REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 295 OF 2018

HONOURABLE PHILOMENA MBETE MWILU.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS……...…2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT

(ANTI-CORRUPTION COURT NAIROBI).....3RD RESPONDENT

THE ATTORNEY GENERAL…….....4TH RESPONDENT

AND

STANLEY MULUVI KIIMA…….....INTERESTED PARTY

INTERNATIONAL COMMISSION OF JURISTS

KENYA CHAPTER……..……AMICUS CURIAE

JUDGMENT

Introduction

1. By a Petition dated 29th August 2018, the Petitioner, Hon. Philomena Mbete Mwilu moved this Court against a backdrop of charges that had been instituted against her and the Interested Party in **Nairobi Chief Magistrate's ACC No. 38 of 2018 – Republic v Philomena Mwilu & Another.**

2. The Petitioner had been arrested on 28th August 2018 on the basis of investigations by the 2nd Respondent. She was presented before court for plea on the same afternoon. The plea was deferred to the 29th day of August 2018.

3. On the day scheduled for plea, however, the charges were not read out to the Petitioner following an

application by her Counsel for deferment of plea on the basis that a petition had been filed before the High Court challenging the actions of the 1st and 2nd Respondents. This is the Petition now before us for determination.

The Parties

4. The Petitioner is the Deputy Chief Justice of the Republic of Kenya and the Vice President of the Supreme Court of Kenya. She has filed the Petition against the 1st Respondent, the Director of Public Prosecutions (DPP), a public office established under Article 157(1) of the Constitution and governed by the **Office of the Director of Public Prosecutions Act (Act No. 2 of 2013) (ODPP Act)** .

5. The 2nd Respondent is the Director of Criminal Investigations (DCI) and the head of the Directorate of Criminal Investigations whose mandate is prescribed under the **National Police Service Act, Chapter 84 Laws of Kenya** (**NPS Act**).

6. The 3rd Respondent is a subordinate court established pursuant to Article 169(1) of the Constitution and section 5 of the **Magistrates' Courts Act, No. 56 of 2015**.

7. The 4th Respondent is the Attorney General (AG) of the Republic of Kenya and the principal legal advisor to the national government. His office is established under Article 156(1) of the Constitution.

8. The Interested Party, Stanley Muluvi Kiima, is an Advocate of the High Court of Kenya who was, at all material times acting as such on behalf of the Petitioner in the transactions that gave rise to the charges that are challenged in this Petition.

9. The International Commission of Jurists-Kenya Chapter (ICJ-K) was permitted to participate in these proceedings as an A*micus Curiae* on the basis of its *expertise in the promotion, protection and enforcement of human rights in Kenya.*

The Petition

10. The Petitioner avers that her intended prosecution has its genesis in the decision of the Supreme Court delivered on 1st September 2017 in **Raila Amolo Odinga & Another v The Independent Electoral and Boundaries Commission and 2 Others, Supreme Court Presidential Petition No. 1 of 2017** ("the Presidential Petition"). By a majority decision, the Court annulled the election of His Excellency President Uhuru Kenyatta as the President of the Republic of Kenya (the President) in the presidential election conducted on 8th August 2017. The Petitioner was one of the four judges who delivered the majority decision.

11. The Petitioner states that immediately following that determination, the President made public statements against the majority judges. One such statement was ***"We shall revisit this thing. We clearly have a problem".***

12. The Petitioner further states that on 14th September 2017, Nyeri Town Member of Parliament, Hon. Ngunjiri Wambugu, a member of the President's Jubilee Party, lodged a petition with the Judicial Service Commission (JSC) for the removal of the Chief Justice. On 18th September 2017, Derrick Malika Ngumu lodged a petition with the JSC for the removal of the Petitioner and Justice Isaac Lenaola on account of the said decision. The Petitioner further avers that on 24th October 2017, her driver was shot while with her official motor vehicle and seriously wounded, a day before the Supreme Court was expected to hear a case touching on the repeat presidential poll.

13. It is her averment further that on 26th February 2018, Adrian Kamotho Njenga petitioned Parliament for the removal of the Chief Justice and the Petitioner among other members of the JSC.

14. According to the Petitioner, since the determination of the Presidential Petition on 1st September 2017 and the public and direct threats issued by the President, there have been a series of events against the judiciary and specifically against the majority judges carried out by state agencies, organs, and actors in what appears to be intended to give effect to the threats made by the President.

15. The Petitioner states that on 28th August 2018, without any notice or prior warning, she learnt through the media that she was the target of investigations by the DCI on unspecified allegations of corruption. She further states that later the same day, the DPP and the DCI ambushed her at the Supreme Court Building, arrested and took her to the DCI headquarters where she was interrogated and for the first time confronted with the basis of the allegations against her.

16. According to the Petitioner, while her interrogation was going on, the DPP issued a public statement on national television and other public broadcast media on the case that he was about to bring against her. She avers that no summons had ever been issued requiring her to respond to any inquiries by the DCI contrary to the practice and or precedent adopted by the DCI when dealing with other suspects.

17. The Petitioner goes on to state that on the same day, at about 16.00 hours, she was taken to court for purposes of taking plea, However, due to the lateness of the hour and objections raised by her Advocates, the proceedings were adjourned to 29th August 2018 at 09.00 hours. The Petitioner contends that the actions of the DPP and DCI were deliberately and primarily calculated to subject her to public humiliation and embarrassment.

18. The Petitioner states that the intended charges against her relate to:-

i. The credit facilities/transactions between her and Imperial Bank Limited (In Receivership) (IBL or the Bank) and an alleged failure to pay stamp duty on four properties she had purchased between 2014 and 2016; and

ii. Her acquisition of L.R. No. 3734/202 on 18th December 2014 at a consideration of Kshs 1,450,000, L.R. No. 3734/209 on 18th December 2014 at a consideration of Kshs 78,550,000.00 and L.R. No. 3734/1129 on 21st March 2016.

19. She states that the Interested Party acted on her behalf in the acquisition of the four properties and paid stamp duty as a condition for the registration of the transfers in her name. It is the Petitioner's contention that she has never received any query or demand for non-payment of stamp duty on any of the four properties as alleged or at all and that the transfers could not have been registered without payment of stamp duty.

20. The Petitioner states that prior to 23rd August 2013, she operated a bank account with IBL (now In Receivership) and subsequently obtained various credit facilities negotiated with the Bank in the course of normal banking/contractual relationship as follows:

(i) By a letter of offer dated 23/18/ 2013 (perhaps intended to refer to 23/8/2013) and amended on 1st November 2013, the Bank advanced the Petitioner a loan of Kshs 60,000,000.00 secured by a charge over L. R. Nos. 3734/202 and 3734/209;

(ii) A sum of Kshs 12,000,000.00, referred to in count two of the intended charge, was an unsecured loan advanced to the Petitioner by the Bank and was later repaid in full;

(iii) On 12th November 2015, the Interested Party, acting on the Petitioner's instructions, requested the Bank to discharge the charge on the two properties with a replacement charge to be registered over L. R. No. 3734/1129, against which the Bank had approved a loan prior to its being placed under receivership;

(iv) The Interested Party further issued an undertaking to the Bank to pay it Kshs. 60,000,000.00 in

full settlement of a short-term loan the Bank had advanced to the Petitioner. The short-term loan had been secured by the Petitioner's surrender to the Bank of the original titles for L. R. Nos. 1265/1273/1274/1275/1276 as a consequence of which the Bank acquired an equitable mortgage over the five (5) properties;

(v) On 22nd December 2015, the Bank notified the Interested Party that the Petitioner's indebtedness in respect of the short-term loan was Kshs 62,802,740.00; the balance of the unsecured loan was Kshs. 2,000,000.00; a debit of Kshs 265,688.00 in the Petitioner's loan repayment account and an outstanding balance of Kshs. 59,396,653.00 on a long-term loan.

21. The Petitioner states that the Bank undertook to release the discharge and titles on L. R. Nos. 3734/202 and 3734/209 within 7 days of full payment of the short- term loan, the unsecured loan, as well as part payment of the long-term loan from the sale proceeds.

22. On 1st January 2016, the Interested Party notified the Bank of the Petitioner's payment of a sum of Kshs. 65,000,000.00 in the Bank's account and requested the Bank to release the original titles for L. R. Nos. 3734/202 and 3734/209 together with duly executed discharge of charge. On 12th January 2016, the Bank acknowledged receipt of the sum of Kshs. 65,000,000.00 but demanded from the Interested Party the replacement charge over L. R. No. 2734/1129 duly executed and registered in favour of the bank within 14 days from that date.

23. It is the Petitioner's contention that she continues to repay the long-term loan and the sum outstanding in respect thereto as at the date of the Petition was Kshs 43,000,000.00. She maintains that the Bank still holds the original titles to five of her properties and therefore has an equitable mortgage over these properties, namely L. R. Nos. 1265/1273/1274/1275 and 1276. It is her case that the discharge of charge on L. R. Nos. 3734/202 and 3734/209 by the Bank was a negotiated commercial transaction between her and the Bank.

24. According to the Petitioner, the allegations against her arise from pure commercial or civil transactions concluded in the normal course of the banking relationship between her and the Bank and have no rational correlation with the pursuit of criminal justice in the public interest. Further, that the actions of the DPP and DCI are an abuse of power and arbitrary exercise of authority to achieve a purpose unconnected with the rule of law or objectives of the system of the administration of justice and that she will not receive a square deal contrary to her right under Article 27(1) of the Constitution. She also contends that she has suffered and will continue to suffer irreparable prejudice, loss and damage.

25. The Petitioner contends that the actions of the DPP and DCI violate her fundamental rights and freedoms under the Constitution. She alleges violation of her right to equality and non-discrimination guaranteed under Article 27(1) and (2) of the Constitution, right to fair hearing under Article 50 (1) and (2), and the right to human dignity under Article 28. She further alleges contravention of Article 157(11).

26. With respect to Article 27, the Petitioner contends that the foundation of the alleged offences is a contractual commercial/banking relationship. That the Bank has never confronted her with any complaints or issues on any of the alleged matters and that it is her legitimate expectation that if there were any issues, the Bank would have raised them with her first.

27. On the right to a fair hearing guaranteed under Article 50(1) and (2) (a, b, c, j, k), the Petitioner contends that the charges against her lack a proper factual basis or foundation to give rise to criminal charges. It is her case that as a basic requirement of a fair trial under Article 50(2)(b), precise information as to the nature of the complaint must be given to an accused person.

28. She asks the court to interrogate the charges she and the Interested Party face. It is her contention that the rationale and justification for interrogating the charges is to demonstrate that there is lack of a foundation. The decision in **Republic v Director of Public Prosecutions & Another *ex parte* Patrick Ogola Onyango & 8 Others [2016] eKLR** is cited as explaining the rationale for this approach. Drawing from the decision, the Petitioner submits that the goal of interrogating the charges is not to

determine innocence or guilt, but to establish if there is a foundation for the charge. The Petitioner contends that a charge is the basis of a criminal case and if found to be fundamentally defective, then the prosecution cannot stand.

29. The Petitioner dismisses the argument by the DPP and DCI that the veracity of the evidence or otherwise in the criminal case is a matter for the trial court and relies on **Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR.**

30. The Petitioner also avers, in reliance on **Stanley Munga Githunguri v Republic (1986) eKLR** that *"**[a] prosecution is not to be made good by what it turns up. It is good or bad when it starts."***

31. The Petitioner reiterates that the charges against her arise out of private commercial banking transactions between her and IBL. Further, that they arise out of complaints, which require a complainant, more so where the complaints relate to private transactions. She contends that there are no complainants to the charges as the persons concerned, and who are reasonably expected to complain, have not done so.

32. The Petitioner follows through with this argument by submitting on each of the charges. Count I, she argues, is a charge that would of necessity be initiated by IBL. Furthermore, what is stated as a benefit was a loan to her. She asserts that count II cannot be sustained without IBL or the Receiver Manager complaining against her, nor would any reasonable banker with an ongoing relationship with a customer resort to filing a report with the police before confronting the customer with a complaint.

33. Counts III, IV, V, VI and VII all relate to alleged failure to pay stamp duty. The Petitioner makes the argument that no transfer can be registered before both the KRA and the Land Registrar have confirmed and satisfied themselves that stamp duty has been paid. That at any rate, KRA has not raised a complaint. A similar assertion is made with regard to counts VIII, X, XI and XII. The Petitioner relies on **Joram Mwenda Guantai v The Chief Magistrate, Nairobi (2007) eKLR** in which a criminal prosecution instituted without the complaint of the aggrieved party was stopped.

34. Turning to another challenge to the charges, the Petitioner avers that *prima facie*, the charges do not disclose proper or sufficient detail and therefore violate Article 50(2)(b) of the Constitution. She argues that an essential element of count I is the improper use of office. She contends that the particulars of improper use must be stated to give any basis or foundation to the charge. That a charge which merely repeats the words in the statute, which she alleges count I does, is not a proper charge. The Petitioner relies on **Ibrahim v Republic [1983] KLR 596** and **Chandi Bin Khamis Mtumbatu & Others v R**. **[1961] EA 587**.

35. The Petitioner also takes issue with count II and argues that a charge of obtaining by false pretences cannot be founded on a future event. That it has to be based on a 'present perfect or past perfect' act. It is averred that the particulars of the charge being futuristic render the charge improbable and unsustainable. She cites **Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Another [2008] eKLR.**

36. The Petitioner also argues that her right to a fair trial, which includes the right to be presumed innocent until the contrary is proved, is being contravened or undermined by the actions of the DPP in litigating the matter through the media. With regard to the right to human dignity under Article 28, the Petitioner asserts that her right to dignity by virtue of the office she holds as Deputy Chief Justice is not being respected and protected.

37. The Petitioner alleges that there has been abuse of the powers of the DPP whose exercise is provided for under Article 157(11) of the Constitution. She contends that under Article 79, the Constitution contemplates the creation of an independent Anti-corruption Commission with the status and powers of a commission under Chapter 15 of the Constitution. This is for the purpose of ensuring compliance with and enforcement of the provisions of Chapter 6 which deal with leadership and integrity.

38. The Petitioner avers that in compliance with the provisions of Chapter 6, Parliament enacted the

Ethics and Anti-Corruption Commission (EACC) Act and the **Anti-Corruption and Economic Crimes Act (ACECA)** which set out a legal regime for dealing with complaints, investigations and recommendations to the DPP. It also creates offences under the statute.

39. She contends that in order to ensure integrity of investigations and implementation of reports and recommendations made under the statute, the independence of the EACC is protected under Article 249(2) of the Constitution and section 3(1) of the Act. She avers that the DPP can give directions under Article 157(11) only to the Inspector General of Police. That the DPP is pretending to couch the matters under investigation as matters of ethics and anti-corruption outside of the legal regime established under the Constitution, and in so doing, is denying the Petitioner equal protection of the law under the regime established by ACECA.

40. The Petitioner charges the DPP and DCI with abuse of power, abuse of court process and of oppressiveness. She contends that the criminal proceedings and the criminal justice system are being manipulated by the DPP and DCI for ulterior motive and to achieve extraneous purposes. That the DPP instigated the complaints, not for the general public interest, but for the advancement and championing of *'a trumped-up civil claim,'* which is illegal.

41. She asserts that the actions of the DCI lack impartiality and are discriminatory as, in her view, the DCI is applying selective justice. This is because she has never been summoned or invited to answer any queries in relation to the allegations levelled against her. Moreover, the Bank, with whom she has a contractual relationship, has never raised any complaints or issues with her in relation to the allegations.

