rights.

k. An order of prohibition against the Respondents from prosecuting the Petitioner on the basis of the decision of the Director of Public Prosecutions or at all communicated vide a press statement issued and dated the 5th October 2015.

l. An order of certiorari bringing into this honourable court for purpose of being quashed and to quash the decision of the Director of Public Prosecutions or at all communicated vide a press statement issued and dated the 5th October 2015.

m. Costs and Interests.

Respondents' grounds of opposition

28. The Respondents through the DPP filed grounds in opposition to the Petition dated 9th October 2015 stating *inter alia* that:-

*a) In exercising his powers, the DPP enjoys complete autonomy under Article **157(10)** of the Constitution, and, that, under Article **157 (4)** of the Constitution, the DPP can direct the third Respondent to investigate any information or allegation of criminal conduct. In addition, the DPP has powers under section **5 (2) (b)** of the Office of the Director of Public Prosecutions Act**[6]** to direct investigations by an investigative agency.*

b) The decision to prosecute the Petitioner was made based on evidence obtained in the course of investigations; hence, the allegations of selective, punitive and or discriminatory prosecution had no basis.

*c) The prayers sought are unconstitutional as they seek to prevent the DPP from exercising his mandate as provided under Article **157** of the Constitution, and the prayers, if granted, would result in greater injustice and would harm public interest.*

*d) That the Petitioner has not demonstrated that substantial injustice would otherwise result if the criminal proceedings take place. For emphasis, he contends that Article **50** of the Constitution provide adequate safeguards.*

e) That the offence in question is provided under the law; hence, it is constitutional.

Respondents' Replying Affidavit

29. Chief Inspector (CI) Lucy Ndungu, attached to the Nairobi County CID Headquarters and the investigating officer in the case, swore a Replying Affidavit dated 9thOctober 2015. She averred that on 23rdSeptember, 2015 at Uhuru Park, Nairobi CBD, within Nairobi County, a political rally was held by the CORD Political Party, and during the rally which received wide coverage, it was reported that certain speakers uttered words that amounted to incitement to violence.

30. She averred that on 24thSeptember, 2015, investigations were commenced and in the course of investigations, it was established that the Petitioner had during the said meeting uttered words to the effect *"Kuanza wiki ijayo kama walimu hawatalipwa, hakuna mtu ataenda kufanya kazi, na yule ataenda kufany kazi atakula mawe."* (Translated to mean, *"From next week if teachers will not have been paid, nobody will go to work, and whoever goes shall be stoned"*).

31. CI Ndungu further deposed that investigations established that the Interested Party at the same meeting uttered words to the effect *"Sisi tunasema ile motion inaletwa ya kum impeach Uhuru, Mbunge yeyote ambaye hataipingia kura, sisi wanainchi tuta muweka tairi*." (Translated to mean, *"We are saying, the motion being brought to impeach Uhuru, any Member of Parliament who votes against it will be lynched")*. She averred that the investigations file was thereafter forwarded to the DPP as required by law. She annexed the relevant witnesses' statements to her Replying Affidavit touching on the Petitioner.

Petitioner's submission

32. The Petitioner was represented by Dr. Khaminwa while the Respondents were represented by Mr. Omirera, Senior Assistant Director of Prosecutions.

33. The Petitioner filed skeletal submissions on 14th December, 2017 in support of his Petition. He asserted that the words he was alleged to have uttered did not contain any elements of violence, incitement or hate. He was of the view that if one gave the said words their natural meaning, they would not meet the threshold of incitement to violence as contemplated under section **96(a)** of the Penal Code.[7] He maintained that he was merely exercising his right to freedom of expression. He averred that the particulars of the charge failed to disclose the offence under section **96(a)** of the Penal Code.[8] He submitted that the charge sheet was defective as it failed to disclose any offence and was therefore an abuse of the court process. He cited Article **50(2) (b)** of the Constitution which requires every accused person to be informed of the charge against them with sufficient detail.

34. The Petitioner relied on the case of *Charles Onyango Oboo & Andrew Mujuni Mwenda v the Attorney General**[9]*** where the Supreme Court of Uganda canvassed the question of ***'hate speech'*** and incitement to violence *vis-à-vis* the constitutional right to freedom of expression. In that case, the Court affirmed the provisions of **Article 10** of the **International Covenant on Civil and Political Rights** with regard to the right to hold opinions without interference as well as the right to freedom of expression. The said court held that the liberty of free speech cannot be denied due to some ideas and saved for others and that even statements that ***'excite popular prejudice'*** are in tandem with tolerance and the exercise of democracy. The said court also cited the case of *Edmonton Journal v Alberta**[10]*** where the court held that democracy cannot exist without free speech. The Petitioner stated that the danger enunciated in the speech must be actual and the likelihood must be extensively canvassed in court in order to determine the substantial concern.

35. The Petitioner further cited the case of *Hon. Kanini Kega vs OKOA Kenya Movement & 6 Others**[11]*** where the Court affirmed the right to freedom of association and expression, and held that a political question does not lend itself to scrutiny by the courts of law. The Court in that case also cited the case of *Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua* [12] where the court held thus;

> *"There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under political question doctrine which states that being political acts they are non-justiciable and not reviewable by a court."*

36. The Petitioner submitted that his utterances were fair comments and in line with his rights as an individual and as a citizen. He also relied on the case of *CREAW & 7 Others vs. Attorney General**[13]*** where it was held that no provision of the Constitution should be read in isolation. The court further held that the Constitution is a progressive and living document and priority must be given to non-discrimination and equality. The Petitioner asserted that Kenyans ought to shy away from the obsolete doctrine that the governed must not criticize the governors. The Petitioner humbly urged this Court to dismiss the charges against him as it failed to adequately define how the constitutional guarantee of free speech was breached.

37. Dr. Khaminwa submitted that the Petitioner's Petition raised substantial issues of a constitutional nature. He argued that the late Hon. Joseph Nkaissery who was the then Cabinet Secretary for the Ministry of Interior and Coordination of National Government issued a

statement directed at the first and third Respondents. In the said statement, the second Respondent directed that the Petitioner records a statement immediately. Counsel for the Petitioner asserted that the second Respondent had no legal authority to issue the said directives. He stated that such legal power is vested in the third Respondent who is an independent entity. He submitted that the third Respondent is required by law to carry out independent investigations and forward the findings to the first Respondent. He urged that the second Respondent acted in excess of his powers. He stated that looking at Kenya's history, the power to investigate and prosecute was often abused, but the abuses were curtailed by the promulgation of the 2010 Constitution. He asserted that the Cabinet Secretary did not have the authority to order issuance of a warrant of arrest. Counsel for the Petitioner further argued that section **96** of the Penal Code placed the burden of proof on the accused person. He submitted that the said section was in contravention of Article **50(1)** of the Constitution. In the premises, he urged this court to allow the Petitioner's Petition as prayed.

Respondents' submission

38. Mr. Omirera for the first Respondent opposed the Petition. He submitted that the responses from various State officers including the second Respondent prompted by the utterances of the Petitioner at the public rally were not prejudicial to the Petitioner. He submitted that the second Respondent did not give the DPP any directives with regard to the decision to prosecute the Petitioner. He stated that the first Respondent is an independent office and only made the decision to prosecute the Petitioner after investigations were concluded. He pointed out that the second Respondent, Hon. Dennis Waweru and Hon. Moses Kuria were not witnesses in the case against the Petitioner and therefore their statements did not prejudice the Petitioner in any way. He asserted that the Court was independent and impartial and would therefore not be affected by the statements made by the second Respondent or any other parties. To this end, he cited the case of *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others.* ***[14]***He maintained that the Petitioner was duly charged after proper investigations were conducted, and that there was no constitutional violation of his rights during the pre-trial period.

39. On the issue of constitutionality of section **96(a)** of the Penal Code, Learned State Counsel submitted that Article **24** of the Constitution limits the right to freedom of speech as enshrined under Article **33** of the Constitution. He asserted that section **96(a)** of the Penal Code only creates an evidential burden of proof upon an accused person. He maintained that the same does not violate the constitutional rights of an accused person. He stated that the legal burden of proof still lies with the prosecution as provided under section **111** and **119** of the Evidence Act,[15] since the prosecution has to prove the exact words uttered by the Petitioner.

