REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E266 OF 2020

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....1ST INTERESTED PARTY

ATTORNEY GENERAL.....2ND INTERESTED PARTY

AND

INTERNATIONAL COMMISSION OF

JURISTS (KENYA SECTION).....1ST PROPOSED AMICUS CURIAE

LAW SOCIETY OF KENYA.....2ND PROPOSEDAMICUS CURIAE

RULING NO. 1

The Applications

1. The Petitioner, Okiya Omtatah Okoiti, filed his petition dated 3rd September, 2020 together with a notice of motion brought under Articles 20, 22, 50(1), 23(3), 159(2)(d), 165 and 258 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ('Mutunga Rules"). Relevant to this ruling is Prayer No.4 of the application in which he seeks the following order:

> **"THAT upon hearing this application, the Honourable Court be pleased to certify that the instant petition raises a substantial question of law and forthwith refer the petition to His Lordship the Chief Justice for empanelment of a bench of three or five judges to hear and determine it pursuant to Article 165(4) of the Constitution of Kenya, 2010."**

2. Subsequent to the filing of the petition and application, the 1st Proposed Amicus Curiae, International Commission of Jurists (Kenya Section) ("ICJ Kenya") filed a notice of motion dated 11th September, 2020. Through the application brought under Articles 2(1) & (2), 3(1), 10(2), 19(2) & (3), 20(2) & (3), 21(1), 22, 27(1), (2) & (3), 47, 48, 50 and 159(2) of the Constitution; Rule 6 of the Mutunga Rules; sections 2, 3A and 63(e) of the Civil Procedure Act, Cap. 21; and Order 51 rules 1 and 2 of the Civil Procedure Rules, 2010, ICJ Kenya seeks leave to join the proceedings as *amicus curiae.*

3. An application similar to that of ICJ Kenya was brought by the 2nd Proposed Amicus Curiae, Law Society of Kenya (LSK), through a notice of motion dated 6th October, 2020.

4. The Respondent, Director of Public Prosecutions (DPP), through grounds of opposition dated 23rd October, 2020 opposed the Petitioner's application for empanelment of a bench of an uneven number of judges by the Chief Justice as follows:

"a) THAT none of the issues raised in the petition nor the application is novel.

b) THAT none of the issues raised in the petition nor the application raises nor amounts to a substantial question of law.

c) THAT the application is a waste of the limited and already stretched judicial time and resources and therefore an abuse of the court process.

d) THAT it is in the interest of justice and public interest that the orders sought herein be declined."

5. When the three applications came up for oral highlighting of the written submissions on 3rd November, 2020, the DPP indicated his support for the applications by ICJ Kenya and LSK to join the proceedings as *amici curiae.*

6. The 1st Interested Party, the Inspector General of National Police Service ("I. G.") and the Attorney General ("A. G.") took the same stance with the DPP in respect of the three applications.

7. No papers were filed on behalf of the interested parties but their counsel, Ms Mutindi, put forward her arguments during the hearing of the applications.

8. On his part, the Petitioner through grounds of opposition dated 16th September, 2020 opposed ICJ Kenya's application thus:

"a) The application is incompetent since the Applicant does not annex its interpretation of the Constitutional issues in the Petition which it seeks to argue should leave be granted for joinder.

b) The application is vexatious, scandalous, and is brought *mala fides*.

c) The application is an abuse of the process of the Honourable Court.

d) The meritless application should be dismissed with costs and both the Petitioner's Notice of Motion application dated 3rd September, 2020 and the petition of even date should be set down for a full hearing on merit at the earliest date convenient to the Court."

9. In opposition to LSK's application, the Petitioner swore a replying affidavit on 12th October, 2020.

10. The proposed amici curiae indicated that they were not taking a stand on the Petitioner's application for the constitution of a bench by the Chief Justice.

11. Some of the parties filed and exchanged written submissions expressing their positions on the three applications, while others put across their positions during the hearing of the applications. The written and oral submissions will be taken into account in the determination of the three applications.

12. In my view, two issues arise for the determination of this Court:

a. Whether the Petitioner has met the test for certification of the petition as requiring hearing by an odd number of judges being not less than three; and

b. Whether ICJ Kenya and LSK, or any one of them, has met the conditions for admission into these proceedings as amicus curiae.