42. The Petitioner therefore seeks the following reliefs:

> ***(i) A declaration be and is hereby issued that investigations on the petitioner by the DCI and the DPP's institution of criminal proceedings against the Petitioner in criminal case number 292 of 2018, – Republic v Philomena Mbete Mwilu & Stanley Muluvi Kiima violates her constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void ab initio;***
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> ***(ii) An order of certiorari be and is hereby issued to quash the entire charge sheet dated 28th August 2018 and proceedings against the Petitioner in ACC Criminal Case Number 38 of 2018 – Republic v Philomena Mbete Mwilu & Stanley Muluvi Kiima;***
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> ***(iii) An order of prohibition be and is hereby issued prohibiting the respondents from proceeding with the prosecution of ACC Criminal Case Number 38 of 2018 – Republic v Philomena Mbete Mwilu & Stanley Muluvi Kiima;***
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> ***(iv) An order of prohibition be and is hereby issued against the IG, DCI and DPP from investigating, recommending the prosecution or commencing any prosecution of the petitioner in respect of which ACC Criminal Case Number 38 of 2018 – Republic v Philomena Mbete Mwilu & Stanley Muluvi Kiima was instituted; and***
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> ***(v) The costs of this Petition be provided for.***

The Interested Party's response

43. The Interested Party supports the Petition through a replying affidavit sworn on 20th September 2018. He deposes that the criminal charges against him and the Petitioner are grossly presumptuous and betray a lack of understanding of the commercial nature of lending transactions, land transfer procedures in Kenya, bank-customer relationships and client-advocate engagement.

44. He further deposes that the charges in their entirety, are founded on unjustifiable and erroneous presumptions which are that:

i. Bank lending is a simple straightforward procedure, free from the complexities of ordinary

commercial transactions;

ii. Evaluation of the creditworthiness of a customer is a simple straight-line procedure, where one shoe fits all;

iii. All lending must be secured individually and specifically, and such securities must be registered and perfected, and it is the duty of the customer to ensure that securities are perfected;

iv. It is possible to register transfer of property without payment of stamp duty and without any form of exemption from the Kenya Revenue Authority and that a contract must be written.

45. In paragraph 9 of his affidavit, the Interested Party narrates events surrounding his arrest. He states that officers from the DCI informed him that they were investigating the Petitioner and had questions for him. They sought information about certain titles and demanded to see the documents. He states that although the documents demanded by the officers were privileged, the officers did not afford him an opportunity to seek the consent of the Petitioner to access them. He further states that immediately thereafter, he received a call from the Petitioner informing him of the presence of police officers in her office, and she asked him to take the documents to her office. After interrogation, he was made to sign an inventory, was arrested and taken to the DCI headquarters.

46. At the DCI headquarters, he was questioned by a Mr. Komesha (Abdallah Komesha Mwatsefu) in relation to discharge of charge over title Nos. 3734/202 and 3734/209. He, however, states that because he did not have his files and documents, he could not record a statement and simply wrote "I have nothing to state".

47. The Interested Party deposes that later that evening, he was surprised to see a charge sheet with his name and that of the Petitioner, with a total of 24 counts, even before his statement had been taken. On the afternoon of 28th August 2018, he recorded a statement and was shown a charge sheet with 19 counts, but when presented to court the same day they had reduced to 13 counts. He contends that he was merely acting as authorised advocate in furtherance to client's instructions and should not be victimised. In his view, the actions of the DPP and DCI are unconstitutional, unlawful and unfair. He supports the Petitioner's arguments that the charges are founded on a purely commercial transaction between a bank and its customer. He further supports the position of the Petitioner that criminal charges cannot be preferred until investigations have been finalised.

48. The Interested Party asks the court to allow the petition, grant the reliefs sought, and extend them to apply to him. He justifies the grant of relief in his favour on the ground that there are clear and manifest breaches of his rights, and it would not be efficacious to file a separate petition while he is already a party to this petition.

The Responses by the DPP and DCI

49. The DPP and DCI oppose the Petition. The DPP filed a replying affidavit sworn on 31st August 2018 by **Ms. Lillian Ogwora** –a Senior Principal Prosecution Counsel (S.P.P.C), while the DCI responded through an affidavit sworn on the same day by Abdallah Komesha Mwatsefu, a Commissioner of Police (CP Mwatsefu).

50. We start with the response by the DCI. In his affidavit CP. Mwatsefu, attached to the Investigations Bureau of the Directorate of Criminal Investigations avers that on 27th day of August 2018, he was part of the investigations team that went to the Petitioner's office and requested audience with her through the Chief Justice. He explained that the purpose of seeking audience with the Petitioner was out of respect for the office she holds, and further, that it was for the purpose of conducting an interview with her.

51. He states that he met the Petitioner at the Boardroom of the Chief Justice and explained the purpose of their visit to her and the Chief Justice, which was to interview her on the allegations she was facing that were the subject of the investigations that he was carrying out. The Petitioner asked for more time to

enable her get her records and also requested for the presence of her advocate. It was mutually agreed that they meet the following day for the purpose of conducting an interview and to record her statement.

52. CP Mwatsefu states that the following day, the 28th of August 2018, they met the Petitioner and her advocate, Mr. Okongo Omogeni at the Boardroom of the Chief Justice for the purpose of conducting an interview and recording a statement. After the interview with the Petitioner, he personally recorded her statement in the presence of her advocate. Thereafter, the Petitioner was arrested and duly informed of the reason for her arrest.

53. He further states that on 27th August 2018, part of his team also visited the offices of the Interested Party and informed him about the inquiries they were carrying out. Thereafter the Interested Party was arrested and duly informed of the reason for his arrest. CP Mwatsefu further deposes that after interviewing him, the Interested Party agreed to record a statement.

54. CP. Mwatsefu gives the background to the events that preceded the Petitioner's arrest. He states that on 23rd May 2018, the DPP directed the DCI and the Inspector General of Police (IG) that thorough investigations be conducted, and on conclusion, the file be submitted to his office for directions. He further avers that on 8th August 2018, upon completion of investigations, the DCI submitted the inquiry file to the DPP for perusal and appropriate directions.

55. The findings by his investigative team were as follows:

> i. That on the 15th day of August 2018 (which may have been intended to be 15th August 2013, being the date on the said letter), the Petitioner wrote a letter on her official judiciary letterhead to the Group Managing Director at IBL. In that letter, the Petitioner requests for a facility of Kshs 70,000,000.00 at an interest rate of 12%;
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> ii. On 30th August 2013, the Petitioner wrote a handwritten letter to the then IBL Group Managing Director, A. Jan Mohamed, requesting for reduction of the interest rate from 14% to any lower rate even before the said loan of Kshs. 70,000,000.00 was processed;
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> iii. The Petitioner received Kshs. 12,000,000.00 from the Bank, which was credited to her account No. 7244000306 at the Bank on 23rd October 2013.

56. According to the DCI, the Kshs. 12 000,000.00 facility was given to the Petitioner under circumstances which were not commensurate with bank-customer relationship as no appraisal of her creditworthiness had been done, she had not formally applied for the loan, nor was there a letter of offer from the bank specifying the terms. CP. Mwatsefu avers that the Petitioner fully benefitted from this facility by making cash withdrawals on diverse dates.

57. CP Mwatsefu further avers that he recorded statements from bank officials namely; Mehbooba Jaferali Khalfan Shamji, Peter Nzuki, Jacob Kivindyo and Naeem Ahmed Shah. CP. Mwatsefu deposes that three of these witnesses considered the disbursement to have been highly irregular as it could not be described as a loan given that critical features of a loan, namely an application, offer, acceptance or even a contract were missing. He observes that the Petitioner, being a state officer, accepted the facility of Kshs. 12,000,000.00 on 23rd October 2013 without applying for the same, without any letter of offer and with nil interest which can only be termed as a benefit to the Petitioner. It is the case of the DCI that the circumstances under which she received the Kshs. 12,000,000.00 were illegal as she obtained financial advantage by virtue of her office as Court of Appeal judge.

58. CP Mwatsefu states that the Petitioner made a cash payment of Kshs 10,000,000.00 on 26th November 2014 to reduce the loan to Kshs 2,000,000.00. He avers that Silas Juma Genga, a teller at IBL, confirmed that on the 26th day of November 2014 he received Kshs. 10,000,000.00 in cash from Mehbooba Shamji on behalf of the Petitioner. The payment was accompanied by a cash deposit slip

which he stamped in acknowledgment of receipt of the money.

59. CP Mwatsefu makes various averments with regard to the substitution of securities. He deposes that their investigations revealed that the Petitioner and the Interested Party falsely pretended that they were substituting the charge over L.R. Nos. 3734/202 and 3734/209 with a charge over L.R. No. 3734/1129. He states that the intention however, was to defraud the Bank, and in fact induced the Receiver Manager to execute the discharge of charge over L.R. Nos. 3734/202 and 3734/209 with an intention to sell the said properties, but not to replace the securities as undertaken.

60. He states that from their investigations, they established that L. R 3734/202 and L. R 3734/209 were initially owned by Ashvinkumar Dharamashi Shah and Mahendra Haria who sold them to the Petitioner for Kshs 80,000,000.00. He avers that the Petitioner paid the purchase price as follows:

i. On 28th October 2014 Kshs 3,000,000.00 in cash at the Supreme Court parking area;

ii. On 28th October 2014 Kshs 7,000,000.00 in cash at her office at the Supreme Court;

iii. On 5th November 2014 Kshs 10,000,000.00 in cash at her residence in Kilimani;

iv. On 12th February 2015 Kshs 60,000,000.00 being a loan disbursement from the bank.

61. It is his averment that the Petitioner used the two properties as security for a term loan of Kshs 60,000,000.00 from IBL

62. It is his further evidence that the investigation established that the Petitioner sold L. R Nos. 3734/202 and 3734/209 to Grand Forest Hospital Japan Limited and RAEI Investment Limited independently on different dates for a sum of Kshs 165 000,000.00. Out of this amount, Kshs 65 000,000.00 was paid to the Bank to clear outstanding short -term loan of Kshs 60,000,000.00 and the balance of Kshs 2,000,000.00 of the unsecured facility.

63. With regard to L. R. No. 3734/1129 CP Mwatsefu states that it was initially owned by Mohamed Said Chute who sold it to the Petitioner for Kshs 70,000,000.00. According to the documentation on the property, the vendor received Kshs 80,000,000.00 from the Petitioner. That upon transfer to the Petitioner, the parcel was sold to Grand Forest Hospital Japan Limited for a sum of Kshs 150 000,000.00 which was deposited to the Petitioner's account at Standard Chartered Bank Yaya Centre Branch as follows:

i. 15/4/2016 Kshs 37,500,000 .00;

ii. 22/4/2016 Kshs 37,500,000.00;

iii. 31/5/2016 Kshs 74,000,000.00;

Total Kshs 149,000,000.00.

64. Out of this payment to the Petitioner, only Kshs 35,000,000.00 was debited from the Petitioner's account at Standard Chartered Bank and credited to her crystal account at IBL. Thus, according to the DCI, the sale of this property to Grand Forest Hospital Japan Limited by the Petitioner extinguished IBL's rights to the said parcel as it was supposed to have been charged to IBL after discharge of charge over L. R. Nos. 3734/202 and 3734/209 which had been used to secure the long-term facility of Kshs. 60,000,000.00. To demonstrate that the Petitioner and the Interested Party had no intention of charging the said property to IBL and that they obtained the said securities by making false representations to IBL, the DCI referred to the following documentation, events and transactions:-

i. Hand written letter by the Petitioner dated 30th July 2015 to IBL requesting substitution of

securities over L. R Nos .3734/202 and 3734/209 for L. R. NO. 3734/1129;

ii. Hand written letter dated 4th November 2015 by the Petitioner to the Receiver Manager reminding the Bank of her request for substitution;

iii. Letter of undertaking dated 25th November 2015 by Mutunga & Co. Advocates to replace the released securities;

iv. Letter of undertaking dated 12th November 2015 from Mutunga & Co. Advocates to the Receiver Manager IBL;

v. Letter of undertaking dated 7th December 2015 from Mutunga & Co. Advocates to the Bank for execution of a discharge of charge over L. R Nos. 3734/202 and 3734/209;

vi. The Interested Party drawing and dispatching a discharge of charge to the Receiver Manager with a clause indicating that the loan secured by the securities had been fully paid, a position which the DCI considers to be false;.

vii. The Petitioner signing the discharge of charge knowing that the contents are false;

viii. The Petitioner collecting and acknowledging receipt of original title deeds from the Bank's Legal Officer on 12th January 2016;

ix. Letter dated 25th August 2015 from Mutunga & Company Advocate to Securities Manager KCB indicating that they represent both the purchaser and borrower;

x. Letter of professional undertaking from Mutunga & Company Advocates to Gikera Vadgama dated 21st September 2015;

xi. RTGS from Crane Bank Ltd Uganda through Prime Bank Ltd Kenya for payment of Kshs. 60,000,000.00 to discharge L. R No. 3734/1129 charged at KCB Ltd for a loan of Kshs. 75,000,000.00 in favour of the vendor, Mohammed Said Chute;

xii. Discharge of charge in respect of L. R. No. 3734/1129 drawn by Mutunga & Company Advocates;

xiii. Letter dated 21st September 2015 from Gikera & Vadgama Advocates to Mutunga & Company Advocate requesting for professional undertaking regarding discharge of charge over L.R. No. 3734/1129;

xiv. Petitioner enters into negotiations and agreement dated 15th April 2016 with Mitsuo Takei for sale of L R No. 3734/1129, which was meant to replace L. R Nos. 3734/202 and 3734/209, whose titles were earlier discharged and collected from IBL by the Petitioner;

xv. Kshs. 150,000,000.00 is paid to the Petitioner's account at Standard Chartered Bank in three tranches between April and May 2016 by Mitsuo Takei;

xvi. L. R No. 3734/1129 is transferred to Mitsuo Takei on 13th July 2016.

65. With respect to the alleged non-payment of stamp duty, CP Mwatsefu states that they made inquiries at KRA which revealed that the Petitioner in conjunction with the Interested Party did not pay stamp duty amounting to Kshs 12,440,000.00 in respect to the purchase of the following properties:

i. L. R 3734/202 and L. R 3734/209 for Kshs. 80,000,000.00;

ii. L. R 3734/1129 at Kshs 80,000,000.00;

iii. L. R 3734/1297 at Kshs 80,000,000.00;

iv. L. R 330/634 at Kshs 80,000,000.00.

66. He further states that the Interested Party provided the investigators with National Bank of Kenya pay-in slips which were confirmed by KRA to be forged and that no stamp duty in respect of the above quoted properties was credited into KRA National Bank account. It was also established in the course of investigations that the Petitioner's son, Timothy Mutunga, was working at the IBL headquarters Westlands as Quality Assurance Officer at the time of the investigations, having been employed in 2015.

67. In response to the Petition, the DPP filed an affidavit sworn on 31st August 2018 by Ms. Lillian Ogwora. She makes various averments with regard to the powers and functions of the DPP under Article 157(6) of the Constitution. Most of her averments relate to constitutional and legal arguments with respect to these powers and functions, which we shall address later in this judgment.

68. With regard to the factual issues, Ms. Ogwora states that the Petitioner has been charged in her individual capacity for acts committed that violate penal laws of this country and the sole purpose of the prosecution is to ensure that justice is served without regard to any other considerations. That in making the decision to prosecute the Petitioner and the Interested Party, the DPP acted independently, was not influenced by any political statements, and the decision reached was purely based on evidence, law and public interest. She deposes that the Petitioner's contention that this matter is borne out of the decision made in the Presidential election petition is misconstrued as, upon perusal of the evidence collected by the DCI, the DPP did not find any material connected either directly or remotely to her participation in the decision.