40. Mr. Omirera stated that as per the provisions of sections **211** and **306** of the Criminal Procedure Code,[16] an accused person is only called to answer to the charges at the close of the prosecution's case, where a *prima facie* case against him has been established. He cited the case of *Isaac Robert Murambi v Attorney General & 3 others* ***[17]*** which affirmed that position. He added that even if an accused person opts to keep quiet, the prosecution retains the legal burden to establish its case to the required standard of proof beyond any reasonable doubt.

41. On the question of whether the charge sheet was defective, Learned State Counsel submitted that this court had no jurisdiction to deal with the said issue as the trial court is the competent to address of the same. He therefore urged this Court to dismiss the Petitioner's Petition for lack of merit.

Issues for determination

42. Upon considering the opposing facts presented by the parties, we find that the following issues distill themselves for determination, namely:-

a. Whether the charge sheet is defective.

b. Whether the Petitioner is citing what ought to be his defence in the lower court.

c. Whether the Petitioner was exercising his freedom of expression.

d. Whether Section 96 (a) of the Penal Code shifts the burden of proof to an accused person.

e. Whether the statements issued by the Cabinet Secretary and Members of Parliament influenced the decisions by IGP, the National Cohesion and Integration Commission and the DPP.

f. Whether the decision to prosecute the Petitioner was selective and therefore discriminatory.

g. Whether the Petitioner has established grounds for an award of damages.

a. Whether the charge sheet is defective.

43. Dr. Khaminwa, the Petitioner's counsel submitted that the charge sheet is defective in that it does not contain particulars in tandem with the offence as defined in the Penal Code.[18] He argued that the charge sheet does not contain sufficient details, hence, it offends Article **50(2) (b)** of the Constitution.

44. The first Respondent's counsel Mr. Omirera, submitted that the question whether the charge sheet is defective is a matter for the trial court. To buttress his position, he relied on the Court of Appeal decision in *Esther Njeri Ngari v DPP*[19] which restated the said position.

45. A copy of the charge sheet is annexed to the Petitioner's Affidavit. The statement of the offence reads "incitement to violence and disobedience of the law contrary to section 96(a) and (b) of the Penal Code.[20]" The particulars of the offence are stated as follows:-

> *"On the 23rd day of September 2015 at Uhuru Park, in Nairobi within Nairobi County without lawful excuse uttered "KUANZIA WIKI IJAYO KAMA WALIMU HAWAJALIPWA, HAKUNA MTU ATAENDA KUFANYA KAZI, NA YULE ATAENDA KUFANYA KAZI ATAKULA MAWE" (TRANSLATED TO MEAN FROM NEXT WEEK IF TEACHERS WILL NOT HAVE BEEN PAID NOBODY WILL GO TO WORK AND WHOEVER GOES SHALL BE STONED) which words indicated it desirable to bring death and physical injury to persons in Kenya."*

46. The law contemplates that there may be occasions when there may be an error, omission or irregularity in a charge sheet. In addition, there may be errors, omissions or irregularities that may defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a miscarriage of justice. This is the foundation of Section **382** of the Criminal Procedure Code[21] which provides:-

> *"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice shall have regard to the question whether the objection could and should have been raised at an early stage in the proceedings."*

47. The proviso to the above section provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. A reading of the above provision leaves us with no doubt that the competence of the charge sheet is an issue that can be determined by the trial court.

48. Before us for determination is a constitutional Petition which addresses constitutional questions. Whether a charge sheet is defective is not a constitutional question. A constitutional question is an issue whose resolution requires the interpretation of the Constitution rather than that of a statute.[22] The competence of a charge sheet can be resolved by applying the relevant provisions of the Criminal Procedure Code. [23] 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 or values.[24]

49. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others**[25]*** in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak**[26]*** stated:-

> *"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 ....the 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 matters. So too,.., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects 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 an extensive jurisdiction."**[27]***

50. Put simply, the following are examples of what constitutes constitutional issues; the constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[28] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Accordingly, the argument that the charge sheet as framed is defective fails on grounds that that it is a matter that can be determined by the Magistrate's court hearing the criminal trial. Further, the Petitioner has a remedy under the Criminal Procedure Code if aggrieved by the decision of the trial court when challenging the viability of the charge sheet on account of an alleged defect. This includes making an appropriate application for revision under section 362 of the Criminal Procedure Code or filing an appeal under section 348 thereof. In any event, some defects in a charge sheet are curable by way of an amendment. In the event of such incurable defects, the trial court is competent to declare it as such and acquit the accused person.

b. Whether the Petitioner is citing what ought to be his defence in the lower court

51. Dr. Khaminwa argued that the Petitioner was exercising his freedom of expression. He placed reliance on *Charles Onyango Obbo & Another v Andrew Mujuni Mwendwa and Attorney General*[29] in which the Supreme Court of Uganda discussed the question of what constitutes hate speech and incitement to violence *vis a vis* the constitutional right to freedom of expression/speech. In the said case, the Supreme Court of Uganda defended the right to state/express truth, falsity, erroneous and unpleasant statements.[30]

52. He further relied on *Edmonton Journal v Alberta*[31]which held that democracy cannot exist without free speech, and, that, the guarantee to free speech must not just extent to favorable or inoffensive ideas and statements. He also relied on *R v Oaks*[32] which held that the standard of limitation of fundamental rights and free speech was pegged on values and principles essential to a free and democratic society.

53. Dr. Khaminwa argued that the Petitioner's statements were fair comment and that the court must embrace a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic rights or the rule of law. He cited Hon. *Kanini Kega v OKOA Kenya Movement & 6 Others*[33] in support of the proposition that the Constitution should be interpreted as a living document.

54. Mr. Omirera cited Article 33(1) (2) of the Constitution and argued that freedom of expression is not absolute. He argued that Article 24

imposes reasonable restrictions.

55. The argument advanced by the Petitioner's counsel as we understand it is that the Petitioner was simply exercising his freedom of expression. We are alive to the fact that arguments citing violation of constitutional rights are attractive and must be approached with great care. This is because the Constitution is the supreme law of the land, and courts have a constitutional obligation to hoist high fundamental rights. However, the freedom of expression guaranteed under Article 33 of the Constitution is not absolute. Article 33 (2) of the Constitution provides that the right to freedom of expression does not extend to—

> *a) propaganda for war;*
>
> *b) incitement to violence;*
>
> *c) hate speech; or*
>
> *d) advocacy of hatred that— (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).*

56. In addition, Article 33 (3) of the Constitution provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

57. Our reading of the above provisions is that the Petitioner is attempting to argue his defence to the criminal trial in this constitutional Petition. It is a fundamental principle of law that it is not for this court to determine the veracity or to weigh the strength of the prosecution's evidence or accused person's defence. That is a function for the trial court hearing the criminal trial. In any event, Article **50** of the Constitution contains iron clad safeguards that protect the rights of accused persons during trial. It follows that the Petitioner cannot be heard to lament that Article 50 of the Constitution does protect his rights to a fair trial. The Petitioner's argument on the issue under consideration lacks merits and therefore it fails.

c. Whether Section 96 (a) of the Penal Code shifts the burden of proof to an accused person.

58. Dr. Khaminwa submitted that the above section places the burden of prove on the accused person, as a consequence, it has no validity under the Constitution because it infringes Articles **50 (1) (a) and 50 (1) (b)** of the Constitution which guarantee an accused person a fair trial and presumption of innocence before and during the course of trial. He also argued that the provision offends an arrested persons' right to remain silent as provided under Article **49 (1) (a) (ii) & (iii)** of the Constitution. Citing *Republic v Paul Gicheru & Another*[34] he invited the court to uphold the Petitioner's fundamental rights.