<u>The Petitioner's application for empanelment of a bench</u>

13. At paragraphs 77 to 87 of his grounds in support of his notice of motion application dated 3rd September, 2020, the Petitioner argues that the instant petition involves a substantial question of law in the meaning of Article 165(4) of the Constitution as it concerns the basic structure of the Constitution hence requiring a seminal interpretation of the Constitution as there are no settled general principles to be applied in the determination of the matter.

14. According to the Petitioner, the petition engages numerous substantial questions of law, including whether it is the mandate of the police or the DPP to investigate crimes and to charge suspects in court. He asserts that this matter meets the objective standard by which the discretion of this Court should be exercised to certify the petition as raising a substantial question of law.

15. The Petitioner refers to the decisions in **Sir Chunilal V. Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314; Santosh Hazari v Purushottam Tiwari [2001] 3 SCC 179**; **Okiya Omtatah Okoiti & another v Anne Waiguru, The Cabinet Secretary, Devolution and Planning & 3 others [2015] eKLR**; **Okiya Omtata Okoiti & 4 others v Attorney General & others [2019] eKLR**; and **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** as determining what amounts to a substantial question of law.

16. At paragraphs 85 to 95 of his written submissions dated 16th September, 2020 the Petitioner cites additional authorities being **Eric GItari**

v Attorney General & another [2016] eKLR; Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae [2014] **eKLR; Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 3 others [2016] eKLR**; **Amos Kiumo & 2 others v Cabinet Secretary of Interior and Coordination of National Government & 3 others [2014] eKLR**; and **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR,** and submit that the authorities provide the principles to be applied when the court is considering an application for certifying a matter as raising a substantial question of law warranting the empanelment of a bench by the Chief Justice to hear the matter.

17. It is the Petitioner's case that applying the principles in the cited cases to this petition, it is clear that there is both a substantial question of law and a matter of substantial public interest in determining the boundary between the powers of the police to process (investigate incidents and draw, sign and file charge sheets/information) and present suspects in court, and the mandate of the DPP to institute and undertake criminal proceedings against any person accused of or alleged to have committed crimes. The Court is therefore urged to certify this petition as raising a substantial question of law and refer the same to the Chief Justice to empanel an uneven number of judges to hear and determine it.

18. Through submissions dated 23rd October, 2020, the DPP identifies two issues being whether the petition raises a substantial point of law and whether it raises a novel issue.

19. It is the DPP's case that the main issue raised in the petition concern the relationship between the National Police Service and the Office of the Director of Public Prosecutions (ODPP) in as far as the decision to charge is concerned.

20. The DPP submits that none of the issues raised in the petition involves a substantial question of law in the meaning of Article 165(4) of the Constitution and therefore does not merit the assigning by the Chief Justice of an uneven number of judges to hear and determine it. The DPP cites the decisions in **Sir Chunilal V. Mehta and Sons, Ltd (supra)** and **Santosh Hazari (supra)** as defining the term *"a substantial question of law."*

21. As to whether the petition raises a novel issue, the DPP asserts that it does not. According to him, the question as to who is mandated to make the decision to charge has been settled by superior courts in Kenya. The decisions in the cases of **Eng. Geoffrey K. Sang v The Director of Public Prosecutions & 4 others, Machakos H.C. Petition No. 19 of 2020**; **Ethics and Anti-Corruption Commission v James Makura M'abira, Court of Appeal Civil Appeal No. 27 of 2013**; and **Joseph Lendrix Waswa v Republic**, **Supreme Court Petition No. 23 of 2019,** are cited as determining that the power to prosecute solely belongs to the prosecutor.

22. Placing reliance on **Sir Chunilal V. Mehta and Sons, Ltd (supra)**, the DPP asserts that the question raised in the petition having been determined by the superior courts, there is no longer a substantial question of law or novel issue for consideration by a panel of an uneven number of judges.

23. The DPP also relies on the decisions in **Philomena Mbete Mwilu v Director of Public Prosecutions & 4 others [2018] eKLR; Luo Council of Elders & 7 others v Cabinet Secretary Water and Irrigation & 13 others [2017] eKLR**; **Maina Kiai & 2 others v Independent Electoral Boundaries Commission & another [2016] eKLR**; and **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary Devolution and Planning & 3 others [2017] eKLR** in opposition to the application for empanelment.