69. She further avers that the Petitioner and the Interested Party have not demonstrated that in making the decision to prefer criminal charges against them, the DPP has acted without or in excess of the powers conferred upon him by the law or has infringed, violated, contravened or in any other manner failed to comply with or respect and observe any constitutional or legal provisions. In her view, their allegation that the charges against them are intended to serve ulterior motives, to harass or embarrass them, is without merit and is devoid of evidentiary backing or legal reason.

70. In reference to the Petitioner's assertion that she was harassed by the DPP, Ms. Ogwora reiterates the DCI's position that the DPP had approached the matter with extreme caution and contacted the Chief Justice and informed him about the investigations that were being undertaken against the Petitioner. In her view, the correctness, veracity and weight of the evidence gathered by the DCI and independently evaluated by the DPP can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence.

71. Ms. Ogwora makes averments with respect to the genesis and some aspects of the investigations leading to the impugned charges. She states that on 21st May 2018, KRA brought to the attention of the DPP information regarding suspicious financial activities relating to two companies, RAEI Investments Limited and Grand Forest Japan Hospital Ltd, which dealt with the Petitioner and Interested Party in a sale transaction that will feature prominently in the prosecution of the criminal case.

72. Upon receipt of the KRA letter, the DPP, on the 23rd May 2019 (this is perhaps a reference to 2018), directed the DCI to conduct investigations into the said matter and on conclusion the file be submitted to his office for appropriate direction. On 8th August 2018, the DCI forwarded its findings to the DPP together with the Duplicate Police File.

73. She states that upon perusal of the files, the DPP noted that the Petitioner and the Interested Party had not recorded statements and on 24th August 2018, he directed the DCI to record statements from the Petitioner and the Interested Party to afford them an opportunity to state their case before he could give

the matter his final consideration.

74. It is the DPP's position therefore that the Petitioner and the Interested Party have not demonstrated that he has exercised his powers contrary to Article 157(11) of the Constitution nor have they shown that the DCI has violated any provisions of the Constitution or the law**.**

The 4th Respondent's Response

75. The AG filed a Reply to the Petition dated 7th September 2018 in which he opposes the Petition on twelve grounds. He argues, first, that the present Petition is in respect to pending criminal proceedings in which neither the Attorney General nor the national government is a party, and he is therefore wrongly enjoined. He notes in this regard that no reliefs are sought against either his office or the national government. Further, that neither he nor the President has any control over criminal proceedings in Kenya.

76. He contends, in his fourth, fifth and eleventh grounds that there is no allegation of either bias or incompetence on the part of the subordinate court which has the constitutional and statutory mandate to hear and determine the criminal matter before it; and that the court is presumed to be impartial and no evidence has been presented to rebut that legal presumption. In addition, there is no basis for the Petitioner to presume that the court will not have control of its proceedings and ensure that the Petitioner's rights are protected**.**

77. In his sixth ground, he contends that the Petition seeks to preempt the presentation of evidence and is presumptive of the findings by the trial court. It is his contention in his seventh ground that at any rate, a claim for malicious prosecution is contingent on acquittal of an accused person and is actionable in private law.

78. His eighth ground is that it is in the public interest that the pending proceedings before the subordinate court should be allowed to continue to their logical conclusion in accordance with the Constitution and the law.

79. The AG contends that the Petition seeks to give the Petitioner immunity from criminal prosecution for actions undertaken in her private capacity. In his view, such immunity is not provided for under the Constitution and the applicable law and would in any event be discriminatory based on status.

80. The AG asserts in his tenth ground that it is only the JSC which has the legal capacity to commence proceedings for the removal of a judge pursuant to the provisions of Article 168(2) of the Constitution. There is therefore no basis to presume ulterior motive of an intention to remove the Petitioner based on the pending criminal proceedings.

81. In his final ground, the AG argues that this court lacks the jurisdiction to determine whether there is sufficient evidence to put the Petitioner on her defence as this can only be done by a court exercising criminal jurisdiction.

The Petitioner's averments in response

82. In response to the averments by CP Mwatsefu and Ms. Ogwora in their separate affidavits, the Petitioner swore a supplementary affidavit on 13th September 2018. She reiterates that the charges have no factual or legal foundation, and the intended prosecution has been instituted maliciously and unlawfully.

83. With respect to count I, she contends that she had never been confronted with the facts stated in the said affidavits nor had any explanation ever been sought from her prior to her arrest.

84. She deposes that this being a private contractual bank-customer relationship, due process and fair administrative action dictated that the Bank would first give her notice of any queries and matters in

dispute. She further asserts that the documents and the evidence presented by the DPP and the DCI confirm that there was no complaint from the Bank, and the investigation by the DCI was a fishing expedition.

85. It is her averment that the evidence in the statements of the Bank officials is exculpatory. She gives a number of reasons for making this assertion. The Petitioner avers that her relationship with the Bank as a customer began on 23rd August 2013 when the Bank accepted her request of 15th August 2013 for a credit facility to purchase L. R. No. 3734/205. The sum approved was Kshs. 80,000,000.00. However, the intended purchase fell through and it is her evidence that she notified the Bank of the failure and requested it to finance the purchase of alternative properties, namely L. R. Nos. 3734/202 and 3734/209 for the same amount.

86. She further states that on 1st November 2013, the Bank accepted her request and issued a letter of offer for purchase of the alternative properties. She also states that on 4th November 2013, upon her request, the Bank revised the loan facility from Kshs. 80,000,000.00 to Kshs. 60,000,000.00. The said loan was to be repaid in 228 equal instalments inclusive of interest.

87. It is her contention that while awaiting approval for the facility of Kshs. 60,000,000.00, she negotiated for an advance of Kshs. 12,000,000.00, which was approved by the Bank, debited to her loan repayment account number 7224000375 and credited to her personal account number 7224000306 on 23rd October 2013. She explains that she needed the said amount for purposes of making part payment of the deposit on the purchase price of the two properties.

88. The Petitioner further states that the Bank already had her credit appraisal as at the time of approval and disbursement of Kshs. 12,000,000.00, information that had been supplied in her loan application letter dated 15th August 2013.

89. The Petitioner queries why more than five years after she received the money and close to three years after she repaid the loan, the question of how she obtained the money would arise, and she deems it an illustration of her claim that the charges are a fishing expedition with ulterior motives.

90. The Petitioner asserts that in the entire affidavit of CP Mwatsefu and the statements from the Bank officials there is no allegation that she used her office as Judge of Appeal to secure the loan of Kshs. 12,000,000.00 or that she improperly benefited.

91. With regard to count II, the Petitioner makes a response to the allegations in the affidavits of CP Mwatsefu and Ms. Ogwora by giving her perspective regarding the security over the two properties before the Bank was placed under receivership.

92. She states that at the time the Bank was placed under receivership, a charge of Kshs. 60,000,000.00 had already been registered in favour of the Bank over L. R. Nos. 3734/202 and 3734/209 to secure the advance made to her, which she was servicing. She explains that the negotiations for the substitution of the securities of the facility commenced before the Bank was placed under receivership but were concluded post receivership.

93. It is the Petitioner's averment that in furtherance of the arrangement with the Bank she executed a charge over L. R. No. 3734/1129 in favour of the Bank on a date she cannot remember and tasked the Interested Party to deal with the Bank on the registration of the charge. However, before the registration of the charge, she personally approached the then Receiver Manager, Mohamud Ahmed Mohamud, with the proposal that she be allowed to sell the property instead of charging it and utilize part of the sale proceeds to reduce the outstanding long-term loan. She further proposed to pay any outstanding balance thereafter from the sale of another property, in respect of which she was looking for a purchaser. She also proposed that the Bank continues to hold an equitable mortgage over the original titles L. R. Nos. 1265/1273/1274/1275/1276 which were and are still in the Bank's possession.

94. It is her averment that the Receiver Manager, Mohamud Ahmed Mohamud, accepted her proposal, minuted the agreement to that effect in a handwritten document, which they both signed and which he kept. It is her recollection that during her interrogation on 28th August 2018 she saw the document in the possession of CP Mwatsefu. She requested for a copy, but he declined. It was on the basis of the handwritten agreement that she sold L. R. No. 3734/1129 on 15th April 2016 for Kshs. 150,000,000.00 with the full knowledge of Mohamud Ahmed Mohamud.

95. With regard to application of the proceeds of the sale of L. R. No. 3734/1129, the Petitioner states that she paid Kshs. 35,000,000.00 to the Bank on 17th June 2016 towards the reduction of the long-term loan in terms of the handwritten agreement. The sum outstanding under the long-term loan then stood at Kshs. 59,396,653.00 as communicated to her by the Bank through the Interested Party in its letter of 22nd December 2015. She instructed Mohamud Ahmed Mohamud to apply Kshs. 15,000,000.00 out of the sum paid towards the immediate reduction of the then outstanding sum of Kshs. 59,396,653.00 to reduce it to Kshs. 44,396,653.00 and spread out Kshs. 20,000,000.00 towards meeting her monthly repayment under the long-term loan.

96. She further asserts that at the time of receipt of the said sum of Kshs. 35,000,000.00, she had a credit of Kshs. 1,000,000.00 in her savings account with the Bank. It is her contention that had the Bank applied the said credit together with the sum of Kshs. 35, 000,000.00 as instructed, or in any other manner, her liability under the long-term loan would have reduced to Kshs. 23,396,653.00 as at 17th June 2016.

97. She states, however, that the sum of Kshs. 35,000,000.00 appears to have been utilized contrary to her instructions, which explains the balance of Kshs. 43,098,498.48 as at 14th June 2018, as claimed by Mohamud Ahmed Mohamud in his statement to the DCI made on 17th June 2018.

98. It is the Petitioner's case, therefore, that whichever way one looks at the matter, the payment of the sum of Kshs. 35,000,000.00 on 17th June 2016 to the Bank, covered 52 monthly instalments of Kshs. 669,422.00, a period of about 4 years. It is the Petitioner's view that in terms of the long-term loan repayment schedule, she had surpassed her repayment obligations to the Bank. She contends that given the above scenario the Bank was not exposed to any loss, and more so as it still holds an equitable mortgage over the five properties.

99. The Petitioner observes that in his statement to the DCI, Mohamud Ahmed Mohamud states that it is only on or after 7th July 2018, and after being served with an order in **Misc. App No 2225 of 2018**, that he established that the replacement charge and original title to L.R. No. 3734/1129 had not been surrendered to the Bank by the Petitioner's lawyers. In her view, this meant that the investigations into her transactions with the bank had not been initiated by the Bank.

100. The Petitioner contends that the application is the basis on which Mohamud claims to have been compelled by the DCI to release account details and transaction documents for investigations. That upon reviewing the application and order, she discerns that it related to KCB Bank (K) Limited and not IBL (In Receivership); and it sought access to information and certified copies relating to bank transactions of A/c. No. 1108448828 in the name of Blue Nile East Africa Limited at KCB Bank Limited; and it did not authorise any investigations into her accounts with IBL (In Receivership).

101. The Petitioner observes that in any event, IBL has instituted a claim before the High Court, being **HCCC. No 522 of 2015, IBL (Under The Statutory Receivership of The Receiver Manager) v W E Tilley (Muthaiga) Limited & 19 others** seeking to recover more than Kshs 34,969,702,891.60 of money alleged to have been misappropriated by some of its customers and to restrain the disposal of properties acquired pursuant to such misappropriation.

102. In her view, therefore, nothing other than abuse of the court process, abuse of administrative power, malice and ulterior motive explains why such similar civil action has not been pursued by the Bank in respect of the various claims against her.

103. With respect to counts III to VII which allege failure to pay stamp duty, the Petitioner states that she instructed the Interested Party to pay the stamp duty and gave him the funds for that purpose, in cash, on several occasions, relevant to each transaction, as advised by the Interested Party. This fact is acknowledged by the Interested Party in his statement made to the DCI on 28th August 2018. She asserts that it was not and could not have been her duty to oversee, supervise and account for the transfer process. A similar response is made with regard to count VIII to XI.

104. She states that she was given the original titles for the properties transferred to her name and that she is aware that under section 46 of the Land Registration Act, No. 3 of 2012, a transfer cannot be registered unless stamp duty has been paid as required under the Stamp Duty Act.

105. The Petitioner depones that contrary to the averment by the DPP, the investigations on the issue of stamp duty were not prompted by the Commissioner of Domestic Taxes. She refers to the statement of Julius Chege Macharia, an officer of KRA made to the DCI which is exhibited in the affidavit of CP Mwatsefu. The statement indicates that the DCI requested for information on the matter from KRA on 9th August 2018. Taken with Ms. Ogwora's deposition that the DCI had concluded his investigations and forwarded his findings to the DPP on 8th August 2018, this confirms that the stamp duty inquiry could not have been initiated by KRA.

106. In support of her contention that the charges against her have been initiated with an ulterior motive, the Petitioner points out that the DPP, DCI and AG have her tax records; that KRA issued her with clearance certificates over the years, including one for 2016; that the DCI issued her with a certificate of good conduct on 22nd June 2016 and she was issued with a CRB certificate on 20th June 2016. She asserts that as these certificates cover the period after the time of alleged commission of the offenses set out in the charge sheet, they are a confirmation of her tax compliance and credit worthiness.

107. In further illustration of what she alleges to be the ulterior motive and malice at the heart of her prosecution, the Petitioner refers to the widespread media coverage and publicity of her intended prosecution. She attributes leakage of information on the charges and intended prosecution to the DPP and DCI. She argues that the adverse publicity was intended to create an impression in the mind of the public that she is guilty, which violates her right to a fair trial and the presumption of innocence.

108. It is the Petitioner's case, however, that an allegation of abuse of office and misconduct against a judge is one that relates to the Judicial Code of Conduct and Ethics and for which a judge may be removed at the instance of the JSC under Article 168 of the Constitution. She asserts that if there is any legitimate complaint against her for abuse of office or misconduct, such a complaint ought to have been submitted to the JSC for consideration. She contends that she would only be liable for prosecution in the event of removal from office by a Tribunal and not before.

The Petitioner's Submissions

109. The Petitioner filed written submissions dated 13th September 2018 and supplementary submissions dated 25th February 2019. She sets out five thematic areas which she submits on. First, she deals with the issue of the transactions between her and IBL. It is her submission that the said transactions are of a pure commercial nature and should not be relied upon as a basis for institution and prosecution of criminal charges in terms of counts I and II of the charge sheet. She submits that for the DCI and DPP to institute criminal charges against her on the basis of these transactions is to violate her right to equal protection and equal benefit of the law guaranteed under **Article 27 (1)** of the Constitution. She reiterates her averments that the advance to her of Kshs. 12,000,000.00 was a contractual transaction, the entire sum has been repaid and there was no complaint by the Bank or the Receiver Manager to the DCI with respect to it.

110. It is her submission that whereas the DPP and DCI have concluded from the statements made by the IBL officers that the circumstances under which she received Kshs. 12,000,000.00 were illegal and the Petitioner had obtained financial advantage by virtue of her office as a judge of the Court of Appeal,

they had not explained the illegality with reference to the law contravened.

111. The Petitioner advances the same argument with regard to the facility secured by a charge over L. R. Nos. 3734/202 and 3734/209 and the discharge of charge, which she terms a negotiated contract between her and the Bank, and with respect to which no complaint has been raised by the Bank or the Receiver Manager.