59. Mr. Omirera submitted that the impugned provision is constitutional and that it only imposes evidential burden on the accused person. He referred to section **111** of the Evidence Act[35] and argued that the prosecution is required to discharge the burden of proof and the accused is asked to explain the utterances. To buttress his argument, he cited *Isaac Robert Murambi v Attorney General & 3 Others*[36] in which the court discussing the offence of handling stolen property under section **323** of Penal Code[37] stated:-

> *"In my view Section 323 does not put a burden on an accused person that cannot be easily and reasonably discharged. The accused person is simply required to give an explanation on a balance of probabilities as to how he came by the property in question. It is only the accused person who can explain how he came by a certain item. It would indeed be difficult to expect the finder (the police) to know the circumstances under which an item that is reasonably suspected to have been stolen or unlawfully obtained landed in the hands of an accused person. In my view, the provision does not carry the inherent risk of innocent persons being got in its web and convicted."*

60. Mr. Omirera also cited on section **119** of the Evidence Act[38]which provides that the court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

61. On legal burden of proof, Mr. Omirera relied on *Peter Wafula Juma & 2 Others v Republic*[39] in which the Court stated as follows:-

> *"Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the constitutional right of the accused; presumption of innocence, not to give incriminating evidence and to remain silent. Did the trial magistrate shift the legal burden of proof to the Appellants?"*

62. He added that the right to remain silent is constitutional, but the State must prove its case, hence, the impugned provision is not unconstitutional.

63. Article **2(1)** of the Constitution proclaims the Constitution to be the supreme law of the country. Importantly, it declares that any law or conduct inconsistent with it is invalid.

64. Article **259** of the Constitution enjoins the court 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 and in a manner that contributes to good

governance. In exercising its judicial authority, this court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the Constitution.

65. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.[40] (The court should start by assuming that the Act in question is constitutional). Indisputably, there exists a presumption as regard constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[41] However, this rule is subject to the limitation that it is operative only until the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits.

66. The Constitution should be given a purposive, liberal interpretation. 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.[42]The spirit of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.[43] The courts have had occasion to consider the principles upon which the courts are called upon to interpret this Constitution.

67. In the *Matter of Kenya National Human Rights Commission*,[44] the Supreme Court held that in interpreting the Constitution, the court should adopt a holistic approach. It stated thus:-

> *"But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is 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 in each other, so as to arrive at a desired result."*

68. In *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*,[45] the court held that in interpreting the Constitution a purposive approach must be employed. The court held in paragraph 167 as follows:-

> *"In Pepper v. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself: "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*

69. The Court of Appeal in *County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu**[46]*** held that:-

> *"14. Alive to the fact that we are called upon to interpret the aforementioned provision, we remind ourselves that the cardinal rule for construction of a statute; that is a statute should be construed according to the intention expressed in the statute itself".*

70. The intention of a statute can be identified through a number of factors. In *Cusack –vs- Harrow London Borough Council*,[47] the Supreme Court observed:-

> *"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."*

71. The court then held that in interpreting an Act of Parliament, the court must ensure that the Act conforms to the Constitution. The court noted that the preamble to the Constitution provided that in adopting and enacting the Constitution, the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights, freedom, democracy, social justice and the rule of law.

72. In *Institute of Social Accountability & Anor. Vs. National Assembly & 4 others**[48]*** the High Court had this to say in regard to its jurisdiction to interpret the Constitution where certain provisions in an Act of Parliament are sought to be declared unconstitutional:-

> *"56. First, this Court is enjoined under Article 259 of the Constitution 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 and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.*
>
> *57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see Ndyanabo v Attorney General of Tanzania [2001] EA 495). We therefore reiterate that this Court*

will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.

58. Third, in 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 and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and 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 S.C.R. 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 of 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.

60. 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))."

73. In *Coalition for Reform and Democracy (CORD) & 2 others vs. Republic of Kenya & 10 others*[**[49]**] the High Court held thus:-

"*In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.*"

74. Disposition of issues relating to interpretation of statutes and determining constitutional validity of statutes must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and are applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand.[50]The Privy Council[51] while interpreting the Constitution of Bermuda stated that a constitutional order is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.

75. In interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

76. Therefore, a court must try to determine how a statute should be enforced. However, we are alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law, so this judicial power should be exercised with restraint. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.

77. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain, clear and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it, which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The court of course adopts a construction, which will carry out the obvious intention of the legislature but cannot not legislate itself.

78. All that the court has to see at the very outset is what does the provision say? The courts are bound by the mandate of the Legislature and once it has expressed its intention in words, which have a clear significance and meaning, the court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. However, the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning, which cannot be warranted by the words employed by the Legislature.

79. Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question. As the Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*[**[52]**] observed:-

"*Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.*"

80. The law of statutory interpretation reflects and implements the principle of legality. As the Chief Justice French said the principle of legality 'can be regarded as "constitutional" in character' and 'that common law freedoms are more than merely residual.'[53]

> *"[These rights and freedoms] have in dependent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal."****[54]***

81. Gleeson CJ explained the justification for the principle of legality in the following terms:-

> *"The [principle] is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."****[55]***

82. As Lord Hoffmann famously observed in *Ex parte Simms*:

> *"[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."****[56]***

83. The important point is that the principle of legality is no longer an 'interpretive fiction'[57]about likely parliamentary intent, but a clear and prior judicial statement to the elected arms of government as to the constitutional law rights and freedoms that will be jealously guarded from legislative encroachment.

84. Having briefly stated the guiding principles in constitutional and statutory interpretation, we proceed to examine the impugned provision. Section **96 (a)** of the Penal Code[58] provides as follows:-

> ***96. Incitement to violence and disobedience of the law***
>
> *Any person who, without lawful excuse,* ***the burden of proof whereof shall lie upon him****, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated—*
>
> *(a) to bring death or physical injury to any person or to any class, community or body of persons; or*
>
> *(b) to lead to the damage or destruction of any property; or*
>
> *(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.*

85. When the constitutionality of legislation or a provision in a statute is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[59] the impugned legislation or provision is capable of being read in a manner that is constitutionally compliant. In interpreting the law, courts must infuse it with values of the Constitution. Courts must never shirk from this constitutional responsibility. As Moseneke DCJ stated:-

> *"The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles. The new legal order liberates the judicial function from the confines of the common law, customary law, statutory law or any other law to the extent of its inconsistency with the Constitution. This is an epoch making opportunity which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate shift of legal culture at the High Courts and Magistrates' Courts is necessary. After all, it is the Constitution that confers substantial review powers on the judiciary. However, without an appropriate legal culture change the judiciary may become an instrument of social retrogression. In time the judiciary will lose its constitutionally derived legitimacy."****[60]***

86. Dr. Khaminwa's assault on the above provision is premised on the phrase *"****the burden of proof whereof shall lie upon him****"* appearing in the section. There was no contest before us on the meaning and impact of the above phrase. The point of departure is whether the shifting of the burden of prove offends fair trial rights guaranteed under Article 50 of the Constitution.

87. Mr. Omirera's argument was grounded on section **111** of the Evidence Act,[61] which places the burden of proof on accused person in certain cases. He also relied on section **119** of the Evidence Act[62] which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

88. **Mr. Omirera** drew a parallel by citing authorities dealing with the offence of handling stolen goods where the accused is presumed to be the thief unless he explains how he came into possession of the stolen goods. To contextualize Mr. Omirera's argument, it is useful to

examine section **322** of the Penal Code[63] which provides that:-

> *"A person handles stolen goods if otherwise than in the course of stealing, knowing or having reason to believe them to be stolen he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so."*

89. A notable distinction between section **322** and the impugned provision is that section **322**, like other penal statutes stipulates the ingredients of the offence, which must be proved by the prosecution before the evidential burden of proof shifts to an accused person to explain what the prosecution has established. In the first instance, it is only necessary for the Prosecution to establish that the property was stolen and that it was found in the possession of the accused. The accused is thereupon liable to be convicted unless he proves that he had reasonable cause for believing that the property was not stolen. Section **322** therefore, introduces a departure from the common law by imposing on the accused the burden of adducing evidence to establish the reasonableness of his or her subjective belief, albeit innocent, acquisition or receipt of stolen goods.

90. The meaning of the phrase "knowing or having reason to believe" in section **322** will depend on the circumstances. In many cases, an explanation by the accused of the manner in which the goods were acquired will be sufficient to meet the burden. Courts approach the question whether an excuse is reasonable in the context of the character and background of the accused, the nature of the goods found in his or her possession, and the manner in which they were acquired.[64]

91. Another example is the defence of insanity (also called the defence of mental disorder) which has long been an explicit exception to Viscount Sankey's "golden thread." "As regards insanity, every accused is presumed by law to be sane and accountable for his actions unless the contrary is proved."[65] In itself, a reverse burden of proof – with the onus on the defendant, rather than the prosecution – can be uncontroversial. Once factual guilt, or *actus reus,* is confirmed, it seems perfectly reasonable to ask a defendant why they did what they did, and to expect a convincing answer. Thus, shifting burden of prove in cases of insanity can pass the constitutional muster.