24. Article 165(4) of the Constitution provides that:

> **"Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."**

25. Clause 3 (b) and (d) of Article 165 of the Constitution state:

> **"(3) Subject to clause (5), the High Court shall have—**
>
> **(a)….;**
>
> **(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
>
> **(c)….;**
>
> **(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —**
>
> **(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
>
> **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
>
> **(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
>
> **(iv) a question relating to conflict of laws under Article 191."**

26. In **Sir Chunilal V. Mehta and Sons, Ltd (supra)** the meaning of a substantial question of law was enunciated as follows:

> **"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."**

27. The meaning of the term *"substantial question of law"* was also defined in **Santosh Hazari (supra)** as follows:

> **"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."**

28. The Court of Appeal in **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** provided the principles of certification under Article 165(4) of the Constitution as follows:

> **"There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of "general public importance", The word, "substantial" in its ordinary meaning, means "of considerable importance". There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:**
>
> > **"(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;**
> >
> > **(ii) The applicant must show that there is a state of uncertainty in the law;**
> >
> > **(iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;**
> >
> > **(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."**

29. That no one factor is decisive in the determination of an application for empanelment was confirmed by the Court of Appeal in the just cited case as follows:

> **"The position we take whilst embracing the test by the Supreme Court of India in Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd is that each case must be decided on its own facts and circumstances. No factor alone is decisive. A party seeking certification must lay a basis for the certification. Further, certification under Article 165(4) of the Constitution is a matter in the judicial discretion of the court. Such discretion must however, be exercised on sound basis."**

30. The Petitioner asserts that his petition raises substantial and novel issues never adjudicated before and the wisdom of not less than three judges is appropriate. He places reliance on **Okiya Omtatah Okoiti & another v Anne Waiguru, The Cabinet Secretary, Devolution and Planning & 3 others [2015] eKLR** wherein it was held by the Court of Appeal that:

> **"The question therefore arises as to whether the jurisprudence arising from a determination of a question of law by a court comprising three or more judges would be of equal weight as a question of law that is determined by a court comprising of just one judge.**
>
> **Our preliminary view in answer to this question is that while both the courts envisaged would be exercising the same jurisdiction, the decision of three or more judges would have more jurisprudential weight than the decision of a single judge. To our minds, the inclusion of Article 165 (4) of the Constitution, requiring that a matter of substantial importance be heard by a bench of more than three judges, infers that a substantial question will yield a substantial decision, and as such, that decision would bear more weight."**

31. I do not wish to deeply delve into the issue as to whether the issues raised in this petition have been dealt with by the superior courts of this country. Doing so would prejudice the cases of the parties. However, I have carefully perused the pleadings in this petition and some of the issues I have identified are: the unconstitutionality of Section 5(2)(b) & (3) of the Office of the Director of Public Prosecutions Act, 2013; the interpretation of Articles 157 and 245 of the Constitution; and the unconstitutionality of the ODPP's Guidelines on the Decision to Charge, 2019.

32. The issues I have identified are matters dealt with on a daily basis in the Constitutional and Human Rights Division of the High Court. The jurisprudence on the principles applicable in determining whether a law or a statutory provision or a regulation is unconstitutional is now firmly established all the way to the Supreme Court. Reading one constitutional provision against another and determining the true meaning of the provisions is nothing new. There are also more than enough decisions in this area.

33. As was observed in **Sir Chunilal V. Mehta and Sons, Ltd (supra):**

> **"On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."**

34. The issues raised in the petition may indeed be novel. The Petitioner may even be introducing a new perspective to issues already determined by the courts. Nevertheless, it cannot be said that the petition raises a substantial question of law for the tools to be used in determining the petition are readily available. It is not sufficient to establish that the issue is novel. It is also necessary to demonstrate that a substantial question of law rides on the novel issue. For the stated reasons, the Petitioner's application fails.

The Applications for Joinder as Amici Curiae

35. I now turn to the applications for joinder by the proposed *amici curiae.* Each application will be determined on its own merit. In the grounds upon which ICJ Kenya's application rests, it is averred that ICJ Kenya is an institute with expertise in criminal law and international human rights law and it seeks to be admitted in this case in its capacity of human rights and legal expert.

36. It is asserted that the mandate of ICJ Kenya is to assist the Judiciary in promoting and protecting human rights. It therefore seeks to lend its expertise to the Court in the interpretation and application of the relevant constitutional principles, international law and comparative jurisprudence.