112. In her view, the statements of Mohamud Ahmed Mohamud, taken in their totality do not form a basis to prosecute her on count II. She submits that first, Mohamud personally dealt with her and the Interested Party; that since the release of the discharge of charge in December 2015 to 6th July 2018, a period of two and a half years, the Bank has not followed up on the replacement charge. Second, that Mohamud acknowledged receipt of Kshs. 35,000,000.00 from her towards the repayment of the long-term loan on 17th June 2016, way after the release of the discharge of charge and sale of L. R. No. 3734/1129. Third, that none of the Bank officers raised a complaint to the DCI. Rather, it was the DCI who, on his own volition, initiated investigations on the strength of an order allegedly made in **Miscellaneous Application No. 2225 of 2018**.

113. Elaborating on the commercial nature of the transaction involving the Kshs 12,000,000.00, the Petitioner submits that there is a known civil process for recovering interest, if such interest was the concern of the Bank. Similarly, that there is a civil process for enforcing the undertaking of the Interested Party if at all there is default. She maintains that there is no allegation of default on her part in respect of these two transactions. Given that there is no complaint from the Bank or the Receiver Manager, the DPP and DCI cannot claim to have taken up the matter on their own motion in the public interest.

114. To fortify her assertion that there is an alternative remedy available to IBL, the Petitioner makes reference to **HCCC No 522 of 2015 Imperial Bank Limited (under The Statutory Receivership of The Receiver Manager) v W E Tilley (Muthaiga) Limited & 19 others**, which was instituted on 26th October 2015 against twenty of its customers on claims of fraud and conspiracy, seeking to recover Kshs. 34,969,702,891.60.

115. It is the Petitioner's submission therefore that there can be no justification for the criminal investigations and prosecution on a matter of a lesser magnitude than that pursued through civil proceedings in **HCCC No. 522 of 2015**.

116. The Petitioner cites **Jared Benson Kangwana v Attorney General Misc. Application No 446 of 1996, Vincent Kibiego Maina v The Attorney General Misc. Application Nos 839 and 1085 of 1999 (UR) and Samuel Kamau Macharia & another v Attorney General & another, Misc. Application No 356 of 2006 (UR)** for the proposition that a civil matter cannot be the foundation of a criminal charge. She further cites **Mohamed Gulam Hussein Fazal Karmal & another v Chief Magistrate' Court Nairobi & another (2006) eKLR** in which a similar proposition is made. It is thus her submission that there was no foundation for criminalizing the two commercial transactions nor is it in the public interest.

117. With regard to the charges relating to failure to pay stamp duty, the Petitioner similarly cites the violation of her rights under Article 27 (1) which entitles her to the right to equal protection and equal benefit of the law in respect to the issue of stamp duty. In her view, this benefit is only in the civil process and the institution of the criminal charges is intended to deny her that benefit. The Petitioner relies on section 46 of the Land Registration Act to submit that it makes registration of transfers conditional upon payment of stamp duty.

118. The Petitioner submits that she was represented by the Interested Party to whom she gave money for purposes of paying stamp duty and registration of transfers, and from whom she received original titles for the five properties duly registered in her name.

119. In submissions that mirror her averments which we have set out elsewhere in this judgment, she argues that there was no complaint to the DCI by KRA; that she was represented by a counsel to whom she gave money for purposes of stamp duty and her documents were duly registered.

120. In pressing the point that the institution of the proceedings was malicious and abuse of discretion, the Petitioner submits that the DCI should have taken into account certain information before mounting the charges. As examples, the Petitioner submits that the DPP could have asked certain questions such as how and why the five properties were registered in her name without payment of stamp duty, whether she should be responsible for such non-payment when she had provided the money for stamp duty to the Interested Party, and whether the criminal process is the only avenue for addressing any concerns for non-payment of stamp duty. With respect to the last question, the Petitioner argues that sections 39 and 40 of the Tax Procedure Act provides an elaborate civil procedure for recovery of unpaid tax.

121. The Petitioner relies on **Republic v Director of Public Prosecutions & 2 others *ex parte* Praxidis Namoni Saisi (2016) eKLR** and **Bitange Ndemo v Director of Public Prosecution & 4 others (supra)** to support the argument that neglect to make reasonable use of sources of information available before instituting proceedings and to take into account exculpatory evidence is indicative of malice and abuse of process.

122. The Petitioner further submits that the criminal charges were mounted with ulterior motive, malice and abuse of process contrary to Article 157 (11) which requires the DPP to have regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process in the exercise of his prosecutorial powers. Reliance was again placed on **Republic v Director of Public Prosecutions & 2 others Ex Parte Praxidis Namoni Saisi (supra)** and **Bitange Ndemo v Director of Public Prosecution & 4 others (supra)** for the proposition that failure, ignorance or neglect to act judiciously in the making of a decision to prosecute contravenes **Article 157 (11)** and manifests ulterior motive, malice and abuse of process.

123. According to the Petitioner, the institution of criminal charges against her on matters of a civil nature instead of pursuing the available civil remedy is intended to deny her the right to a fair hearing guaranteed under **Article 50 (1) and 2 (a) (b) (c) (J)** and **(k)** and is further an attempt to avoid the civil process thus a violation of her rights under **Article 50 (1)**.

124. Referring to the statement of Mohamud Ahmed Mohamud, the Petitioner submits that the investigations on her account were commenced, undertaken and documents to that effect released to the DCI without notice, her consent or a court order.

125. It is her further submission that if the order obtained in **Miscellaneous Criminal Application No. 2225 of 2018** was the basis of the authority for IBL's release of her account details and documents to the DCI, then this was a violation of her rights under Articles 47 (1) and (2) as well as 50 (1). She argues that the order in that case was neither directed to IBL nor did it relate to any of her accounts.

126. The Petitioner makes two arguments with respect to the charges of abuse of office preferred against her. She submits first, that sections 26 and 27 of ACECA require that notice be given to persons suspected of corruption or economic crimes to furnish information in respect to investigations and that an Order may be sought directing the suspect to provide such information. She submits that failure to comply with these sections is a violation of her rights under Article 47 (1) and (2) and Article 50 (1) of the constitution. In this regard she relies on the case of **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others (2016) eKLR** .

127. Her second argument is that the DCI and DPP commenced investigations on offences alleged to be committed in contravention of ACECA instead of having the investigations undertaken by EACC. Regarding the place of ACECA on the prevention, investigation and punishment of corruption and economic crimes, the Petitioner submits that it is a specialised legal regime with inbuilt structures and procedures to guide EACC in the performance of its duty for good reasons and the rule of law. It is her submission that ACECA is a complete code in dealing with matters brought under it.

128. According to the Petitioner, the commencement of investigation of offences under ACECA is the sole mandate of EACC, and therefore the DCI had no basis to investigate her in respect to the charge relating to abuse of office, which is an offence under ACECA.

129. The Petitioner further submits that EACC is designed to be independent and not subject to direction or control by any person or authority pursuant to Article 249 of the Constitution, and she relies on **Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others**.

130. Building on this argument, the Petitioner submits that the DPP does not have powers to directly initiate criminal proceedings under ACECA. She argues that the powers of the DPP in relation to any prosecutions under ACECA are specified and limited under section 35 of the Act to receiving reports and recommendations and thereafter making decisions on whether or not to prosecute such offences.

131. The essence of her argument is that both the DCI and DPP have overstepped their mandate and encroached on the jurisdiction of EACC under ACECA.

132. It is the Petitioner's submission that section 35 of ACECA is designed to protect public officers from frivolous prosecution and prosecutions without sanction. The purpose of that sanction is an important safeguard in ensuring that before a prosecution is recommended there is justifiable and probable cause.

133. She poses the question as to who the complainant is in the charges instituted against her. Her response is that under ACECA, the DPP is neither a complainant nor an investigator. The DPP cannot direct EACC on what to do because he would be overstepping his mandate. Under the ODPP Act, the DPP has power to direct the IG to investigate any information or allegation of criminal conduct and the IG shall comply with any such direction. The DPP does not possess such powers under ACECA. She submits that the very foundation of a charge, which is a complaint, is lacking from the charges brought against her. She further argues that the charges are without factual foundation which would explain the want of complainants. In her view, the entire prosecution has been instigated by and is being driven by the DPP and this is the reason why the DPP would want to selectively apply or bypass the statutory regime established under ACECA and any benefits that would thereby accrue to her.

134. According to the Petitioner, one such benefit under ACECA can be found in the report that EACC is required to make to the DPP under section 35. Before EACC makes a report to the DPP, it is required to ensure that matters or complaints that are brought before it are properly investigated and justified before it makes a recommendation to the DPP to prosecute. Under the Act, EACC is also obliged to take into consideration factors such as the office held by a public or state officer who is under investigation. It is the Petitioner's case that one such safeguard embedded in the legislation is section 62(6) of the Act which takes cognisance of and limits the power of EACC to act where the Constitution limits or provides for the grounds upon which a holder of the public office may be removed or the circumstances in which the office must be vacated.

135. With respect to the question by the DPP and the DCI whether the Petitioner should continue serving as a judge, the Petitioner submits that this demonstrates that the DPP is predominantly preoccupied with her removal from the office of Deputy Chief Justice without following the process laid down by the law. The Petitioner submits that she is protected under ACECA because the Constitution limits the grounds upon which she may be removed or circumstances in which she would have to vacate office.

136. She submits that she does not claim any immunity from criminal prosecution. Her complaint is that the entire criminal process initiated against her was intended to procure her removal from office without regard to the procedure set out in the Constitution. In her view, the taking of plea, of itself, has the effect of removing her from office. She refers to Article 168 of the Constitution which provides the grounds upon which a judge may be removed from office. It is her case that it is only upon removal that the judge may be charged for any criminal offences related to the grounds upon which he or she was removed.

137. In further support of her arguments, the Petitioner makes reference to the position in the United States of America (USA) to submit that a judge cannot be prosecuted before removal from office. She cites **Steven W. Gold**'s article **"Temporary Criminal Immunity for Federal Judges"** for the

submission that a "temporary criminal immunity" for judges facilitates an independent, unbiased judiciary.

138. The Petitioner expresses the concern that the ulterior motive behind her intended prosecution is a decision she made against the President of the Republic of Kenya. She urges the court to be guided by the America approach on how the prosecution of sitting judges in Kenya should be handled.

139. In the same vein, the Petitioner refers to the process in South Africa, where the removal of a judge from office is a function of the Judicial Service Commission and it is a process undertaken with utmost regard to the rights of the judge, to prevent loss of respect for the Judiciary. She posits that such a matter is conducted with decorum and without publicized funfair such as she faced in the three days preceding her arraignment. She cites in support the decision in **Hlophe v Constitutional Court of South Africa & Others (08/22932) [2008] ZAGPHC 289**.

140. The petitioner also draws parallels with the situation in India where the prosecution of a sitting judge can only be undertaken with permission from the Chief Justice or if it is the Chief Justice who is sought to be prosecuted, from the President. She cites the case of **K. Veeraswami v Union of India and others, 1991 SCR (3) 189**.

141. The Petitioner also makes reference to the process of removal of a judge from office in Nigeria which she says is the same as that in Kenya. She relies on **Nganjiwa v FRN (2017) LPELR – 4 3391 (CA)** in which it was held that a sitting judge cannot be prosecuted for offences that would have otherwise been a ground for removal from office.

142. The Petitioner points out that there are three incidents in Kenya where judges were subjected to the removal process by the JSC post the promulgation of the 2010 Constitution. The judges faced complaints which were, in actual fact, of a criminal nature. First, in the matter relating to former DCJ Dr Nancy Barasa, a complaint of physical assault against her was made to the police. The complaint was taken up by the JSC, considered and a recommendation to form a tribunal for the DCJ's removal made to the President. Second, a similar process was undertaken through the JSC in respect of Justice John Mbalu Mutava and Justice Philip Tunoi.

143. She contrasts this with the circumstances that faced the late Justice Oguk who was charged in court before the 2010 Constitution but resigned before trial. Justice GBM Kariuki was charged with attempted murder, stood trial as a sitting judge and was acquitted. According to the Petitioner, in those cases, JSC did not take up the matters. It is therefore the Petitioner's submission that there are categories of offences of the nature faced by the two judges that may justify departure from "temporary immunity" referred to by Gold. It is her submission that that category was acknowledged in **Nganjiwa v FRN** (supra) where it was held that if a judicial officer commits theft, fraud, murder or manslaughter, arson or similar offences, which are crimes committed outside the scope of judicial functions, he may be arrested, interrogated and prosecuted directly by the state.

144. It is the Petitioner's submission, that the answer to the question as to whether or not a judge can be prosecuted before removal from office is answered by the practice that if the offence relates to a matter bordering on misconduct, JSC should first consider it and if the judge is removed, he may be charged. However, where the offence does not relate to misconduct and is of an aggravated nature like theft and murder, JSC has no disciplinary role and the judge may be arrested and charged.

145. According to the Petitioner, the charges levelled against her arise out of a claim of abuse of office of her then office as judge of the Court of Appeal and based upon the cited decisions referred to, the effect of charging her is a *de facto* removal from office for amongst others, grounds which cannot form a basis for her removal.

The DPP and DCI's Submissions

146. The DPP filed submissions dated 6th September 2018 on his own behalf, and that of the DCI. After

identifying issues which they deem necessary for determination, the DPP and the DCI made their submissions on some thematic areas.

147. Beginning with the constitutional and statutory mandate of the DPP**,** it is submitted that he exercises state powers of prosecution that are constitutionally reposed in his office under Article 157 of the Constitution. According to the DPP the Article leaves no doubt as to the powers of his office to institute proceedings against the Petitioner and the Interested Party. He submits further that his office has published a National Prosecution Policy that provides guidelines on the test to be applied before a decision to prosecute is taken. Key among the considerations is whether the evidence placed before him discloses a prosecutable case and whether it is in the public interest to commence a prosecution.

148. According to the DPP, where acts of a criminal nature are brought to his knowledge, it is incumbent upon him to ensure that the allegations are thoroughly investigated, and appropriate action taken. In doing so, the DPP is not subject to the direction and control of any person, body or authority. It is also his submission that he is at liberty to receive representations on criminal culpability from any quarter.

149. The DPP states that it is against this background, that upon receipt of information from KRA that he directed the DCI to commence investigations against the Petitioner, hence, the directive to the DCI was not actuated by malice, ill will or spite on his part. It is his argument that his office, being an independent institution established under the Constitution, the court can only interfere with or interrogate his actions where there is contravention of the Constitution, the law, rules of natural justice or breach of fundamental rights.