92. Mr. Omirera also relied on section **119** of the Evidence Act[66] which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

93. Presumptions are inferences that a court may draw, could draw or must draw. Presumptions are devices that entitle a court to pronounce on a particular issue notwithstanding the fact that there is no direct evidence or there is circumstantial evidence. The inference that the court may draw could be affirmative or dis-affirmative. Presumptions enable a court to find a fact to exist or to find a fact not to exist. Essentially presumptions will have effect on the burden of proof. If we are saying that presumptions will help the prosecution prove certain facts to exist, it will have an effect on what burden of proof an accused person will be called upon to rebut when put on his defence.

94. Presumptions of facts are inferences that may be drawn upon the establishment of a basic fact. The operative word in these presumptions is 'may.' Presumptions in criminal cases are rebuttable. Rebuttable presumptions of law are inferences that must be drawn in the absence of conclusive evidence to the contrary. A good example is the presumption of innocence, that every person accused of a crime is innocent until proved guilty by a court of law. Essentially presumption in criminal law is a legal device that requires a conclusion that is logical to be arrived at by the court unless the contrary is established to dispel the presumption. A court is however precluded from reaching a conclusion based on a presumption of fact if the same does not meet the threshold of that fact being established to the required standard of proof beyond reasonable doubt.

95. Section **4** of the Evidence Act defines presumptions of facts and rebuttable presumptions of law. It states as follows:-

> *1. Whenever it is provided by law that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.*
>
> *2. Whenever it is directed by law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.*
>
> *3. When one fact is declared by law to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.*

96. As section **119** of the Evidence Act[67] suggests, the court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Differently put, section **119** refers to presumption of likely facts. These are an inference that may be drawn regarding natural events, human conduct and the common course of natural events. The court can infer from what it can see not perceive. If a person is caught with stolen goods, it is presumed that he stole them or that he knows who stole them. If they cannot adequately explain how they came to possess stolen goods, then the incumbent of proof is on them to say how the owner came to lose the goods.

97. John H. Wigmore, America's great scholar in the field of evidence, made the following observations respecting the future of this important branch of our law:-

> *"That our law of Evidence can be improved upon, no one doubts. That the improvement must be gradual, yet unremitting, is equally certain, -- at least if we believe, with Carlyle, that 'all Law is but a tamed furrow field, slowly worked out and rendered arable from the waste Jungle.' That the profession is interested, and that all practicable proposals for progress will have to come from or through the profession itself, must be conceded."**[68]***

98. In addition, the Supreme Court of the United States, acting upon the faith of the principle so effectively stated by Wigmore, broke away from one of the most ancient rules of Anglo-American law respecting the competency of witnesses and held that a wife was a competent witness to testify for her husband in a criminal prosecution. Mr. Justice Sutherland, writing the opinion of the Court, said:-

> *"The fundamental basis upon which all rules of evidence must rest if they are to rest upon reason-is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of the truth should yield to the experience of a succeeding generation whenever that experience has dearly demonstrated the fallacy or unwisdom of the old rule."**[69]***

99. From the above discussion on sections **111** and **119** of the Evidence Act,[70] it is clear that presumptions of facts are inferences that may be drawn upon the establishment of a basic fact. The basic facts must be established before the presumption can come into play. It is also clear that the court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

100. A reading of section **96 (a)** of the Penal Code shows that the phrase *"the burden of proof whereof shall lie upon him"* shifts the burden of proof to an accused person before the basic facts have been established. This in our view excludes it from the scope of section **111** and **119** of the Evidence Act.[71] The basic facts in this case would be the ingredients of the offence as stated in the charge sheet, which must be proved by the prosecution before the evidential burden shifts to an accused person. The impugned section falls under the category of provisions referred to as “reverse onus” provisions. These are provisions, which shift the burden to an accused person where the law deems it appropriate in the circumstances where the proven facts are within the special knowledge of the accused.

101. The question is whether such a provision can pass constitutional muster. Before addressing this question, it is desirable to consider foreign jurisprudence dealing with comparable legislation. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence.[72]

102. Our Constitution was inspired by the South African Constitution. Accordingly, South African court decisions on the issue under consideration affecting similar provisions of their Constitution would offer useful guidance. However, we are conscious that the decisions are persuasive. In this regard, the South African Constitutional Court has held that reverse onus provisions infringe the right of an accused person to be presumed innocent as envisaged in Section **25(3) (c)** of their Constitution,[73] the equivalent of Article **50** of our Constitution. It held that the function and effect of the presumption is to relieve the prosecution of the burden of proving all the elements of the offence with which the accused is charged.

103. Section **96 (a)** shifts both the legal burden and the evidential burden of proof to an accused person even before the prosecution discharges its burden of proof. The question that ensues is whether the reverse onus created by the said section is consistent with the constitutionally entrenched rights to a fair trial, to be presumed innocent, to remain silent, and not to testify during the proceedings or give self-incriminating evidence. Differently put, the contestation is whether the said section offends Article **50 (2) (a)** of the Constitution which guarantees the right to a fair hearing. It reads that *“Every accused person has the right to a fair trial, which includes the right—**(a)** to be presumed innocent until the contrary is proved;”*

104. Despite the provision of limitation of rights provided under Article **24** of the Constitution, Article **25** provides for Fundamental Rights and freedoms that shall not be limited or abridged under any circumstances. These are— (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of habeas corpus.

105. Article **50 (2)** of the Constitution provides that every accused person has the right to a fair trial, which includes the right—

> *a) to be presumed innocent until the contrary is proved;*
>
> *b) to be informed of the charge, with sufficient detail to answer it;*
>
> *c) to have adequate time and facilities to prepare a defence;*
>
> *d) to a public trial before a court established under this Constitution;*
>
> *e) to have the trial begin and conclude without unreasonable delay;*
>
> *f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
>
> *g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*
>
> *h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
>
> *i) to remain silent, and not to testify during the proceedings;*

j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

k) to adduce and challenge evidence;

l) to refuse to give self-incriminating evidence;

m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

n) not to be convicted for an act or omission that at the time it was committed or omitted was not— (i) an offence in Kenya; or (ii) a crime under international law;

o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

106. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article **14** of the International Covenant on Civil and Political Rights (ICCPR).[74]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under Article **25 (c)** of our Constitution, it is among the fundamental rights and freedoms that may not be limited or abridged.

107. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles **50** of the Constitution. The Right to a fair trial is one of the cornerstones of a just society. The Supreme Court of India in *Rattiram v. State of M P*[75] ruled thus:-

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."

And again:-

"Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused….."

108. The presumption of innocence is one of the cornerstones of a fair trial. It imposes a burden of proof on the prosecution, i.e. a burden to prove the guilt of a person accused of a criminal offence. To discharge this burden, the prosecution must prove the guilt of the accused person beyond reasonable doubt. Article **14(2)** of the ICCPR highlights the fact that the "right to be presumed innocent until proved guilty according to law" is essential to upholding the right to a fair trial.[76] It involves questions of the burden and standard of proof in criminal proceedings as well as the treatment of an accused person that may undermine the presumption of innocence. The right applies to all stages of criminal proceedings, from the time a person is suspected of having committed a criminal offence, is arrested, is arraigned in court, is admitted to bail, during the trial, and if convicted[77] and sentenced, the right to bail pending appeal until the appeal is heard and determined.

109. The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C**.** in the celebrated case of *Woolmington vs. DPP*[78] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that:-

'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

110. The function and effect of the reverse onus provision in the above section is to relieve the prosecution of the burden of proving all the elements of the offence with which the accused is charged. Differently put, the provision shifts the legal burden of proof to the accused person thereby infringing the presumption of innocence which is entrenched in Article **50 (2) (a)** of the Constitution. The challenged section is in conflict with Article **50 (2) (a)** of the Constitution and the long-established rule of the common law on the burden of proof that *"it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond a reasonable doubt."*[79]

111. In addition to the presumption of innocence, the section also infringes what is described as "the cluster of rights associated with it." These are the general right to a fair trial, the privilege against self-incrimination, the right not to be a compellable witness against oneself and the right to silence[80] guaranteed under Article in **49 (1) (a) (ii)** of the Constitution in respect of arrested persons. The inevitable effect of the provision is that the accused is obliged to produce evidence of reasonable cause to avoid arrest and if charged in court, conviction even if the prosecution leads no evidence regarding reasonable cause. Moreover, the absence of evidence produced by the accused of reasonable

cause in such circumstances would result not in the mere possibility of an inference of absence of reasonable doubt, but in the inevitability of such a finding. In these circumstances, for the accused to remain silent increases the risk of an inference of guilt.