37. ICJ Kenya discloses that in the past, and on several occasions it has been granted leave by the courts to join proceedings as *amicus curiae* in similar cases raising constitutional issues and it has successfully offered such expertise. According to ICJ Kenya, the application should be granted because of the exceptional importance that the determination of this case will have in promoting human rights and the rule of law.

38. In submissions filed together with the application, counsel for ICJ Kenya points out that the law governing joinder of a friend of the court in constitutional proceedings is found in Rule 6 of the Mutunga Rules.

39. Counsel submitted that the principles guiding the joinder of an *amicus curiae* were settled in the Supreme Court case of **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR**; and Court of Appeal decision of **Katiba Institute v Judicial service Commission & 8 others [2017] eKLR**.

40. According to ICJ Kenya, the petition raises substantial constitutional issues. It is ICJ Kenya's case that its only interest in the petition is to assist the Court reach a legal and well informed decision in the interest of justice and public good. It is stated that ICJ Kenya is dedicated to the implementation of the Constitution, and more specifically the constitutional principles of the rule of law and human rights, and this is the agenda it seeks to further if it is allowed into the petition.

41. Counsel submits that ICJ Kenya will restrict its submissions to legal issues raised in the petition specifically on the alleged infringement of constitutional rights. According to counsel the *amicus* brief shall be limited to legal arguments of the principal parties in the petition. He contends that ICJ Kenya, governed by the principle of neutrality and fidelity to the law, will only introduce novel aspects of the legal issues raised by the parties and therefore assist in the development of the law.

42. It is further ICJ Kenya's position that it will draw the attention of the Court to relevant matters of law and that such new and relevant matters will be based on the evidence already laid before the Court and not fresh evidence.

43. Counsel for ICJ Kenya points out that no prejudice will be occasioned to any party as the application was filed without delay and the substantial issues in the petition are yet to be heard. The South African decision of **Republic of South Africa & others v Grootboom & others 2001 (1) SA 46 (CC)** is cited as stating the important role a friend of the court plays in proceedings, including broadening the debate on the issues before the court.

44. ICJ Kenya concludes its submissions by stating that it will assist the Court in addressing the following issues:

> **"i) Is Section 5(2)(b) & (3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 unconstitutional?**
>
> **ii) Who has the principal mandate to charge or not to charge a suspect with a crime in Kenya?**
>
> **iii) At what stage does the DPP get involved in criminal proceedings in Kenya?**

iv) What is the role of the DPP in the criminal investigation process and what is the extent of his involvement with the police?

v) Does the DPP have the capacity in law to direct and draft miscellaneous criminal applications on behalf of investigators?

vi) Does the DPP have the capacity in law to endorse charge sheets before they are registered in court?

vii) Does the DPP have any powers or role to play in drawing, signing and presenting a charge sheet in court?

viii) What is the legality of Section 5(2)(b) and (3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013?

ix) What is the legality of the DPP's "Guidelines on the Decision to Charge, 2019"?"

45. The Court is therefore urged to allow the application by ICJ Kenya to join the proceedings as a friend of this Court.

46. In respect of the application of LSK, counsel for LSK asserts that the object of LSK as per Section 4 of the Law Society of Kenya Act, 2014, includes assisting the government and courts in matters relating to legislation, the administration of justice and practice of law in Kenya; and upholding the Constitution and advancing the rule of law and administration of justice.

47. At paragraphs 6 and 7 of the grounds in support of the application it is stated that:

"6. There has been a perceived tussle in the recent past between the Office of the Director of Public Prosecutions and the Office of the Director of Criminal Investigations which office falls under the National Police Service on the power of institution of criminal proceedings.

7. The petition herein seeks in the main, to divest the Office of the Director of Public Prosecutions of the State powers of prosecution by:

a. Declaring as unconstitutional Section 5(2)(b) and (3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013;

b. Declaring as unconstitutional the Guidelines on the Decision to Charge, 2019; and

c. Seeking to allocate the power on the decision to prosecute criminal offenses to the National Police Service."

48. LSK proceed to state at paragraph 9(e) that:

"9. The LSK brief as *amicus curiae* is as follows:

e. The LSK is better to illuminate light on the issue, with reference to the past, the current and the future as demonstrated by amongst others, the following recent decisions on the issue, which it seeks to rely upon: i. Edgar Kagoni Matsigulu v Director of Public Prosecutions & Others Petition No.144 of 2019 (UR); ii. Daniel Ogwoka Manduku v Director of Public Prosecutions & Others; iii. Geoffrey K. Sang v Director of Public Prosecutions & Others [2020] eKLR; and iv. Sudi Oscar Kipchumba v Republic [2020] eKLR."