150. In support of this argument, he relies on **Paul Ng'ang'a Nyaga v Attorney General & 3 others [2013] eKLR** and **Francis Anyango Juma v The Director of Public Prosecutions and another [2012] eKLR.** It is therefore the DPP's submission that courts should not usurp his constitutional mandate, substitute their own assessment of evidence, decide on what charges are to be preferred and against whom they are to be levelled. The DPP relies on **Kenya Commercial Bank Limited & 2 others v Commissioner of Police and Another [2013] eKLR.**

151. He further cites **George Joshua Okungu and Another v Chief Magistrate Court Anti-Corruption Court at Nairobi and Another [2014] eKLR** in which the court summarized some of the considerations that will not form the basis for the court's interference with his constitutional mandate. It is his submission, therefore, that he was neither influenced nor directed by any person, body or authority to direct investigations and subsequently have the Petitioner charged. He relies on **Republic v Royal Media Services [2014] eKLR.**

152. The DPP further submits that the court's power to prohibit prosecution should be exercised sparingly and in the clearest of cases as prosecutorial decisions should be left to him to determine on the basis of evidence and public interest. He also submits that the court should remain the neutral arbiter and restrain itself from making orders that would unnecessarily fetter his constitutional mandate. He argues that the onus is on the Petitioner to establish that he acted *ultra vires* and irrationally. In this regard he relies on **Mohit v The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20.**

153. In laying emphasis that the Petitioner has failed to establish a case that merits the review of the decision to prosecute her, the DPP relies on **Diamond Hasham Lalji & Another v Attorney General and 4 others [2018] eKLR,** which cited with approval the case of **William v Spautz [1993] 2 LRC 659.** Concluding on this point, the DPP asserts that the guarantees of fair trial envisaged under Article 50 and the procedural safeguards embedded in the Criminal Procedure Code and the Evidence Act are sufficient to ensure that the Petitioner is accorded a fair trial, and relies on **R v *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 23.**

154. The DPP addresses himself in his submissions to the question of the independence of the judiciary and the extent of judicial immunity to criminal prosecution. He submits that judicial immunity does not extend to acts that are criminal and are committed outside the official duties of a judicial officer. It is his submission that judicial officers, like other persons, are subject to the penal laws of the country and must

be held accountable for their actions. In his view, the mere institution of a criminal charge against a judge or any other judicial officer, is not, in itself, a threat to the independence of the judiciary. Like all other persons, judges and magistrates are under an obligation to ensure that they operate within the law and should not expect preferential treatment in the enforcement of criminal law.

155. The DPP refers to **Shimon Shetreet and Sophie Turenne,** in their book **Judges on Trial: The Independence and Accountability of the English Judiciary**, page 243, to support his assertion that judges are not special beings who are immune to criminal prosecution. He also cites Article 160 (5) of the Constitution to submit that this Article, which immunizes acts of judicial officers done in good faith in lawful performance of judicial function, does not extend to acts that are devoid of good faith. He further cites section 6 of the Judicature Act, which is to the same effect in respect to civil liability.

156. It is the DPP's submission therefore that acts not done in good faith on the part of a judicial officer are not covered by this Article. The individual judicial officer concerned should be prepared to take responsibility for such conduct. He relies on **Abdulkadir Athman Salim Elkindy v Director of Public Prosecution and Another [2017] eKLR,** for the proposition that while a judicial officer cannot be held to be under civil liability for good faith actions done in the course of his duties, those provisions do not cover criminal liability. In his view therefore, the Petitioner's claim to immunity from prosecution while in office is not founded on the Constitution or any statute.

157. In response to the Petitioner's claim that her prosecution is a threat to the independence of the judiciary, the DPP cites various instruments to which Kenya has committed itself and which, by dint of Article 2 (5) and (6) of the Constitution, form part of our law. Making reference to Article 11 of the **United Nations Convention Against Corruption**, the DPP argues that it directly addresses the question of combatting corruption and economic crime and places upon each state the duty to eradicate corruption and strengthen integrity among members of the judiciary. The DPP asserts that he would be failing in his duty if he were to accord judicial officers against whom issues touching on integrity have been raised preferential treatment.

158. The DPP further submits that the **Universal Declaration of Human Rights** emphasizes equality of all persons before the law under Article 7. This is echoed in Article 3 and 19 of the **African Charter on Human and Peoples Rights.**

159. Thus, it is the DPP's submission that precedent indicates that immunity from suits applies where acts are done in the bona fide exercise of judicial function and in the belief, though mistaken, that there is jurisdiction. He relies on the case of **Mireles v Waco 502 U.S. 9, 13 (1991)** and **Harris v. Harvey, 436 F. Supp. 143 (E.D. Wis. 1977)** for this proposition.

160. The DPP makes reference to section 77 of the Indian Penal Code which exempts judges from criminal proceedings for things done or said during judicial duties. He submits, however, that section 3(2) of the Judges (Protection) Act, 1985 makes provision for the state to initiate criminal proceedings against a sitting or former judge of a superior court if it can produce material evidence to show that a judgement was passed after taking a bribe.

161. According to the DPP, in the present case, the Petitioner's acts were so far outside the purview of judicial acts that she cannot claim to be covered under judicial immunity. In his view therefore, the steps taken by the DPP in this matter should not be viewed as an attack on the independence of the judiciary since other countries have provisions dealing with the question of prosecution of judicial officers.

162. The DPP submits that at any rate senior judges, including Chief Justices, in other jurisdictions have been the subject of criminal prosecution notwithstanding the independence of the judiciary. He cites the case of **Nganjiwa v FRN** (supra) and **Sharma v Deputy Director of Public Prosecution & Others (Trinidad and Tobago) [2006] UKPC 57 (30 November 2006)**. He also relies on the case of **Braatelien et al. v United States (147 F 2.d 888 (1945)** where the judge contended that he was not subject to criminal prosecution for the acts alleged to have been done by him because the said acts were done by him in his capacity as a conciliation commissioner. However, the court held that while it is true

that as a general rule a judge cannot be held criminally liable for erroneous judicial acts done in good faith, he may be held criminally liable when he acts fraudulently or corruptly.

163. The DPP submits that the situation in Kenya is no different as the law is clear as to the extent of judicial immunity. He relies on **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and 5 Others [2016] eKLR** where the court addressed the question of judicial immunity and cited **Maina Gitonga v Catherine Nyawira Maina & Another [2015] eKLR**. He argues that the court in that matter confirmed that judicial immunity would only be limited to acts touching on judicial decision making so as to protect judicial officers from constant fear of prosecution over acts or omissions in the performance of their judicial functions. It is his submission therefore, that the acts complained of in this case are not connected in any way to the judicial decision rendered by the Petitioner in the course of her duty as she has not demonstrated by way of evidence how this case relates to any of her judicial decisions.

164. One of the issues that the Petition raises is whether the removal of a judge from office should precede the institution of criminal proceedings against the judge. In response to this issue, the DPP submits that he is not obliged to await the removal of a judge from office in order to institute criminal proceedings as such a position is not supported by any law. In his view, immunity from prosecution in Kenya is only available to a sitting President under Article 143 of the Constitution.

165. The DPP submits that in any event, the removal of a judge from office is not a function of the DPP but a matter for the JSC under Article 168 as read with Article 172 of the Constitution. Moreover, it is his position that he cannot close his eyes to criminal conduct in the judiciary to await decisions of other organs. If he were to do so, he would be acting against the letter and spirit of Article 157 (10) and (11) and would be in dereliction of his duty. He cites **Alfred Mutua v Ethics and Anti-Corruption Commission and 4 others [2016] eKLR** and **N. Edath-Tally v M. J. K. Glover [1994 MR 200],** to underscore the protection that courts in this and other jurisdictions have given to his powers, functions and status under the Constitution.

166. The DPP further takes the position that the proceedings to remove a judge and a criminal prosecution against a judge can run concurrently. This is because, in his view, removal proceedings are not penal in nature but disciplinary and are not a bar to criminal prosecution. That the two processes are distinct and not interdependent and nothing in our Constitution precludes the institution of either processes. He argues that he has no role in the removal of a judge from office unless the petition to remove a judge is generated from his office. He again relies on Article 168 of the Constitution which provides for the process of removal of a judge from office on grounds of inter-alia gross misconduct or misbehavior or breach of code of conduct prescribed by an Act of Parliament. According to the DPP, even though the grounds and particulars of the offences stated in the charge sheet against the Petitioner may well constitute a ground for initiation of the disciplinary process before the JSC, that may result in her removal from office, such removal is not within the jurisdiction of any of the Respondents.

167. The DPP reiterates the argument that there is no constitutional or legal requirement that the matters giving rise to this Petition should have first been placed before the JSC as a disciplinary issue before commencement of the criminal process. He adds that there is no prejudice or double jeopardy for a judicial officer to undergo both disciplinary and criminal proceedings concurrently under the Constitution and the law. That in any event, the law is clear that civil and criminal proceedings can be pursued concurrently. The DPP relies on **Prof Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-corruption Commission & 5 others (2016) eKLR**, **Floriculture International Limited and others v The Trust Bank Ltd & others High Court Misc. Civil Application No 114 of 1997 (unreported**) and section 193A of the CPC for this submission.

168. He concludes therefore from the above analysis that the question of removal of the Petitioner was not a matter he was concerned with since that would have been an irrelevant consideration which would render his decision to prosecute susceptible to judicial review. He cites in support of this submission the

case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] APP. L.R. 11/10**.

169. Furthermore, it was the DPP's submission that the Petitioner was afforded an opportunity to make a statement with the police in observance of the rules of natural justice and the provisions of Article 47 of the Constitution were complied with. He terms the Petitioner's claim that she was arrested without full knowledge of the allegations made against her as untrue.

170. It is also his submission that the removal of a judge and prosecution have different objectives and different outcomes as the DPP has a clear mandate to prosecute but no role in the removal of a judge. Thus, an order of prohibition would not be available to the Petitioner since the decision by the DPP was not *ultra vires*, irrational, disproportionate or procedurally unfair. The DPP cites the case of **Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** with respect to the circumstances under which an order of prohibition should issue. He also relies on **London Borough of Wandsworth v Rashid (2009) EWHC 1844 (Admin)** which is to similar effect.

171. The DPP defends the role taken by the DCI in investigations in this case and in the investigation of anti-corruption and economic crimes in general and crimes under ACECA. He asserts that he is not bound by recommendations of any investigative agency in making prosecutorial decisions. He further submits that investigation of the kind of offences the Petitioner and the Interested Party face can be initiated and undertaken by the DCI or EACC. He relies on Article 244 which sets out the objects and functions of the National Police Service which include at Article 244(b) the prevention of corruption and promotion of transparency and accountability. He therefore terms as fallacious the argument that the police cannot investigate matters related to corruption and economic crimes.

172. The DPP further relies on section 35 of the **National Police Service Act No. 11A of 2011** to underline the specific functions of the Directorate of Criminal Investigations which include at section 35(b) the mandate to ***"undertake investigations on serious crimes including… economic crimes…"***

173. It was thus the DPP's submission that in the instant case, he directed the DCI to investigate the matter not because of any oblique motive on his part but in recognition of the fact that the DCI just like EACC could investigate the crime reported to him by KRA. According to the DPP, EACC exercises donated police powers and therefore the donor of those powers cannot be robbed of the function of prevention of corruption and economic crimes. He supports his submission on the role of the DCI to investigate economic crimes on **Okiya Omtatah Okoiti and 2 others v The Attorney General and 4 Others (2018) eKLR** in which the court determined that ***"the…Constitution mandates the National Police Service to undertake investigations and prevent corruption."***

174. He further relies on **Republic v Commissioner of Police and Another *ex parte* Michael Monari &Another (2012) eKLR**.

175. At the crux of this Petition is the complaint that the Petitioner has been subjected to such adverse publicity that her right to fair hearing has been compromised. In response, the DPP points out that under Article 34, the Constitution provides for media freedom which extends to the right to receive and disseminate information. This right, it is submitted, is subject to the limitations contemplated under Article 24. The present case has generated considerable publicity given the Petitioner's position in the third arm of government.

176. The DPP asserts that he and the DCI have absolutely no control over the media and cannot therefore be faulted over media reports touching on the case. He argues that in any event, adverse publicity by itself has not been found by our courts to be a matter that would influence the mind of a judge, since judges are expected to apply their minds to the law and facts as presented before them. The DPP relies on **Republic** v **Attorney General & 3 others ex parte Kamlesh Mansukhlal Damji Pattni]2013] eKLR** and **William S.K. Ruto & Another v Attorney General [2010]eKLR**.

177. In response to the Petitioner's allegations that her tribulations have their genesis in the majority decision in the Presidential election petition, the DPP submits that the present prosecution has absolutely nothing to do with the alleged threats but is purely borne out of criminal conduct of the Petitioner completely unrelated to her participation in the presidential petition. He further observes that the Petitioner was not the only judge who presided over the petition and made adverse orders against the President. He thus terms the Petitioner's allegations as hollow, far-fetched and lacking in substance as the decision to prosecute her was taken independently and upon a professional and thorough examination of the evidence collected against her. The DPP cites **Sharma v Deputy Director of Public Prosecution & Others (Trinidad and Tobago) [supra)** to submit that where it is alleged that a decision to prosecute was reached out of political pressure, the party alleging must prove the allegation. However, in the present case, the DPP argues that the Petitioner has not demonstrated connivance between his office, the DCI and the President.

178. It is further submitted that the mere institution of criminal charges against the Petitioner does not put her integrity at stake as the doctrine of presumption of innocence still prevails and she is entitled to all protections under the law. The DPP therefore protests that to impute a political motive in the decision to charge is to cast aspersions on his office without a factual basis. He relies on **Dr Tiberius Muhebwa v Uganda Constitutional Reference No 09 of 2012**.

179. The DPP refers to paragraphs 18, 19, 20, 21, 22 & 23 of the Petition, in which he states that the Petitioner alleges that at the time the DPP went on national television to inform the public of the decision that he had reached regarding her case, she was not aware that she was the subject of investigations. He submits that the contention is not factual as the DPP had already informed the Chief Justice. Further that the Petitioner had also been contacted by the investigating officer over the matter and had even recorded a statement which he had given due consideration before making the decision to charge.

180. It is his submission that he informed the public of the decision to charge the Petitioner in accordance with Articles 35 and 157 (11) of the Constitution. This was on account of the office occupied by the Petitioner in the judiciary and any action taken against her without full disclosure to the public could attract negative innuendos and allow room for speculation and misinformation. According to the DPP, the communication was not made to cause any public embarrassment since, in any event, the Petitioner was to be presented before an open court for a public trial.

181. The DPP once again relied on **Shimon Shetreet and Sophie Turenne Judges on Trial [supra]** to submit that the Petitioner's financial entanglements gave rise to the subject of criminal investigations and intended prosecution. In his view, it was in the public interest to make such a disclosure of the petitioner's financial entanglements, and such disclosure cannot amount to intimidation or public embarrassment.

The Attorney General's Submissions

182. The AG submits that although the Petitioner raised a number of allegations against his office, she has not adduced sufficient evidence to support them. He argues that the Petitioner has both legal and evidential burden, but which she has not discharged. He relies on **Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 others [2013]eKLR, Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR and Kuria & 3 Others v Attorney General [2002] KLR 69**.

183. On the issue of equality and freedom from discrimination, the AG supports the DPP's position and submits that as a point of law, the fact that a matter may be actionable in civil proceedings is not a bar to undertaking criminal proceedings on a similar matter. He relies on **Samuel Ndungu Gitau, Senior Resident Magistrate, Chief Magistrate's Court at Kiambu & 3 Others [2012]eKLR**

184. On the right to fair hearing and human dignity, the AG submits that the DPP took the decision to prosecute the Petitioner, investigations having been undertaken by the DCI, and upon independent review thereof by the DPP. Citing **William S.K. Ruto & another v Attorney General** (supra), the AG argues

that in comparable circumstances the court held that it is not for the constitutional court to determine the sufficiency or otherwise of the evidence to be adduced at the trial. He further argues that the onus is on the DPP and DCI to demonstrate that they have a reasonable or probable cause that the offence may have been committed.

185. He agrees with the submissions by the DPP that as a State officer as defined under Article 260, the DPP has an obligation under Article 35 (3) to publish information affecting the public. He also agrees that prosecution of a Deputy Chief Justice on criminal charges is important information affecting the public which merits publication. In his view therefore, the disclosure of information about the prosecution does not breach any of the Petitioner's rights.

186. With regard to the Petitioner's claim that her prosecution will be a violation to her right to fair hearing, the AG submits that she does not allege that the trial court will not accord her a fair hearing. That in any event, it is the presiding magistrate and not his office, the DCI or DPP who is ultimately responsible both for the conduct of the proceedings and the outcome.