112. The presumption of innocence and the right to a fair trial is manifestly transgressed by the impugned provision. The reverse onuses of this kind in some cases impose a full legal burden of proof on the accused. Accordingly, if after hearing of all the evidence, the court is uncertain as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of guilt. This is an impermissible position where a statutory provision supplants a constitutional edict.

113. Article 14(3) (g) of the ICCPR requires that, as a minimum guarantee in the determination of any criminal charge, every person is entitled "not to be compelled to testify against himself or to confess guilt." This 'privilege against self-incrimination' is closely linked to the presumption of innocence and is of relevance in three contexts. *First*, the right to silence of an accused person, along with the presumption against any adverse inference to be drawn from the exercise by an accused person of this right. *Second*, the absolute prohibition of the use of any information obtained through illegal methods violating the accused person's right to fair trial and, *third*, through the conduct of trial.

114. The purpose of the presumption of innocence is to minimize the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt,[81] thereby reducing to an acceptable level the risk of error in courts overall assessment of evidence tendered in the course of a trial. So important is the right to a fair trial that under Article **25** of the Constitution, it is one of the rights that may not be limited or abridged. The Right to a fair trial is an absolute right. It follows that the infringement cannot be a permissible limitation under Article **24** of the Constitution.

115. Our courts have severally emphasized the importance of the rights entrenched in Article **50** of the Constitution. Underlying the decisions in those cases is the recognition that a consequence of the value system introduced by the Constitution is that the freedom of the individual may not lightly be taken away.

116. The impugned section also infringes the right to silence guaranteed under Article **50 (2) (i)** of the Constitution. Like the presumption of innocence, the right to silence is firmly rooted in both our Constitution and the common law and statute and is inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness against himself at his trial. The presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct. It ensures that until the State proves an accused persons' guilt beyond a reasonable doubt, he or she cannot be convicted. The right is vital to an open and democratic society committed to fairness and social justice.

117. In 1997, the Supreme Court of Cananda in *R vs Lifchus*[82] suggested the following explanation:-

> *"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. ...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.*
>
> *A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.*
>
> *Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.*
>
> *In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."*

118. According to Article 14(2) of the ICCPR, "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[83] As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis-a-vis* the accused, but also in relation to a suspect or accused throughout the pre-trial phase.

119. In the light of the vital importance to our criminal justice system of the right to be presumed innocent and the cluster of fair trial rights, which accompany it, the imposition of a full burden of proof on the accused person in the circumstances has a disproportionate impact on the rights in question. It follows that the reverse onus provision under challenge out rightly violates the provisions of Articles 49 and 50 of the Constitution and the long cherished and established common law principles that the legal burden of prove never leaves the prosecutions backyard.

120. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that all law in force immediately before the effective date of the commencement of the Constitution continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. All law must conform to the constitutional edifice. It follows that the impugned provision must meet the threshold prescribed by the Constitution.

121. It was hoped that upon the promulgation of the 2010 Constitution, all laws would be amended to conform to Constitution. On the other hand, courts have a constitutional duty to point out laws which are not consistent with the Constitution and to strike them down where the circumstances so demand. Failure to do so would amount to abrogating from the court's constitutional mandate. The court has a duty not to

frustrate the "hopes and aspirations" of those who made the strenuous efforts to provide the Constitution for the good government and welfare of all persons in the country based on the principles of freedom, equality and justice.[84]

122. The primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[85] What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law. In the words of US Supreme Court in *U.S vs Butler*[86] **:-**

> "*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."*

123. It is our finding that the provisions of section **96 (a)** of the Penal Code[87] are inconsistent with the provisions of the Constitution discussed above.

(e) Whether the statements issued by the Cabinet Secretary and Members of Parliament influenced the decisions by IGP, the National Cohesion and Integration Commission and the DPP.

124. Citing Article **157** of the Constitution, **Dr. Khaminwa** submitted that the DPP is independent and not subject to control of any person. He singled out the statement attributed to the Cabinet Secretary reproduced earlier and argued that the Cabinet Secretary misdirected himself on the law and acted outside his powers.

125. Dr. Khaminwa also submitted the Cabinet Secretary issued a statement directed to the IGP & the DPP. He argued that a Cabinet Secretary has no power to investigate or direct investigations since such powers are vested in the IGP. He referred to Articles **244** & **245** of the Constitution, and submitted that the Cabinet Secretary misdirected himself, and acted in excess of his powers. He placed reliance on *Republic v Director of Public Prosecutions & Another ex parte Job Kigen Kangongo*[88] which *inter alia* held that the police must act independently and impartially, and that, the court has jurisdiction to protect itself from abuse of its procedures. He also took issue with the statement attributed to the Dagoretti MP reproduced earlier.

126. **Dr. Khaminwa** cited Articles **244** and **245** of the Constitution and questioned the statement by the Cabinet Secretary purporting to give directions to the IGP, describing it as unconstitutional. In his view, the Cabinet Secretary has no constitutional mandate to direct or issue instructions to the IGP.

127. Mr. Omirera argued that the pre-trial conduct (i.e. the statements complained of) did not prejudice the Petitioner and that the mere raising of the issue by the Cabinet Secretary does not amount to directing the DPP, who acts independently. He argued that the said statements did not sway the DPP. He submitted that investigations were done properly and that the DPP made an independent decision to charge and prosecute.

128. He also argued that the IGP acts independently and relied on *Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission & 3 Others*[89] for the holding that there should be concrete grounds to support an argument that the prosecution of a criminal case manifests an abuse of the judicial process. It was his submission that the pre-trial conduct complained of did not prejudice the Petitioner, and that by raising the issue, the CS did not direct the DPP who acted independently.

129. It is an established position that public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. It follows that for the investigations by the IGP and the DPP's decision to charge and prosecute the Petitioner to be allowed to stand, it must be demonstrated that the decisions are grounded on the law. Put differently, the IGP's decision to conduct the investigations and the DPP's decision to charge and prosecute the Petitioner must conform to the doctrine of legality. A failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> "*the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"*[90]

130. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[91]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

131. In *Council of Civil Service Unions v. Minister for the Civil Service*[92] Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*.[93]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand

correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as *"unreasonableness"* in *Wednesbury* case.[94] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere. Judicial intervention is posited on the idea that the objective is to ensure that the public body did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision.

132. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised. It must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

133. We will first address the question whether the statements attributed to the Cabinet Secretary influenced the IGP. The starting point for this analysis is Article **245 (4) & (5)** of the Constitution which provides that:-

> *(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to—*
>
> *(a) the investigation of any particular offence or offences;*
>
> *(b) the enforcement of the law against any particular person or persons; or*
>
> *(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.*
>
> *(5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.*

134. A reading of Article **245(4) (a) & (b)** of the Constitution reproduced above leaves us with no doubt that the Cabinet Secretary can only exercise powers of giving directions to the IGP on matters of policy and cannot give directions in relation to investigations in particular offence or against a particular individual. The statement attributed to the Cabinet Secretary appears elsewhere in this judgment. It will serve no purpose to reproduce it save to highlight the relevant parts.

> *"…. It is, therefore, imperative that investigations into the speech and its intent begin in earnest. Senator Muthama should immediately record a statement at the criminal investigations department. The investigations should focus on among others,...undermining the National Cohesion and Integration Act- Section 13; by describing the President as intent to ensure children of the poor continue to suffer in poverty*
>
> *… I expect the National Cohesion and Integration Commission to, as a matter of urgency, commence investigations on each of these and any other claims and allegations made, that impact negatively on the efforts to enhance national cohesion and integration of the Kenya People."*

135. It is clear that the above statement was directed to independent constitutional offices, i.e. the National Cohesion and Integration Commission, the IGP and the DPP. The only question to be addressed regarding the statement by the Cabinet Secretary is whether he had powers to give directions to these agencies. Section 26 (2) (a) of the National Cohesion and Integration Act[95] provides that in the discharge of its functions under the Act, the Commission shall not be subject to the direction or control of any other person or authority. This provision renders the Cabinet Secretary's direction to the Commission legally frail. Simply put, the Cabinet Secretary has no powers under the law to give directions to the Commission. His purported direction to the Commissions flies on the face of the above provision.