49. In brief submissions filed together with its application, LSK points to Rule 6 of the Mutunga Rules as enabling joinder of an *amicus curiae.* The Court is urged to adopt the guidelines of joinder of an *amicus curiae* as enunciated in the decisions of **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR** and **Honourable Philomena Mbete Mwilu v Director of Public Prosecutions & others [2019] eKLR**.

50. The Petitioner swore an affidavit on 12th October, 2020 in opposition to LSK's application for joinder. The Petitioner avers that the President of LSK is a member of the Advisory Board of the ODPP and is conflicted in these proceedings and cannot therefore qualify to be enjoined as an *amicus curiae*. Also, that as a member of the Advisory Board, LSK cannot be admitted separately as an interested party as its interests are already taken care of by the DPP.

51. The Petitioner urged the Court to pay particular attention to the fact that the President of LSK, who represents LSK in the Board of the ODPP, is also the counsel of LSK in these proceedings.

52. Through submissions dated 12th October, 2020, the Petitioner reiterates the contents of his replying affidavit. He stresses that LSK has misconstrued his petition by claiming that the dispute is between the DPP and the Director of Criminal Investigations as to who should make the decision to prosecute. It is the Petitioner's submission that he does not contest the DPP's mandate to prosecute but he questions the decision by the DPP to meddle in pure police work outside court, or before matters are filed in court.

53. The Petitioner asserts that the President of LSK, whose law firm has filed the application for LSK to be enjoined as *amicus curiae*, is personally a member of the Advisory Board of the ODPP, hence both LSK and its advocates on record are conflicted to the extent that they are joined at the hip with the DPP. It is urged that LSK cannot be *amicus curiae* in such circumstances. Further, that it is not necessary to join LSK as an interested party since it is part of the Respondent.

54. The Petitioner submits that in **Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR**, it was held that an *amicus curiae* must have expertise that is relevant to the matters before the court, must be non-partisan, and must provide the court with *"a clear picture of the issues in dispute in order for the court to arrive at an informed and just decision."*

55. The Petitioner relies on the decision of the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR** as holding that **"an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom."**

56. Turning specifically to the application by LSK, the Petitioner submits that LSK does not state in its application what it intends to address in as far as the constitutional questions raised in the petition are concerned. According to the Petitioner, LSK has maliciously crafted its own case and identified the issue as a contest as to who between the ODPP and the DCI should make the decision to prosecute.

57. The Petitioner asserts that his case is different from that perceived by LSK in that he wants the Court to determine who between the ODPP and the DCI should make the decision to charge. He argues that the decision to charge is not synonymous with the decision to prosecute. Further, that the decision to charge belongs to the police while the decision to prosecute belongs to the DPP and other authorities (other than the DPP) upon whom Parliament, by legislation, confers the powers of prosecution pursuant to Article 157(12) of the Constitution.

58. It is the Petitioner's case that LSK has introduced a new cause of action and cannot therefore be admitted as *amicus curiae* since a friend of the court should restrict itself to the facts in issue before the court.

59. The Petitioner relies on the decision in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR** as establishing the principles that guide the determination of an application for joinder as *amicus curiae.*

60. The Petitioner additionally contends that although it is not in issue that LSK is composed of legal experts, it has not demonstrated any expertise relevant to the determination of the issues before this Court. Further, that Section 4 of the Law Society of Kenya Act, 2014 does not give LSK an automatic right to be joined as a friend of the court in every case filed in court. The Petitioner submits that LSK must demonstrate expertise and that it has no partisan stake.

61. As for the application by ICJ Kenya, the Petitioner asserts that the same does not meet the threshold for joinder as laid down in law and precedent. The Petitioner submits that the application is only descriptive of the role of ICJ Kenya but does not demonstrate any expertise that it has on the legal issues in question.

62. The Petitioner states that all the relevant points of law in the motion have already been comprehensively addressed by the parties and there are no novel aspects of the legal issues in question that ICJ Kenya has identified that would aid the development of the law.

63. It is further the Petitioner's case that Kelvin Mogeni who swore the affidavit in support of the application has not disclosed his academic background and professional qualifications for the Court to appreciate his expertise regarding the issues raised in the petition. Further, that Kelvin Mogeni has not disclosed any academic papers he, or other employees of ICJ Kenya, has or have published on the legal issues pending before the Court. It is additionally urged that ICJ Kenya has not disclosed its neutrality or impartiality in the matter and neither is its certificate of registration exhibited to enable the Court appreciate the real purpose for which it is registered.