187. He further argues that the judiciary is presumed to have competent, impartial and conscientious personnel, faithful to their constitutional and statutory obligations, and oath of office. It is therefore argued that there will be no basis to presume that the judiciary will be privy to any scheme to punish the petitioner for political consideration. He relies on **President of the Republic of South Africa and Others v South African Rugby Football Union and Others Case [1999]ZACC 11.**

188. The AG supports the DPP's submission that pre-trial publicity will not infringe on the Petitioner's right to a fair hearing. He cites **Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others [2013]eKLR.** He argues that pre-trial publicity in and of itself is not a violation of the Petitioner's right.

189. The AG contends that the functions and powers of the President and the national executive are clearly set out under Chapter 9 of the Constitution. Those functions and powers do not include the prosecution of crimes. He submits that neither the President nor the national executive have any control over criminal investigations, which is vested in the DPP under Article 157 of the Constitution. In this regard, he argues that the DPP is functionally independent from the national executive.

190. He also agrees with the position taken by the DPP that prosecution is a lawful process sanctioned by the constitution, and to fetter the powers of the DPP would be to undermine the rule of law. He refers to **Isaiah Waweru Ngumi v Attorney General & 7 Others [2013]eKLR.**

191. He lends his voice to the contention by the DPP that the National Police Service has the mandate to investigate crimes falling under ACECA and cites **Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission and 4 Others** (supra).

192. The AG argues that there is reasonable and probable cause for the charges pending against the Petitioner. He takes the view that she has only presented to this court mere apprehensions about possible violations of her rights. He therefore argues that the court should not grant the orders that she seeks and relies on **Republic v Attorney General & 4 Others *ex parte* Kenneth Kariuki Githii [2014] eKLR**.

The Interested Party's Submissions

193. Th**e** Interested Party filed written submissions dated 4th October 2018 in support of the petition and sought to have the orders prayed for by the Petitioner apply to him. An issue arose from the response of the DPP and DCI as to whether the Interested Party, who has not filed a separate petition and has not sought joinder as a co-petitioner, can benefit from the orders sought. In reply the Interested Party submits that Article 159(2)(d) requires that justice be administered without undue regard to procedural technicalities. He also relies on Article 22(3)(b) the Constitution to contend that formalities relating to commencement of proceedings to enforce the Bill of Rights should be kept to the minimum and that where necessary, the court may entertain informal proceedings. In support of his argument, he refers to

the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules)**. He then argues that the court will accord a hearing to parties and grant relief as long as the issues raised are clear.

194. He also argues that he was a party to the proceedings from the outset and the court directed that all parties do file responses to the petition. He submits that a party can either oppose or support a petition, and he has elected to support the petition.

195. It is also his contention that he had filed an application dated 29th August 2018 and filed in court on 30th August 2018 in which he sought to have the orders issued in favour of the Petitioner apply to him. The DPP and DCI did not oppose the application though they had been served. He relies on **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others[2017] eKLR** to submit that a party who is already included in a petition ought to file an affidavit stating his case, rather than filing an application to be enjoined as a co-petitioner.

196. It is his argument that a party who is already indicated in the petition as an interested party cannot file another separate petition to raise issues that can legitimately be raised within the existing petition as this would lead to multiplicity of suits.

197. The Interested Party submits that while the investigations commenced sometime in May 2018, it was not until 27th August 2018 that the DCI got in touch with him, but only for the purpose of arrest. He argues that the nature of offences that he is alleged to have committed require a thorough and more robust engagement with him before the decision to charge is made.

198. The Interested Party agrees with the Petitioner's submissions with respect to the circumstances surrounding the commencement of investigations into the offences relating to stamp duty.

199. He submits that the allegation by the DCI that he provided investigators with National Bank of Kenya pay in slips which were confirmed by KRA to be forged and that no stamp duty had been paid is false as no single statement from KRA showed that these documents were presented before KRA for examination. It is also his case that in a situation where stamp duty was paid through banks as agents, investigations would not terminate at KRA alone as there would have to be statements from relevant banks and reports from experts in documentation before a decision to arrest and charge was reached.

200. He reiterates his averments that though he was arrested on 27th August 2018 at 1.00 p.m., he was not presented in court until 5:30 p.m. on 28th August 2018 which was clearly beyond the 24 hours decreed by Article 49(1)(f). He relies on **Michael Rotich v Republic[2016] eKLR** to underscore the importance of the right to liberty.

201. The Interested Party argues that the invasion, search and confiscation of documents from his office infringed his right to privacy and was a breach of the independence of the Bar. He cites section 134(1) of the Evidence Act in support. While acknowledging that there is a proviso to section 134 of the Evidence Act, he argues that the advocate ought to be given an opportunity to seek the client's consent or to protest an attempt to access documents in his possession.

202. The Interested Party invokes Article 31 of the Constitution which he submits protects his right to privacy, which includes the right not to have one's person, home or property searched, or possessions seized. He relies on **Standard Newspapers Ltd & Another v Attorney General & 4 Others [2013]eKLR** which he submits considered the statutory procedure for conducting search and seizure by police officers under section 118 of the CPC. It is his submission that in this case the DCI did not act in compliance with the provisions of the section.

203. While challenging his arrest and prosecution for things done in the course of his employment as an advocate, the Interested Party submits that such arrest is an affront to the independence of the Bar.

204. He contends that the charges against him arise out of his advocate-client relationship with the Petitioner; that the transactions forming the basis of the charges were completed; that there is procedure for dealing with complaints against advocates that constitute professional misconduct.

205. The Interested Party argues that the functions of the Law Society of Kenya on administration of justice include agitating for the rule of law and fostering constitutionalism. He submits that the rule of law, which includes independence of the judiciary, cannot be fostered without an independent Bar. He relies on an article by **Alice Woolley "Lawyers and the Rule of Law: Independence of the Bar, the Canadian Constitution and the Law Governing Lawyers" 24 National Journal of Constitutional Law 2014**.

206. He submits that the charges against him bear the hallmarks of an unfair trial as the Petitioner is charged jointly with him and the nature of the criminal trial procedures is such that accused persons never get to give their side of the story unless they are put on their defence. Further, that the structure of the allegations is such that he and the Petitioner will have to depend on each other as witnesses. In his view, charging both an advocate and his client in these circumstances denies the accused persons the right under Article 50 (2)(k) to adduce and challenge evidence, and once that right is denied there cannot be said to be a fair trial.

207. On whether his arrest was done and recommended without a formal complaint as required by Article 157 of the Constitution, the Interested Party supports the Petitioner in arguing that the charges were brought without a formal complainant. He argues that under Article 157(4) of the Constitution, the DPP has the power to direct the police to undertake investigations only when there is an information or allegation of criminal conduct. In this case, the nature of complaints as framed in the charge sheet indicates the presence of a substantive complainant, while there is none. He further argues that there was no complaint from IBL, KRA, and neither was the offence committed in the face of a police officer. Accordingly, it is his case that without a complaint, he should have been informed the reasons for his arrest before it was effected.

208. The Interested Party reiterates the Petitioner's submissions that the matters in issue are of a commercial nature for which alternative remedies exist. He repeats many of the arguments made by the Petitioner in this regard. He however adds a new angle to the argument with respect to the charges on the sale of the property that was the subject of his undertaking. He argues that even in circumstances where a court would find that an undertaking must be honoured, the concerned advocate will be given an opportunity to honour it before any enforcement steps are taken.

209. The Interested Party supports the Petitioner's case with regard to the powers of the DPP and submits that this court has jurisdiction to grant the orders sought in the Petition. He cites several decisions which have also been cited by the Petitioner. He also relies on **Republic v Director of CID & another ex parte Ronald Morara Ngisa [2018] eKLR** and **Republic v Director of Public Prosecution & another *ex parte* Job Kigen Kangogo [2016] eKLR**.

Submissions by the *Amicus Curiae*

210. The *Amicus Curiae*, ICJ-K, filed submissions dated 28th February 2019 in which it addresses five issues. First, whether the arrest and intended prosecution of the Petitioner is in the public interest; second, whether the arrest and intended prosecution is in the interests of the administration of justice; third, the need to prevent and avoid abuse of the legal process; fourth, whether criminal proceedings can be instituted against a sitting judge of a superior court or whether it is necessary to remove a judge before criminal prosecution commences; and finally, whether the arrest and intended prosecution of the Petitioner undermines the independence of the judiciary.

211. We note that in its submissions on these issues, the *amicus* advances arguments, and makes reference to authorities that have already been advanced or cited by the parties. For this reason, we shall confine our summation of its submissions to such matters that the parties have not covered.

212. On the first issue, it urges the court to take account of the meaning of 'public interest' as defined in ***Black's Law Dictionary,* 9th Edition (page 1350) to mean *"the general welfare of the public that warrants recognition and protection"*** or ***"something in which the public as a whole has a stake, especially an interest that justifies governmental regulation"***. It cites t**he Supreme Court decision in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR at paragraph 41 in which the court defined what amounts to public interest.**

213. As regards the question whether the arrest and intended prosecution of the Petitioner is in the interest of the administration of justice, ICJ-K refers to **R. v. Samson (No. 7), 37 O.R. (2d) 237 (1982).** It submits that while the rule of law is a multi-faceted concept, at the core is the requirement that people in positions of authority should exercise their power within the constraints of the framework of public norms rather than on the basis of their own preferences or on their own individual sense of right and wrong.

214. ICJ-K further refers the court to an article by **Prof. Robert Stein**, **University of Minnesota Law School** titled "**Rule of Law: What Does it mean?"** published in **18 Minnesota Journal of International Law, 293 (2009)** in which he proposes the ideal characteristics of a society governed by the rule of law as follows:

> ***(a) "The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.***
>
> ***(b) The Law is known, stable and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined, and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.***
>
> ***(c) Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.***
>
> ***(d) The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.***
>
> ***(e) Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases."***

215. It is the submission of the *Amicus* that the DPP is constitutionally mandated to *inter alia*, institute and undertake criminal proceedings against any person before any court in respect of any offence irrespective of the person's status and in line with the rules of natural justice**.** In exercise of that mandate, the DPP does not require the consent of any person or authority. Although the DPP has these powers, he must not exercise them recklessly, arbitrarily, oppressively or in a manifestly discriminatory manner.

216. The *Amicus* refers to Article 27 (1) of the Constitution which holds every person equal before the law and with the right to equal protection and equal benefit of the law, which includes the *"full and equal enjoyment of all rights and fundamental freedoms,"* a fair hearing being the crux. According to the Amicus, in the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The right to a fair trial is placed on a pedestal as an accused is presumed to be innocent till proved guilty, is entitled to fairness and true investigations, and the court is expected to play a balanced role in the trial. In support of these submissions, the Amicus refers to **Rattiram v. State of M.P. {2012} 4 SCC 516** cited in **Joeph Ndungu Kagiri v Republic [2016] eKLR**.

217. With regard to the need to prevent and avoid abuse of the legal process, the Amicus submits that the DPP, while exercising his powers, must avoid abuse of the legal process. It again relies on **Black's Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11** on the definition of abuse of process. It also cites **Graham Rioba Sagwe & 2 Others v. Fina Bank Limited & 5 Others [supra[** for the same submission. The Amicus makes the argument therefore that a litigant has no right to pursue two processes in two courts which will have the same effect with a view of obtaining vitory in one

of the processes or in both.

218. *The Amicus submits that* it is for the prosecution, not the court, to decide whether a prosecution should commence and, if so, whether it should continue. It relies on ***Environment Agency v Stanford,* {1998} C.O.D. 373.**

219. *On* judicial immunity, the *Amicus* asked the court to give regard to the article by **Jeffrey M. Shaman**, titled '**Judicial Immunity from Civil and Criminal Liability' (1990) 27(1)** ***San Diego Law Review* 1**; where he states:

> ***(a) "But for one narrow exception, judicial immunity does not exempt judges from criminal liability in Ex Parte Virginia, Braatelien v. United States, 147 F.2d 888 (1945), courts have stated unequivocally that the judicial title does not render its holder immune from responsibility even when the criminal act is committed behind the shield of judicial office. Judicial immunity generally is not available for criminal behaviour. The one area where judges can be said to enjoy immunity from criminal liability is for malfeasance or misfeasance in the performance of judicial tasks undertaken in good faith."***

220. The *Amicus* borrows the words of the court in **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR** in which the court observed that where a judge's conduct ***"consists in egregious illegalities, violation of the judicial oath or outright illegalities and criminality,"*** there is a mechanism for removal provided under the Constitution which can be initiated when appropriate. It is its submission that the offences that the Petitioner is charged with are non-cognizable offences in law, and no complaint was raised against the Petitioner with the JSC.

221. The *Amicus* cites Article 160 (1) of the Constitution with respect to the question of whether the arrest and prosecution of the Petitioner undermines the independence of the judiciary and reiterates the importance of judicial independence as a pre-requisite to the rule of law.

Analysis and Determination

222. We have considered the pleadings of the parties, their respective submissions, and the authorities that they rely on. We note that the Petitioner alleges violation of her constitutional rights under the provisions of Articles 27, 28, 47 and 50 of the Constitution, and contends that the charges against her are based on an ulterior motive with a view to removing her from her position as the Deputy Chief Justice. The Respondents counter that the charges are brought in the enforcement of the criminal law, in good faith, that there is no intention to remove the Petitioner from office, and the charges are premised on solid evidential and legal basis devoid of any extraneous considerations.

223. Having considered the Petition and the matters raised before us, we believe that the following issues arise for determination:

> ***i. Whether there is a factual or legal foundation for the charges against the Petitioner;***
>
> ***ii. Whether the DCI and DPP followed due process in initiating the charges against the Petitioner;***
>
> ***iii. Whether the DPP has acted in contravention of Article 157(11) of the Constitution;***
>
> ***iv. Whether the DCI and DPP have encroached on the mandate of the EACC;***
>
> ***v. Whether the comments by the DPP amounted to trial by media;***
>
> ***vi. Whether the intended prosecution of the Petitioner amounts to an attempt to remove her from office in contravention of the constitutional process for removal;***

vii. Whether prosecution of the Petitioner should await a decision of the JSC;

viii. Whether there has been a violation of the Petitioner's constitutional rights in the initiation of the charges against her; and

ix. Whether the court can grant orders to the Interested Party in this Petition.

Scope of a Constitutional Petition

224. Before we enter into an analysis of the above issues, we begin by reiterating that this is a constitutional petition in which the Petitioner alleges violation of her constitutional rights. Underlying all the issues identified above and the Petitioner's challenge to the exercise of the powers of the DPP and the DCI is the contention that these actions infringe upon or will result in infringement of her rights guaranteed under the Constitution. It is therefore prudent to consider first the burden that is placed upon a party who alleges violation of constitutional rights under Article 22 of the Constitution, and who seeks redress from the court in respect of such violations.