136. Article **157 (10)** of the Constitution provides that:-

> *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.*

It therefore follows that the Cabinet Secretary cannot under any circumstances direct the DPP on what criminal proceedings to commence or continue with.

137. As is evident from the above cited Article **245 (4) (a) & (b)** of the Constitution, the IGP, in undertaking investigations in relation to any offence and as against any person shall not be subject to the direction of any person except the DPP as provided under Article **157 (4)** of the Constitution. Even though this Article empowers the DPP to give directions to the IGP to conduct investigations, it is only the IGP and other investigative agencies who have the mandate to conduct investigations. The DPP in exercise of his mandate under Article **157 (4)** of the Constitution has no investigative powers.

138. This leads us to the third limb of the issue under consideration, namely, whether the DPP's decision to charge the Petitioner was influenced by the utterances attributed to the then Members of Parliament, namely, Hon. Dennis Waweru, Hon. Moses Kuria and Hon. Johnson Sakaja. The three statements as far as they are relevant to this case were reproduced earlier, hence, it will add no value for us to reproduce them here.

139. A reading of the statement attributed to Hon. Waweru leaves with no doubt that it is an expression of his views about the Petitioner's conduct. It does not direct the DPP in any manner nor is it addressed to the DPP. Hon. Moses Kuria's talked of being aware of plans to arrest the Petitioner. His statement does not contain any directions to the DPP. Being aware of the plans whether true or not is not and cannot be the same as directing the DPP.

140. Hon. Johnstone Sakaja is quoted as demanding all security agencies to immediately arrest Senator Johnstone Muthama. He is said to have said *"the Director of Public Prosecutions to take immediate action today on Senator Muthama. We are demanding immediate arrest of Senator Muthama and if not in future we can institute citizen's arrest on him. He must apologize immediately. We are planning a major rally in Nairobi this weekend."*

141. The question that calls for an answer is whether the DPP was prompted by the above statement in arriving at the decision to charge the Petitioner.

142. A special feature of the Constitution of Kenya, 2010 is the establishment of an independent Office of the Director of Public Prosecution. This independence is provided under Article **157 (10)** which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. This position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act.[96] The section provides that pursuant to Article **157 (10)** of the Constitution, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings. It also provides that the DPP shall not be under the direction or control of any person or authority in the exercise of his powers or functions under the Constitution, the Act or any other written law. Lastly, it provides that the DPP shall be subject only to the Constitution and the law.

143. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Where the decision is surrounded by doubt or even mere reasonable suspicion, such a decision cannot be allowed to stand. The decision must be seen to have been arrived at by the DPP independently. Under no circumstances should the DPP appear to have been prompted by another person to institute any proceedings. Such a scenario, would amount to a violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act.

144. The DPP should remain fiercely independent, fair and courageous. The responsibilities entrusted to the Director of Public Prosecutions by the Constitution demand nothing less. In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP must not only be independent but be seen to act independently. The Constitutional provision in Article **157 (10)** ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system *"should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so."*[97]

145. The following observations are useful to bear in mind:-

> *"...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice–impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one."*[98]

146. The Petitioner's position is that the statements attributed to Hon. Sakaja influenced the DPP's decision to charge him. In order to prove this allegation, the test is not whether the Petitioner believes that the DPP was influenced, but whether on an objective approach, he in fact has reasonable grounds for his suspicion. In *R v Van Heerden*[99] the court held that the suspicion must be reasonable and the test for such reasonableness is objective. The approach to be adopted in considering whether the suspicion was reasonable is the one followed by Jones J in *Mabona and Another v Minister of Law and Order and others*[100] that the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary and not a reasonable suspicion.

147. The DPP is entitled to exercise his discretion to charge as he sees fit, provided that he stays within the bounds of rationality. The standard is not breached because a Member of Parliament or a busy body makes utterances as happened in this case. A number of choices were open to the DPP, all which may fall within the range of his legal mandate. So long as the DPP exercised his discretion within this range permissible by the law, the decision cannot be impugned just because another person issued a public statement. Put differently, there is no material before us to show that, save for the statement attributed to Hon. Sakaja, that there was basis for the Petitioner to allege that the DPP arrived at the decision to prosecute him, given the available evidence, after being influenced.

148. It is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgement *bona fide* expressed, the court will not interfere with the result. There are circumstances in which inference would be possible and right. If for instance such an officer has acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provision of a statute, in such cases the court might grant relief. The court would not interfere where there is due and honest exercise of discretion or power, even if it is considered that the decision is inequitable or wrong.

149. In *Hicks v Faulkner*,[101] Hawkins J defined reasonable and probable cause as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."[102] It was stated that the test contains a subjective as well as an objective element. There must be both actual belief on the part of the prosecutor and the belief must be reasonable in the circumstances.

150. The necessary deduction, which the courts have from time immemorial made from that definition, is that there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration of the adequacy of the evidence available to him or her. This is tantamount to a subjectively honest belief founded on objectively reasonable grounds that the institution of proceedings was justified. [103]A combination of both the subjective and objective tests means that the DPP must have subjectively had an honest belief in the guilt of the accused and such belief must also have been objectively reasonable.[104]

151. From the material before us, we find nothing to show that the DPP would not have arrived at the same decision had the statement complained of not been made. So much depends on the absence of a reasonable and probable cause, and the basis of the decision to prosecute. It is widely accepted that reasonable and probable cause means an honest belief founded on reasonable ground(s) that the institution of proceedings is justified. It is about the honest belief of the DPP that the facts available at the time constituted an offence and that a reasonable person could have concluded that the Petitioner was guilty of such an offence. Ultimately, it is for the trial court to decide at the conclusion of the trial whether or not there is evidence upon which the accused might reasonably have been charged.

f. *Whether the decision to prosecute the Petitioner was selective and therefore discriminatory.*

152. Dr. Khaminwa argued that the Police and DPP applied the law in a selective and discriminatory manner in making the decision to investigate and charge the Petitioner. He submitted that other persons who have made similar utterances have not been prosecuted. In particular, he cited similar utterances or instances by Hon. Moses Kuria, Prof. Mutahi Ngunyi and Senator Isaac Melly referred to earlier.

153. The Respondents' counsel did not address this issue.

154. Article **27** of the Constitution provides for the right to equality before the law and freedom from discrimination.The claim of direct or indirect unfair discrimination implicates the right to equality in our Constitution.[105]The principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law or conduct complained of is likely to be used against them more harshly than others.

155. The International Covenant on Civil and Political Rights, General Comment **18** of the Office of the U.N. High Commission for Human Rights, states the following on discrimination.[106]

> *7. "While these Conventions deal only with case of discrimination on specific grounds, the committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference, which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, or all rights and freedoms.*
>
> *8. The enjoyment or rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.*
>
> . . .
>
> *13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."*

156. In *Willis vs The United Kingdom*[107] the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. From this definition, it is safe to state that the Constitution prohibits unfair discrimination. Unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people differently or as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization. Unfair discrimination principally means treating people differently in a way, which impairs their fundamental dignity as human beings.

157. Did the DPP selectively apply the law as alleged? D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

> *"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense."*

158. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. This basic criterion is the cornerstone of the uniform prosecution policy adopted worldwide. The decision whether or not to prosecute is the most important step in the prosecution process. In every case, great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system. This is what is referred to public interest.

159. It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. In addition, a significant consideration is whether the prosecution is in the public interest. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources must be employed to pursue those cases worthy of prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution.

160. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. The decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The Petitioner has not addressed these crucial considerations.

161. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the suspect and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

162. When evaluating the evidence regard should be had to the following matters:- **(a)** *Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?* ***(b)*** *If the case depends in part on admissions by the suspect, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the suspect?* ***(c)*** *Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the suspect, or may be otherwise unreliable?* ***(d)*** *Does a witness have a motive for telling less than the whole truth?* ***(e)*** *Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute?* ***(f)*** *Whether the alleged offence is of considerable public concern; and* ***(g)*** *The necessity to maintain public confidence in the criminal justice system?* As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

163. The constitutional provision in Article **157 (10)** ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influence. This court respects this constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion in making the decision to prosecute.