64. The Court is consequently urged to dismiss the applications of the proposed *amici curiae* and award costs to the Petitioner.

65. At the hearing of the applications, the DPP came out strongly in support of the applications for joinder by the proposed *amici curiae.*

66. The law applicable in determining an application for joinder as a friend of the Court is stated in Rule 6 of the Mutunga Rules thus:

> **"The following procedure shall apply with respect to a friend of the court—**
>
> **(a) The Court may allow any person with expertise in a particular issue which is before the Court to appear as a friend of the Court.**
>
> **(b) Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.**
>
> **(c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it".**

67. The guiding legal principles are found in paragraphs 41-42 of the decision of the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR** as follows:

> **"[41] From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of *amicus curiae:***
> **i. An amicus brief should be limited to legal arguments.**
>
> **ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.**

iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.

iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.

v. The Court may call upon the Attorney- General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.

vi. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: Raila Odinga & Others v. IEBC & Others; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus).

vii. An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.

viii. The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.

ix. In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.

x. An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.

[42] In addition, we would adopt, with respect, certain guidelines which emerge from *Mr. Justice Odunga's* decision in the Justice Tunoi case *(op.cit.)*:

xi. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

xii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.

xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.

xv. Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor."

68. I find that the stated principles are sufficient to aid this Court in the disposal of the two applications.

69. I begin with the application of LSK. The Petitioner's main ground of opposition to the application is that LSK is conflicted by virtue of the fact that its President, who is also LSK's counsel in these proceedings, is a member of the Advisory Board to the Respondent. I think the membership of the President of LSK in the Board of the DPP is not sufficient to hold that LSK is not neutral. Counsel for the DPP pointed out that the Inspector General of the National Police Service, who is the 1st Interested Party in this case, and the Chief Registrar of the Judiciary (CRJ) are also members of the Advisory Board to the DPP. It cannot therefore be said that the membership of the Inspector General and the CRJ in the Advisory Board distorts their neutrality when it comes to matters touching on the ODPP.

70. It was also pointed out that LSK is also a member of the Advisory Board to the Attorney General. Membership of the Advisory Board alone cannot therefore be used as evidence of lack of neutrality.

71. Nevertheless, the Petitioner went ahead and contended that LSK has misconstrued his case and initiated a new cause of action. In **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR**, the Supreme Court did indeed warn that a friend of the court should not be allowed to introduce new issues in the case. The Court stated:

"However, this opening ought to be regulated, in order to protect the rights of the parties to the causes before us. *Amicus* briefs ought to be carefully appraised, so as not to interfere with the causes of the parties, or the bounds of jurisdiction. While the Court may admit a motion to appear in any proceedings as *amicus*, there is the risk of the real interest of the *amicus* threatening the position of the original suitors, whose rights and obligations stand to be upset by the outcome of the appeal."

72. The Petitioner has clearly stated what his issues are. He says that the issue identified by LSK is new. The Petitioner's assertion was not rebutted. It therefore appears that there is a disconnect between LSK's view of the case and that of the Petitioner. That disconnect alone should not, however, be a valid reason for disqualifying LSK from participating in the proceedings as a friend of the court because LSK can be redirected to the right issues.

73. A perusal of the papers filed by LSK, however, shows that LSK is biased towards the Respondent. I have already quoted some parts of LSK's application and any independent observer can easily perceive that LSK desires to be admitted to this case so as to join forces with the DPP. That is not the remit of a friend of the Court.

74. Neutrality is an important consideration before a party can be admitted as a friend of the Court. This was the holding of the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR**:

> **"[47] Impartiality is a central tenet in the conduct of judicial proceedings. As counsellor before the Court, an *amicus curiae* should not exhibit partiality towards any party's cause; otherwise some party would be prejudiced. Given the role of *amicus* as friend of the Court, impartiality is required of an *amicus curiae*. The role of an *amicus* is to aid the Court so it may reach a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty.... An *amicus curiae* has to stay aloof, assisting the Court, without being seen to take sides."**

75. In dismissing the application of LSK to join the petition as an interested party in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR** the Supreme Court had this to say:

> **"[28] We find and hold that the LSK has manifested its partisan support for the 1st respondent, and on this account it was improper for it to be enjoined as an interested party and much less, as *amicus*. Given LSK's objectives under Section 4 of the Law Society Act, the Society holds a special responsibility for championing the wider public interest, rather than individual interests clothed as public interest. The Society cannot use its mandate for such a cause, as that would be *ultra vires* its statutory mandate.**
>
> **[29] LSK should always strive to remain neutral, letting its members carry out their advocacy work independently. The Courts have their established safeguard-mechanisms to address any frivolous pleadings or suits."**

76. In my view, LSK does not seek to aid the Court in the development of the law. The authorities it seeks to rely on are already cited by the DPP. LSK does not therefore place anything new on the table. Its participation in these proceedings will most likely add no value to the decision of the Court. I therefore decline the application by LSK to join these proceedings as a friend of the Court.

77. In regard to the application by ICJ Kenya, the Petitioner asserts that the same does not meet the threshold for the joinder of a party as *amicus curiae*. In support of this contention it is said that ICJ Kenya failed to file an *amicus* brief disclosing the submissions it intends to make in the matter. It is also submitted that ICJ Kenya has not demonstrated expertise in the areas of law that are of interest to the Court in this petition.

78. On the lack of an *amicus* brief, counsel for ICJ Kenya explained that it could not file an *amicus* brief at the time of filing the application because the Respondent and interested parties were yet to file their pleadings. I find this to be a reasonable explanation for the failure to file an *amicus* brief at the time of filing the application.

79. The impression I get from the jurisprudence cited by the parties in this matter is that one of the roles of *amicus curiae* is to fill in the gaps left by the principal parties to the case. A friend of the court highlights areas of law neglected by the parties to the case but which may aid the court in reaching a sound decision. Therefore, the role of an *amicus curiae* can only be adequately discharged after it accesses and assesses the pleadings and submissions of the parties to the case. That role cannot be properly discharged without the benefit of the pleadings and submissions of all the parties to the case.

80. The Petitioner's statement that an applicant seeking to join proceedings as a friend of the court should demonstrate his expertise is indeed correct. Support for that principle is found in **Nubian Rights Forum v Kenya Human Rights Commission & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property and Information Technology (Proposed Amicus Curiae) [2019] eKLR** where it was stated that:

> **"42. We are constrained, upon a careful appraisal of its application and submissions, to agree with the respondents that the applicant has not sufficiently answered the questions regarding its legal status and identity, what its areas of expertise and mandate are, and what its past experience in matters such as are before us is. In short, it has not established any expertise as an institution, or with regard to the members that it is composed of. The impression we get is that the applicant may be in its formative stages and may not be of any assistance to this Court at this moment in time."**

81. Although ICJ Kenya has not disclosed the cases in which it has appeared as a friend of the court, there is an averment to the effect that it has played the role of *amicus curiae* before. It is also noted that ICJ Kenya's expertise is not expressly disclosed. It would have been more appropriate and of assistance to the Court if ICJ Kenya had indicated its knowledge in the areas specific to the issues raised in this case. However, there is an averment that it is knowledgeable in human rights matters and constitutional law. That averment will suffice for this Court to exercise its discretion to allow the application.

82. In my view, ICJ Kenya is likely to be helpful to the Court as regard international jurisprudence on the issues before this Court. For that reason, I allow ICJ Kenya to join these proceedings as a friend of the court. Its participation will be limited to its insights on comparative jurisprudence on the issues raised in the petition.

83. In summary, the three applications are determined as follows:

a. Prayer No. 4 of the Petitioner's Notice of Motion application dated 3rd September, 2020 seeking certification that this petition raises a substantial question of law and should be referred to the Chief Justice for the empanelment of a bench of an uneven number of judges to hear it is dismissed;

b. The Law Society of Kenya's Notice of Motion application dated 6th October, 2020 seeking to be enjoined in the petition as *amicus curiae* is dismissed;

c. The Notice of Motion application dated 11th September, 2020 filed by the International Commission of Jurists (Kenya Section) seeking to be admitted to these proceedings as *amicus curiae* is allowed with the rider that ICJ Kenya's participation shall be limited to submissions on comparative jurisprudence on the issues before the Court; and

d. The parties will meet their own costs in respect of the three applications.

Dated, signed and delivered virtually at Nairobi this 12th day of November, 2020.

W. Korir,

Judge of the High Court