225. It has been established in various decisions by our courts that a person who seeks redress under the Constitution must state his or her claim with precision and demonstrate which provisions of the Constitution have been violated or infringed, and the manner of the alleged violations. This principle was established in the case of **Anarita Karimi Njeru v Attorney General (1979) KLR 154** in which the court held:

"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

226. This principle was reiterated in the case of **Meme v Republic [2004] eKLR.** In its decision in **Trusted Society of Human Rights Alliance v AG. & 2 others [2012] eKLR** the court re-stated the principle in **Anarita Karimi Njeru** which predated it in the following terms:

"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

(a) The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

227. In **Mumo Matemu v Trusted Society of Human Rights Alliance and others[2013] eKLR,** the Court of Appeal re-affirmed the test in **Anarita Karimi Njeru** when it stated:

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a

requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

228. The Petitioner has alleged violation of Articles 27(1) and (2), 28, 47, and 50 of the Constitution. Article 27 guarantees to everyone the right to equality and freedom from discrimination. The provisions relevant to the present matter are as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

229. Article 28 provides that:

28. Every person has inherent dignity and the right to have that dignity respected and protected.

230. At Article 47, the Constitution protects the right to fair administrative action in the following terms:

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights

231. The final provisions of the Bill of Rights that the Petitioner alleges violation of are Article 50 (2) (a) (b)(c) (j) and (k), which protects the rights of an accused person in the following terms:

(2) 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) …

(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;

…

232. The Petitioner also claims that the charges against her have been brought in contravention of Article 157(11) of the Constitution. She accuses the DPP of ulterior motives, malice, abuse of process, unreasonableness and irrationality in making the decision to prosecute her. Article 157(6) provides that

the DPP, whose office is established under Article 157(1), shall exercise state powers of prosecution. In exercise of such powers, the DPP is required, under Article 157(11) to:

> ***(11) … have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

233. We now turn to consider the issues identified above. In doing so, we shall consider whether the material placed before us demonstrates the alleged violation of fundamental rights guaranteed under the cited Articles, and whether there has been contravention of the state powers of prosecution.

Factual or legal foundation of the charges

234. This is yet another case in which the DPP's decision to mount a prosecution in exercise of his constitutional powers is under challenge. The Petition therefore reignites the debate on the role of the court in checking that the DPP's discretion and power to prosecute is not abused vis a vis the public interest that the DPP's constitutional mandate of commencing criminal prosecutions is not unduly hampered by intervention of the court. When the basis of the challenge to his decision is on the legal and factual foundation of charges preferred, then the debate often revolves around the scope and depth of scrutiny to be undertaken by the court. That debate is present in this matter.

235. Not surprisingly, the opposing sides to this Petition do not agree on the approach which the court should take. We are urged by the Petitioner not only to interrogate the process in which the charges were brought but also the merit of the decision to mount the prosecution. The court is asked to take a cue from the holding of the majority in the Court of Appeal decision in **Njuguna S. Ndungu v Ethics & Anti-Corruption Commission (supra)** that in matters of this nature, the court is enjoined to make tentative and objective findings on the legality of the charges and the prospect of a conviction. An approach that, though not a trial, involves a scrutiny of the proposed evidence in the context of the relevant law.

236. The DPP, DCI and AG on the other hand call for a more restrained examination. They contend that the court's power to prohibit prosecution should be exercised sparingly and in the clearest of cases. We are beseeched to remain the neutral arbiter and refrain from making orders that amount to an unnecessary fetter on the DPP in the discharge of his constitutional mandate.

237. In pressing the argument that the court should not assess the merits of his decision, the DPP cites the decision in **Matalulu & Another v DPP [2003] 4 LRC 712** in which the court held:

> ***"This would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."***

238. We observe that our jurisprudence is replete with decisions which identify with this non-intrusive approach on the basis that courts must grant a measure of deference to the DPP's exercise of prosecutorial discretion. Such decisions include **Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others** (supra) and **Republic v Commissioner of Police and Another *ex parte* Michael Monari &Another** (supra) in which the court addressed the matters germane to the mandate of the police to mount investigations and stated that:

> ***"The police have a duty to investigate on (sic) any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. <u>The rest is left to the trial court.</u> The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. <u>As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene</u>."*** (Emphasis added)

239. Yet, the orthodoxy of the proposition that judicial review on the DPP's decision should confine itself only to process has come under some strain lately. There is an emerging view that a substantive review of the exercise of the DPP's decision must necessarily involve an assessment of the merit of the decision in the context of the threshold set for the DPP by the Constitution. In this regard the decision of Onguto J in **Republic v Director of Public Prosecution &another *ex parte* Patrick Ogola Onyango & 8 others** (supra) proposes the rationale of a more involved review as follows:

> ***"116. The courts' twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.***
>
> ***117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of Thuita Mwangi & 2 Others vs. The Ethics and Anti–Corruption Commission Petition No. 153 of 2013 [2014]eKLR and also Republic vs. Commissioner of Police & Another Ex p Michael Monari & Another [2012] eKLR where Warsame J (as he then was) stated as follows:***
>
> > ***"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."***

240. Justice Onguto then proceeds to analyse the decisions that take a more liberal approach to review of the decisions of the DPP and states as follows:

> ***"118. On the other hand, the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution: see the cases of Republic vs Director of Public Prosecutions Ex p Qian Guon Jun & Another [2013]eKLR, Republic vs. Attorney General Ex p Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Githunguri vs. Republic (Supra) and Republic vs. The Judicial Commission into the Goldenberg Affair and 2 Others Ex p Saitoti HC Misc. Application No. 102 of 2006.***
>
> ***119. In Republic vs. Attorney General Ex p Kipngeno Arap Ngeny (Supra), the court observed as follows:***
>
> ***"It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution." (emphasis mine)***
>
> ***120. The same rather oxymoronic tide appears to obtain outside our jurisdiction. In Australia, in the case of William vs. Spautz [1992] 66 NSWLR 585 the High Court was of the view that proceedings lacking in any proper foundation amount to abuse of process and ought to be stayed. Yet in England, the House of Lords was emphatic in the case of Director of Public***

Prosecutions vs. Humphrey [1976] 2 ALL ER 497 at 511 that:

> ***"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."***

121. The approach in the Director of Public Prosecution vs. Humphreys (Supra), where the doctrine of issue estoppels was held to have no application to criminal proceedings, was followed by the High Court of Botswana in State vs. Matere [1993] BLR 465.

122. Thus while it appears true that the court has authority to prevent abuses of its process and safeguard an accused person from oppression and prejudice on basis of baseless charges, the courts have also been quick to observe and hold that where an indictment is properly drawn in accordance with established practice and pursuant to a decision by the DPP to institute the prosecution the rest must be left to the trial court clothed with jurisdiction to deal with it and the accused is thereat to present its defence.

123. It is these two principles in the context of challenges to prosecutorial powers of the DPP which lead to the inevitable inference that in matters of judicial review, it is not merely a question of process but also merit. How else would a court ascertain the presence of or lack of a foundational basis without questioning the merit of the DPP's decision? The court must reflect on both the law and the evidence to ascertain the foundational basis and in the process undertake a more substantive review of the decision by the DPP."

241. That in fact is the approach advocated by the Court of Appeal in the decision of the majority in **Njuguna S. Ndungu (supra)** in which the court held as follows:

> ***"[23] I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.***
>
> ***The jurisprudence show that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly. In Diamond's case (supra), the court said in part at para. 42:***
>
> > ***"The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision."***

242. In **Diamond Hasham Lalji (supra)** which the Court of Appeal cited in **Njuguna S. Ndung'u,** the Court held:

> ***"[45] In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. State of Maharashtra Ors v Arun Gulab Gawall & Ors – Supreme Court of India – Criminal Appeal No. 590 of 2007 para 18 and 24, Meixner & Another v Attorney General [2005] 2 KLR 189."***

243. We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of **Njuguna S. Ndungu** (supra) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.

244. To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish. The question is whether the present case fits into the latter scenario.

245. At the very heart of this Petition is the allegation that the charges against the Petitioner fall into a pattern of retaliatory action by the executive against the judiciary following the majority decision of the Supreme Court that annulled the August 2017 Presidential election. It is not disputed that soon after the decision, the President made public utterances in respect to the court's judgment. He said of the judiciary ***"We shall revisit this thing. We clearly have a problem."*** The Respondents do not deny that these very public remarks were made by the head of the executive arm of government.

246. The Petitioner asserts that events which followed reveal a systematic and sustained effort to carry out reprisals against the judiciary as an institution and the majority judges in that decision. She takes the view that the commencement of the prosecution against her is part of this scheme, and she enumerates these events as including:

> i. a petition lodged by Hon Ngunjiri Wambugu with the JSC for removal of the Chief Justice on 14th September 2017;
>
> ii. a petition by one Derrick Malika Ngumu for the removal of the Petitioner and Justice Isaac Lenaola on 18th September 2017;
>
> iii. the shooting of the Petitioner's driver while with the petitioner's official vehicle on 24th October 2017; and
>
> iv. a petition by one Adrian Kamotho Njenga for the removal of the Chief Justice and the Petitioner on 26th February 2018.

247. As we indicated at the start of this analysis, the Petitioner has a duty to demonstrate the alleged violations and contraventions of the Constitution. The Petitioner has not presented any evidence before us to show that these events were either instigated, orchestrated or coordinated by the executive arm of government. Further, no evidence has been presented to show a connection between the various events.

248. We are also aware of the constitutional dictate that in performance of his prosecutorial functions, the DPP is to act independently, free from directions or control from any quarter. We have no reason to doubt the DPP when he says that in the matter before us, he acted independently and without internal or external directions. Further, there is no evidence to suggest that the DCI was directed by the executive to investigate the Petitioner and or to reach a particular result. There is no evidence placed before us of conspiracy or connivance between the DPP and or DCI on the one hand, and any other person on the other.

249. That said, the commencement of the prosecution was against the backdrop of a very public utterance by the head of the executive that there shall be a "revisit" on the judiciary. Of course, it is not in our place

to second guess what the President meant by "revisit". We cannot possibly know whether the revisit, whatever it meant, was to be followed through or was merely a statement made in the heat of the moment later to be forgotten. Nevertheless, the person who spoke the words is no ordinary *mwananchi*. He is the head of the executive branch of government and wields formidable instruments of power. A person against whom such remarks are made by the Head of State would be forgiven if he or she were to be troubled, nay, terrified.

250. This court cannot ignore the possible perception held by the ordinary man of the utterances made by the President. In this regard the following observation by Ogola J in **Hassan Ali Joho v Inspector General of Police &3 others[2017]eKLR** is not without significance:

> ***"123. For avoidance of doubt the Presidency is a powerful institution in our Constitutional democracy. Under Article 131 (1), the President is the Head of State and Government, the Commander-in-Chief of the Kenya Defence Forces, the Chairperson of the National Security Council and is a symbol of national unity. When the President says anything, it is reported over and over again. His words, even if disputed, retain the power, respect prestige and honour of the Presidency. The President's utterances can also be taken out of context by various governmental and political actors depending on what the actors intend to achieve. In the present instance, what the President is alleged to have uttered have not been denied. What matters is the context in which the same were made. In their submission the Respondents did not engage so much on this issue. I guess to them the matter was a non-issue. They could be right. This is so because the President is also a politician. He is also given to the political emotions of the moment. It cannot be taken that whatever the President utters is meant to have the force of law. Politicians say so many things which are forgotten as soon as they are uttered. In the circumstances, the court does not accept the submission by the Petitioner that the aforesaid utterances by the President were in any way meant to harm or to cause discomfort to the Petitioner. Those were the kind of not so friendly words that politicians spew out in a moment of annoyance, and forget the same the next moment, and continue to still relate well with one another."***

251. Having said that, the Learned Judge went on to observe:

> ***"124. However, the President's utterances may have effect upon actors or agencies who believe that it is their duty to find expression or meaning for what the President may have said. This appears to be the case in this matter because soon after the President uttered the said words various governmental agencies fell head over heels, to initiate all manners of investigations of the Petitioner. Even investigations which were abandoned in 2013 have been revived. All over sudden, there are fresh investigations on the academic certificates of the Petitioner by the Director of Criminal Investigations; all over sudden the Petitioner is being charged with robbery with violence; all over sudden the Kenya Revenue Authority is investigating the Petitioner for alleged tax evasion; all over sudden the Petitioner's body guards and security detail, and firearms are being withdrawn, and remain withdrawn despite a court order that the same be restored. The question that this court must address is this: why the flurry of investigations, why now? And what causes the government to blatantly disobey the court orders to return the firearms and security guards and detail to the Petitioner?"***

252. The effect of the 'revisit' remark was to put any action by the executive that may be perceived to be prejudicial to the judiciary or its members under great public scrutiny. In this regard, it is noted that the Petitioner is not only a senior member of the judiciary but is one of the four judges who rendered the majority decision that prompted the remarks by the President. Public attention would be piqued if any action was directed at any of the four. Under Chapter Nine of the Constitution, both the President and DPP belong to the same branch of government, the executive. The DCI also falls within the executive branch and is an appointee of the President. While, as stated earlier, no material has been placed before us to give us reason to doubt that both the DPP and DCI acted independently, the Petitioner expresses the apprehension that the two were acting at the behest of the President. Given that the President, the DPP and DCI are all members of the executive which is headed by the President, the apprehension may not be

unreasonable.

253. It is in these circumstances that we deem it appropriate and hold that it is in the interests of the administration of justice that we carry out an inquiry into the merit or otherwise of the Petitioner's contention that the charges against her are without legal or factual foundation. Such an inquiry may help dispel any notion that there is an intention to drag the Petitioner through a criminal trial simply because of her judicial role in the decision of the Presidential election petition.

254. As we turn to that inquiry, we are alive to the caution that we should not engage in a full-fledged scrutiny or, put differently, in a mini-trial. We must not get involved in a miniature fact-finding exercise. To do so would be to trespass into the mandate of the trial court. Yet, delimiting the scope of the inquiry is easier said than done. However, we take the view that useful in drawing the line is the standard the DPP has set for himself as one to be reached before making the decision to prosecute. This is to be found in the **National Prosecution Policy**, **2015.** Part 4B of the Policy identifies two basic components that should inform the decision to prosecute. The first is that the evidence available is admissible and sufficient, while the second is that the public interest requires that where evidence discloses a criminal act, a prosecution be conducted. The former is the evidential test while the latter is the public interest test. On the evidential test, the Policy states:

> ***"Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available? To make this determination, Public Prosecutors should therefore consider the following:***
>
> > ***a) If the identity of the accused is clearly established through admissible evidence.***
> >
> > ***b) The strength of the rebuttal evidence.***
> >
> > ***c) Would the evidence be excluded on the basis of its inadmissibility, for instance under the hearsay and the bad character rules?***
> >
> > ***d) Reliability of the evidence considering; whether there would be concern about accuracy, credibility or motivation of the witnesses? What is the suspect`s explanation?***
>
> ***Is the confession believable? How was evidence obtained***
>
> > ***i.Is there further evidence which would be required? The standard of evidence required under the Evidentiary Test is less than the Court`s "beyond reasonable doubt" standard for conviction.***
> >
> > ***ii. In some cases the available evidence at the time may not be sufficient to determine the Evidential Test, that is, "realistic prospect of conviction". In such circumstances, Public Prosecutors should apply the "Threshold Test" in order to make the decision whether or not to charge.***
> >
> > ***iii. For example, relevant expert evidence or evidence required to determine bail risk may not be available within the limited time of arraignment of a suspect before court. Such are the instances that necessitate the application of the Threshold Test.***
> >
> > ***iv. A prosecutor shall consider the following conditions in applying the Threshold Test:***
> >
> > > ***(i)The evidence available is insufficient to apply the Evidential Test.***
> > >
> > > ***(ii) There are reasonable grounds to believe that evidence will become available in good time.***

(iii) The seriousness of the matter and the circumstances of the case justify the making of an immediate decision to charge

v. The obtaining circumstances necessitate the making of an application for the denial of grant of bail.

vi. If the obtaining circumstances do not fall within the conditions above a decision to charge should not be made.

vii. Where the case does not pass the Evidential Test it must not go ahead, no matter how serious it may be. Public Prosecutors can only apply the Public Interest Test when the Evidential Test is satisfied."