164. The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. No evidence has been tendered to show that the DPP abused his discretion or powers under the Constitution. The duty of the prosecutor is to seek justice, not merely to convict or parade people in court without sufficient evidence.

165. No material was placed before us to enable us reach a conclusion that the DPP treated similar cases and circumstances differently so as to conclude that there was selective application of the law in respect of the Petitioner. In any event, the individuals referred to by the Petitioner were not parties to these proceedings and therefore it would be uncalled for, for this court to comment on the merits or otherwise of the individual circumstances. We find that no abuse of discretion has been established in this case.

(g) Whether the Petitioner has established grounds for an award of damages.

166. The Petitioner claims damages as a result of alleged breach of his fundamental rights. It is now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution.

167. As discussed above, only one ground has succeeded, namely the unconstitutionality of Section **96 (a)** of the Penal Code.[108] The Court having dismissed the issues touching of the alleged violation of the Petitioner's rights to freedom of expression and the right not to be discriminated, we find no basis to award damages nor did the Petitioner establish a case to warrant an award of damages.

Conclusion

168. In summary, we find and hold as follows:-

> *a. The Petitioner approached this Court by way of a Constitutional Petition alleging violation of fundamental rights and freedoms and challenging the constitutional validity of the impugned provision. The question whether a charge sheet is defective is not a constitutional question. A constitutional question is an issue whose resolution requires the interpretation of the Constitution rather than that of a statute.*[109] *The competence of a charge sheet can be resolved by applying the relevant provisions of the Criminal Procedure Code.*[110] *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 or values.*[111] *The competency or otherwise of the charge sheet is matter for the trial court.*
>
> *b. The question whether or not the Petitioner was exercising his constitutional freedom of expression is a matter fit for his defence in the trial court. It is a fundamental principle of law that it is not for this court to determine the veracity or to weigh the strength of the prosecution evidence or accused person's defence. That is a function for the trial court hearing the criminal trial. It is not a matter for this court.*

*c. A reading of the impugned provision shows that the phrase "**the burden of proof whereof shall lie upon him**" shifts the burden of proof to an accused person before the prosecution has discharged its burden of proof to establish the elements charge, which is not envisaged or contemplated under sections **111** and **119** of the Evidence Act.[112]*

*d. Section **96 (a)** of the Penal Code shifts both the legal burden and the evidential burden of proof to an accused person even before the prosecution has discharged its legal burden of proof. Article **25** of the Constitution stipulates that Fundamental Rights and Freedoms related to fair trial provisions of the Constitution from the time a suspect is arrested to the time he is arraigned in court such as provided under Articles **49** and **50** of the Constitution shall not be limited or abridged under any circumstances. This is unlike Article **24** of the Constitution which limits certain rights.*

*e. The function and effect of the reverse onus provision in section **96 (a)** of the Penal Code is to relieve the prosecution of the burden of proving all the elements of the offence with which the accused is charged. The provision shifts the legal and evidential burden of prove to the accused person thereby infringing the presumption of innocence which is entrenched in Article **50 (2) (a)** of the Constitution. The section is not only in conflict with Article **50 (2) (a)** of the Constitution but also offends the long-established rule of the common law on the burden of proof that "it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond a reasonable doubt."[113]*

*f. The impugned section also infringes what is described as the cluster of rights associated with a fair trial. These are the general right to a fair trial, the privilege against self-incrimination, the right not to be a compellable witness against oneself and the right to silence[114] guaranteed under Article in **49 (1) (a) (ii)** and Article **50 (2) (i)** of the Constitution. The inevitable effect of the provision is that the accused is under compulsion to adduce evidence of reasonable cause to avoid conviction even if the prosecution leads no evidence to establish a prima facie case. Moreover, the absence of evidence adduced by the accused of reasonable cause in such circumstances would result not only in the mere possibility of an inference of absence of reasonable cause, but would prejudice him notwithstanding that no prima facie case has been established against him by the prosecution.*

g. The impugned provision manifestly transgresses the presumption of innocence in a criminal trial. The reverse onus of this kind imposes a full legal burden of proof on the accused. Accordingly, if after hearing of all the evidence, the court is uncertain as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of guilt. This is an impermissible position where a statutory provision supplants a constitutional edict.

*h. In the light of the vital importance to our criminal justice system of the right to be presumed innocent and the cluster of fair trial rights, which accompany it, the imposition of a full burden of proof in the circumstances has a disproportionate impact on the rights in question. It follows that the reverse onus provision under challenge out rightly violates the provisions of Articles **49** and **50** of the Constitution and the long cherished and established common law and statutory principles that the legal burden of proof never leaves the prosecution's court.*

*i. reading of Article **245(4) (a) & (b)** of the Constitution leaves us with no doubt that the Cabinet Secretary for Interior and Coordination of National Government can only exercise powers of giving directions to the Inspector General of Police on matters of policy and cannot give directions in relation to investigations in particular offence or against a particular individual.*

*j. Section **26 (2) (a)** of the National Cohesion and Integration Act[115] provides that in the discharge of its functions under the Act, the Commission shall not be subject to the direction or control of any other person or authority. This provision renders the Cabinet Secretary's direction to the Commission legally frail. Simply put, the Cabinet Secretary has no powers under the law to give directions to the Commission. His purported direction to the Commission flies on the face of the above provision.*

k. A reading of the statements attributed to Hon. Dennis Waweru and Hon. Moses Kuria leaves with no doubt that they did not direct or influence the DPP in his decision to charge the Petitioner in any manner.

l. The Director of Public Prosecutions is entitled to exercise his discretion to charge as he sees fit, provided that he stays within the bounds of rationality. The standard is not breached because a Member of Parliament or a busy body makes utterances as happened in this case. A number of choices were open to the DPP, all which may fall within the range of his legal mandate. So long as the DPP exercised his discretion within this range permissible by the law, the decision cannot be impugned just because another person issued a public statement.

m. From the material before us, we find nothing to show that the DPP would not have arrived at the same decision had the statements complained of not been made. It is about the honest belief of the DPP that the facts available at the time constituted an offence and that a reasonable person could have concluded that the Petitioner had committed an offence known in law liable to lead him to be charged. Ultimately, it is for the trial court to decide at the conclusion of the prosecution's evidence whether or not there is evidence upon which the accused might reasonably be called upon to answer the charge.

*n. Article **157 (10)** of the Constitution ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute is made free of any external influence.*

o. No material was placed before us to enable us reach a conclusion that the DPP treated similar cases and circumstances differently so as to conclude that there was selective application of the law in respect of the Petitioner. In any event, the individuals referred to by the Petitioner were not parties to these proceedings and therefore it would be uncalled for, for this court to comment on the merits or otherwise of the individual circumstances. We find that no abuse of discretion has been established in this case.

p. We find no basis to award damages to the Petitioner as claimed.

169. In view of our conclusions herein above, we find that this Petition succeeds to the extent herein above stated. Accordingly, we order as follows:-

*a) **A declaration** be and is hereby issued that section **96 (a)** of the Penal Code is unconstitutional to the extent that it shifts the legal and evidential burden of proof to an accused person before the prosecution has discharged its legal burden of proof of establishing its case in a criminal trial, thereby violating the provisions of Articles **25 (c), 49 (1) (a) (ii) & (iii), (b), (d),** and, Article **50 (2)(a), (i) & (l)** of the Constitution.*

*b) **An order of prohibition** be and is hereby issued prohibiting the Director of Public Prosecutions or any person acting for and on their behalf from further prosecuting the Petitioner in Nairobi Chief Magistrate's Court Criminal Case No. 1689 of 2015 on the basis of the charge sheet presented to court under police case number 141/382/2015, Kilimani Police Station.*

c) In light of (a) above, we recommend that The Honourable Attorney General prepares a Bill to be presented to Parliament with a view of remedying the deficiency in section 96 (a) of the Penal Code so that it is amended to conform with the Constitution as stipulated in section 7 of the Sixth Schedule to the Constitution. The Honourable Attorney General should do so within a period of one year so that the purport and intent of the impugned provision is maintained.

d) That no orders as to costs.

Orders accordingly. Right of appeal

Signed, Dated and Delivered at Nairobi this 29th day of January, 2020

JESSIE LESIIT

JUDGE

LUKA KIMARU

JUDGE

JOHN M. MATIVO

JUDGE

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[1] Article 157 (6) of the Constitution.

[2] Act N0. 11A of 2011.

[3] Cap 63, Laws of Kenya.

[4] Act No. 12 of 2008.

[5] Ibid.

[6] Act No. 2 of 2013.

[7] Cap 63, Laws of Kenya.

[8] Ibid.

[9] {2002} e KLR.

[10] (A.G) [1989] 2 SCR 1326

[11] {2014} e KLR.

[12] {2010} e KLR.

[13] {2011} e KLR.

[14] {2013} e KLR.

[15] Cap 80, Laws of Kenya.

[16] Cap 75, Laws of Kenya.

[17] {2017} e KLR

[18] Cap 63, Laws of Kenya.

[19] Civil Application No. NAI 234 of 2015.

[20] Cap 63, Laws of Kenya.

[21] Cap 75, Laws of Kenya.

[22]http://www.yourdictionary.com/constitutional-question.

[23] Cap 75, Laws of Kenya.

[24]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC).

[25] {2002} 23 ILJ 81 (CC).

[26] {2001} (1) SA 912 (CC).

[27] 2001 (1) SA 912 (CC).

[28] Supra note 5 at paragraph 23.

[29] Supreme Court of Uganda, Constitutional Appeal No. 2 of 2002

[30] Citing Archibald Cox, "Society," Vol. 24 p 8 No. 1, Nov/Dec 1986.

[31] (AG) (1989) 2SCR 1326

[32] 26 DLR p 25-26.

[33] 427 of 2014.

[34]App No. 193 of 2015 Misc. Criminal

[35] Cap 80, Laws of Kenya.

[36] {2017} e KLR.

[37] Cap 63, Laws of Kenya.

[38] Cap 80, Laws of Kenya.

[39] {2014} e KLR.

[40] See *Ndyanabo vs A. G of Tanzania* {2001} E. A. 495.

[41] See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869.

[42] See *Tinyefunza vs A G of Uganda*, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[43] These words were expressed in the Namibian case of *State vs Acheson*{1991} 20 SA 805

[44] Supreme Court Advisory Opinion Ref. No.1 of 2012,

[45] Supreme Court Petition No. 26 of 2014 [2014] eKLR.

[46] {2015} e KLR.

[47] (2013) 4 ALL ER 97

[48] [2015] eKLR

[49] {2015} e KLR

[50] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Harvard Law Review P. 1.

[51] In the case of *Minister for Home Affairs and Another vs Fischer*{1979} 3 ALL ER 21

[52] {1987} 1 SCC 424.

[53] Chief Justice Robert French, 'Human Rights Protection in Australia and the United Kingdom : Contrasts and Comparisons' (Speech delivered at the Anglo-Australasian Law Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>.

[54] Ibid, citing T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), Courts of Final Jurisdiction: The Mason Court in Australia (Federation Press, 1996) 146, 148.

[55] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

[56] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 ('Ex parte Simms').

[57] Malika Holdings Pty Ltd v Stretton (2001) 204 CLR 290, 299 (McHugh J).

[58] Supra.

[59] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC. 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[60]In "Transformative adjudication, the fourth Bram Fischer memorial lecture" (2002) 18 SAJHR 309 at 318.

[61] Cap 80, Laws of Kenya.

[62] Ibid.

[63] Ibid.

[64] See *S v Moller 1990* (3) SA 876 (A) at 884 I-J; *R v Von Elling* 1945 AD 234 at 251.

[65] Bar Council of England and Wales; Response to the Commission Green Paper on the Presumption of Innocence, 2006. Available at: http://ec.europa.eu/justice_home/news/consulting_public/presumption_of_innocence/contributions/tbcoeaw_en.pdf. Accessed on 16 January 2018.

[66] Cap 80, Laws of Kenya.

[67] Cap 80, Laws of Kenya.

[68] Wigmore, Evidence (2d ed. 1923) xviii. (From the Preface to the First Edition, September 16, 1904.).

[69] *Funk v. United States* (1933) 290 U. S. 371, 93 A. L. R. 1136.

[70] Cap 80, Laws of Kenya.

[71] Ibid.

[72] Ibid.

[73] See *S vs Bhulwana; S vs Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); S vs Mbatha; S vs Prinsloo 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC); Scagell and Other v Attorney-General of the Western Cape and Others 1996 (11) BCLR 1446 (CC).

[74] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[75] {2012} 4 SCC 516.

[76] See also article 11(1) of the Universal Declaration of Human Rights.

[77] European Court of Human Rights, Allenet de Ribemont v. France,Application No. 15175/89 (1995), para. 37; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted under General Assembly resolution 43/173 (1998), Principle 36(1).

[78] {1935} A.C 462 at page 481

[79] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 25 citing *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481; see also *R v Benjamin* 1883 EDC 337 at 338; R v Ndhlovu 1945 AD 369 at 386.

[80] Constitutional Court of South Africa, *The State vs Abraham Liebrecht Coetzee & Others* Case CCT 50/95.

[81]Compare the decision of the Supreme Court of Canada in *R v Oakes* (1986) 26 DLR (4th) 200 at 214 in which it was held that the presumption of innocence contains three fundamental components: the onus of proof lies with the prosecution; the standard of proof is beyond a reasonable doubt; and the method of proof must accord with fairness.

[82]{1997}3 SCR 320.

[83]See also European Convention, Article 6(2); American Convention, Article 8(2); African Charter, Article 7(1)(b); and ICC Statute, Article 66(1)

[84] As was pointed out in *Senator Abraham Ade Adesanya vs. President of The Federal Republic of Nigeria And Another* (1981) 5 S.C. 112 at 134

[85] Section 165(2) of the Constitution.

[86] 297 U.S. 1 {1936}.

[87] CAP 63, Laws of Kenya.

[88] {2016} e KLR.

[89] {2019} e KLR

[90] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* {2006} ZACC 9; 2007 (1) SA 343 (CC).

[91] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[92] {1985} AC 374.

[93] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[94] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[95] Act No. 12 OF 2008.

[96] Act No. 2 of 2013.

[97] http://www.paclii.org/fj/other/prosecutors-handbook.pdf.

[98]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[99] 1958 (3) SA 150 (T).

[100] 1988 (2) SA (SE) at 658 F-H.

[101] *Hicks v Faulkner* 1878 8 QBD 167 171, approved and adopted by the House of Lords in *Herniman v Smith* 1938 AC 305 316 per Lord Atkin.

[102] It was held in *Broad v Ham* 1839 5 Bing NC 722 725 that the reasonable cause required is that which would operate on the mind of a discreet person; it must be probable cause which must operate on the mind of the person making the charge, otherwise there would be no probable cause upon which he/she could operate. There can be no probable cause where the state of facts had no effect on the mind of the party charging the other. See also *Rambajan Baboolal v Attorney General of Trinidad and Tobago* 2001 TTHC 17 (Slollmeyer J).

[103] *Minister of Justice and Constitutional Development v Moleko* 2008 3 All SA 47 (SCA) para 20; *Relyant Trading (Pty) Ltd v Shongwe* 2007 1 All SA 375 (SCA) para 14 (hereafter Relyant Trading); *Beckenstrater v Roffcher & Theunissen* 1955 1 SA 129 (A) 136A-B.

[104] *Joubert v Nedbank Ltd* 2011 ZAECPEHC 28 para 11.

[105] Article 27.

[106] Paragraph **7** of that Commentary.

[107]**No. 36042/97, ECHR 2002 – IV.**

[108] Supra.

[109]http://www.yourdictionary.com/constitutional-question.

[110] Cap 75, Laws of Kenya.

[111]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC).

[112] Ibid.

[113] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 25 citing *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481; see also *R v Benjamin* 1883 EDC 337 at 338; R v Ndhlovu 1945 AD 369 at 386.

[114] Constitutional Court of South Africa, *The State vs Abraham Liebrecht Coetzee & Others* Case CCT 50/95.

[115] Act No. 12 OF 2008.