255. This Policy, which encapsulates both the evidential and public interest tests, is in consonance with the constitutional imperative of Article 157(11) which states:

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

256. Applying the evidential test, a charge lacks factual and legal foundation if, on the evidence and the relevant law, it is so patently weak that it does not disclose a prosecutable case or has no prospect of conviction. The charge must be so wanting that no reasonable prosecutor, having proper regard to the prosecutorial powers donated by the Constitution and guided by the National Prosecution Policy, could possibly mount a prosecution. The deficiency has to be readily apparent and should reveal itself without a detailed examination of the evidence available.

Whether charges are defective for lack of a complainant

257. We first consider a repeated criticism that the charges are defective and hopeless as they do not have complainants. That in respect to counts 1 and II, IBL, which ought to be the complainant, did not lodge complaints and is not pursuing them. A similar argument is made with respect to the rest of the counts in which it is argued that the Commissioner of Domestic Taxes should be the complainant.

258. What we need to consider is who is a complainant in the context of our criminal justice system. As correctly pointed out by the Petitioner in her submissions, the word "complainant" is not defined in the CPC**. A** definition had been introduced to the CPC by Act No. 5 of 2003 as follows:

"Complainant" means a person who lodges a complaint with the police or any other lawful authority.

259. This definition was, however, removed by Act No. 7 of 2007. The Petitioner suggests that the effect of the 2007 amendment was to exclude the Republic as a complainant. If the argument by the Petitioner is that the victims of the crime are not named as complainants in the charge sheet, then the question of who a complainant is has been settled by case law to include the Republic. The Court of Appeal determined this question in its decision in **Kamau John Kinyanjui v Republic [2010] eKLR** which we take the liberty to quote in extenso:

"Who is the "complainant in a criminal trial? Is he the victim of the crime?"

We start from first principles and on that basis, we cannot help but observe that all criminal prosecutions in Kenya, whether they be instituted by a private person or by the Attorney-General, are always headed: - "Republic, i.e. the Republic of Kenya Versus the Accused Person." It is the Republic which undertakes the prosecution for a crime on behalf of the victim of the crime and in doing so, the Republic is acting on behalf of all Kenyans. It is in the interest of all Kenyans that crime be punished and if the issue of punishing crimes was to be left to the victims of such

crimes, there will be the question of whether the victims would be in a position to pay for the prosecution of the perpetrators of such crimes.

To avoid such questions arising the Republic normally does the prosecution on behalf of the people and hence the title "Republic vs. The Accused Person" and not The Victim of the Crime vs. The Accused Person."

…

…

Yet if the term "complainant" in section 202 were to exclusively mean the victim of the crime, and he was served with summons to appear at a particular time and place but is absent, the court might well be forced to acquit the accused person. Of course, in respect of a private prosecutor, he is the one to conduct the prosecution and if he was absent, nobody would call his witnesses and examine them.

Again, looking at section 204, can a victim of the crime without any reference to the public prosecutor be allowed to withdraw a complaint which he originally filed with the police or with the Attorney-General? Section 176 of the Code gives the court power to promote reconciliation and to encourage and facilitate settlement in respect of minor offences not amounting to a felony. But where an offence charged amounts to a felony, we do not think that the victim of the crime, if he is the complainant as used in the various sections, can be allowed to withdraw, on his own, the complaint. Our conclusion on this issue is that in cases being conducted by the Attorney-General on behalf of the Republic, the complainant is the Republic itself and not the victim of the crime.

Of course the Republic as complainant would not go far in a prosecution if the victim of the crime does not co-operate and is unwilling to come and testify, but in such a case, the acquittal of the accused person will not be on the basis that the complainant is absent; it will be on the basis that no evidence or no sufficient evidence has been called to support the charge. The complaint of the Republic respecting the alleged criminality of the accused person would have failed. We repeat that except in those rare cases where the court has allowed a private prosecution, the complainant envisaged in the various provisions of the Criminal Procedure Code is always the Republic." (Emphasis added)

260. See also the Court of Appeal decision in **Roy Richard Elirema & Another v Republic [2003] eKLR** and the High Court decisions in **Republic v Ethics & Anti-Corruption Commission & 2 Others *ex parte* Stephen Sanga Barawa [2017] eKLR.; Republic v Faith Wangoi (2015) eKLR:** and **Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another [2016] eKLR.**

261. It appears, however, that the Petitioner's argument is that the investigations were initiated without the 'victims' of the crime lodging a complaint with the state. If that is the contention , then the provisions of the National Police Service Act are of relevance. In this regard, section 35 of the Act sets out the following as the functions of the Directorate of Criminal Investigations:

Functions of the Directorate

The Directorate shall—

(a) collect and provide criminal intelligence;

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

(c) maintain law and order;

(d) <u>detect and prevent crime;</u>

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

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

(i) co-ordinate country Interpol Affairs;

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

(k) ***perform any other function conferred on it by any other written law.*** (Emphasis added)

262. To ***<u>detect crime</u>*** is to discover the existence of crime. As long as it is for reasonable and probable cause, the DCI is empowered to investigate crime. A victim need not initiate the process. In that event the Republic, through the DCI, becomes the complainant to the charges brought.

263. If the victims of the crimes charged are the public, then the DCI and DPP would be obligated to investigate and initiate prosecutions respectively should the evidence disclose the commission of offences. As observed by the Court of Appeal in **Kamau John Kinyanjui v Republic** (supra), if the issue of punishing crimes was to be left to the victims of such crimes, there will be the question of whether the victims, such as in the present case where the victims are said to be bank customers, KRA and therefore the general public, would be in a position to take up the matter. We agree with the DPP that if we were to constrict the word 'complainant' to the victim or institution that has suffered loss, we risk many crimes going without detection, investigation or prosecution. Those responsible for reporting crime may have reason not to. There could be fear of recrimination, self-incrimination or victimisation. Others could simply be indifferent or cynical. This is perhaps why whistle blowing is encouraged and protected in the fight against corruption and crime generally.

264. It is therefore our finding that the charges are not deficient simply because the supposed victims are not the complainants.

The Charges

265. We now turn to consider the complaints with respect to the substance of the charges. In count I, the Petitioner is charged with the offence of abuse of office contrary to section 46 as read with section 48 of ACECA. It is alleged that between 15th August 2013 and 23rd October 2013, at IBL headquarters in Westlands Nairobi, being a person employed in the public service as a Judge of the Court of Appeal, used the said office to improperly confer a benefit to herself of Kshs 12,000,000.00. The Petitioner admits receiving the sum of Kshs 12,000,000.00 from IBL. This amount was credited to her account on 23rd October 2013. It is common ground that the Petitioner utilised the money by withdrawing it in cash in tranches whose details we have set out earlier in this judgment. The Petitioner's assertion is that the advance was a loan granted to her as a customer of the Bank and had been fully repaid by 30th December 2015, the repayment being in two instalments of Kshs 10,000,000.00 on 26th November 2014 and Kshs 2,000,000.00 on 30th December 2015.

266. It is not disputed that the money advanced to the Petitioner was not only unsecured but also granted at no interest. Mehbooba Shamji, Peter Nzuki and Naeem Shah, who were all employees of IBL at the

material time, recorded statements in support of the charge. The gist of their statements is that the facility was unusual not only because no interest was charged and no security was obtained but also because:

(i) there was no written request or application by the Petitioner;

(ii) there was no appraisal of the Petitioner's creditworthiness and subsequent approval of the facility by the Bank; and

(iii) there was no letter of offer setting out the loan amount, repayment period, interest rate, security offered, amongst others.

267. Further, that the Petitioner dealt directly with Abdul Malik Janmohamed (now deceased), who was then the Managing Director of IBL. It is alleged that the Petitioner and Janmohamed appeared to enjoy a close relationship and that she received preferential treatment from him.

268. The case of the DPP and DCI is that the dealings between the Petitioner and the Bank, and in particular its Managing Director, were not at arms- length. This, it is said, is also evident because, although the loan was for a short term and due on 22nd January 2014 as appears in the statement of Naeem Shah, it was not until 10 months later that a portion of it, being Kshs 10,000,000.00, was paid. It was only finally fully repaid a year later, on 30th December 2015.

269. There is no doubt that if the above was proved, then the Petitioner enjoyed a special and perhaps favoured relationship with the Bank. It would probably vindicate the DPP's submission that the Managing Director of the Bank did not deal at arms-length with the Petitioner.

270. Count 1 is founded on sections 46 and 48 of ACECA. The latter is the penal section, while section 46 reads:

Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

271. There are two ingredients of the charge of abuse of office. One, the person must have used a public office to improperly confer something to herself or himself. Second is that the thing conferred must be in the nature of a benefit. In the present case, if it is established, as alleged by the proposed witnesses, that it was unusual for borrowers to be granted interest free facilities, then an interest free loan to the Petitioner could amount to a benefit to her. The benefit would have accrued notwithstanding that the loan was fully repaid.

272. That however, is not the end of the matter for the prosecution because the evidence available must also disclose that she obtained the benefit by improperly using her office as a Judge of the Court of Appeal.

273. The Petitioner obtained the credit when she was a customer to the Bank. On the material before us we are able to sketch out the following sequence of events:

i. on 15th August 2013 the Petitioner applied for a loan facility of Kshs 70,000,000.00;

ii. eight days later, on 23rd August 2013 the loan application is approved;

iii. on 30th August 2013, the Petitioner requests for a reduction of the rate of interest and the same is accepted by a reduction from 14% to 12%;

iv. the Petitioner accepts the letter of offer for a loan of Kshs 60,000,000.00 on 6th September 2013;

v. on 23rd October 2013 the sum of Kshs 12,000,000.00 is disbursed to her.

274. The Petitioner has offered the context in which she obtained the unsecured and interest free loan. She explains that it was to enable her to make part payment of the deposit on the properties she was to buy using the approved loan. Yet the question that remains crucial to us is how far we can go in examining the charges and the merits of the evidence. As to whether her explanation that it was a loan granted in the ordinary course of business, or whether this was done as a favour because of her existing relationship with the Bank in anticipation of bigger business for the Bank, or whether she intimidated or coerced the bank officials into granting the facility, or whether it was on account of her public office, and whether or not it is possible to divorce her personal status from the position she held in the context of the transaction are matters to be determined in detail at a different forum.

275. What the DPP has demonstrated is that given the rather unusual circumstances in obtaining the loan which we have enumerated above, the questions posed are not trivial. In the circumstances, we are constrained to find that there was a factual and legal basis to prefer the charge of abuse of office.

276. We turn to consider count II in which it is alleged that on 12th January 2016 at IBL headquarters, the Petitioner, jointly with the Interested Party and with intent to defraud, induced Mohamud Ahmed Mohamud to execute a discharge of charge for L. R. Nos. 3734/202 and 3734/209 being securities for a loan of Kshs 60,000,000.00 advanced to her on the pretext that a substitute security over L. R. No. 3734/1129 would be provided. This charge revolves around an undertaking given by the Interested Party on 12th November 2015. At that time, the Petitioner owed IBL money on account of a long-term loan of Kshs. 60,000,000.00 disbursed on 9th February 2015 and a short-term loan of Kshs 60, 000,000.00 disbursed to her on 6th July 2015.

277. The undertaking, which is on the letterhead of Mutunga & Company Advocates is dated 12th November 2015 and reads as follows:

The Receiver Manager,

Imperial Bank Limited

Bunyala Road, Upper Hill

P.O. Box 44905-00100

Nairobi

Attn: Peter Gatere

Dear Sir,

RE: Charge and Discharge over L. . No. 3734/202 and 3734/209 PHILOMENA MBETE MWILU ("THE BORROWER")

We refer to the above matter.

Our client, Philomena Mwilu, has requested for substitution of security for a charge registered over property L.R No. 3734/202 and 3734/209 with a replacement Charge to be registered over property L.R. No. 3734/1129 against which the bank had approved a loan prior to the placement under receivership.

To enable you release to us the Original Titles for property L.R No. 3734/202 and 3734/209 together with duly executed Discharge of Charge thereof (enclosed herewith) we hereby give you our professional undertaking to provide the Original Title for property L.R. No. 3734/1129 and thereby on your instructions to register a replacement Charge over the said property in favour of the Bank: and to pay to the Bank the sum of Kenya Shillings Sixty Million (Kshs 60,000,000.00) within One Hundred and Twenty (120) days in full settlement of the short term loan.

Kindly acknowledge receipt of the same by stamping and signing a copy of this letter.

Yours faithfully,

MUTUNGA & COMPANY

STANLEY KIIMA

278. The undertaking was given when IBL was under receivership, having been placed under statutory management on 13th October 2015. On 16th November 2015, Mohamud was appointed as Receiver Manager of IBL in place of Mr. Gatere. In his statement, Mohamud states that he acceded to the Petitioner's request and approved the release of titles to L. R Nos. 3734/202 and 3734/209. It is not disputed that the titles were personally collected by the Petitioner on 12th January 2016. It is also Mohamud's contention that the Interested Party was under a duty to register a replacement charge over L. R No. 3734/1129 in place of the two titles.

279. It is not contested that instead of being charged in favour of IBL, L R No. 3734/1129 was sold to a third party. As at 16th July 2018, the Petitioner owed the Bank Kshs 43,098,489.48.

280. In her supplementary affidavit sworn on 13th September 2018, the Petitioner gives her version of how the matter evolved and avers as follows:

"26. Before the registration of the charge over property Land Reference Number 3734/1129, I personally approached the Receiver Manager, Mohamud Ahmed Mohamud with the proposal that: 1) I be allowed to sell the property instead of charging it and utilize part of the sale proceeds to reduce the then outstanding long term loan; 2) that I pay any balance outstanding thereafter from the proceeds of the sale of another property for which I was looking for a purchaser; 3) upon the sale of 3734/1129 I reduce the liability on the long term loan; and 4) the Bank continues holding an equitable mortgage over the original titles for the following five properties Land Reference Numbers 1265/1273/1274/1275/1276 which were and are still in the Bank's possession."

281. The Petitioner advances the argument that the Bank can enforce the undertaking by simply bringing an action against the Interested Party who gave the undertaking. On the other hand, the property which ought to have been charged in favour of the Bank has been sold to a third party and is no longer available for securitization. Yet again, even in those circumstances, there may be an argument that the amount intended to be secured by the charge and is still due to the Bank can be recovered from the Interested Party.

282. It is therefore a correct argument that there may be a civil remedy if the Bank is aggrieved. But that by itself cannot be a bar to the bringing of criminal charges because one set of facts can be both the foundation of a criminal charge and the basis for a civil action. That is expressly contemplated by statute. Section 193A of the CPC titled ***"Concurrent criminal and civil proceedings"*** states:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

283. On the material before us, it seems that the Petitioner was aware of the undertaking given by her lawyer, the Interested Party, and the centrality of the replacement charge. She, however, states that there was a subsequent arrangement between herself and Mohamud, the Receiver Manager, in which the latter is said to have given a go ahead to the sale of L. R. No. 3734/1129. If that is true, then there can be no sustainable case against the Petitioner. This is because L. R. No. 3734/1129 would have been sold with the express sanction of the Bank. If, however, there was no such agreement, then a question would arise as to the role of the Petitioner in placing L. R. No. 3734/1129 beyond the reach of the Bank in the face of a promise to exchange it for the discharged properties.

284. This then takes us to the evidence of the Petitioner with respect to the alleged agreement that is found in her supplementary affidavit. She deposes:

> ***"27. Mohamud Ahmed Mohamud accepted my proposal and minuted the agreement to that effect in a hand-written document signed by himself and myself, which he kept. I recall that during my interrogation on 28/8/2018 Komesha had this document with him and when I saw it I requested to be given a copy which the said Komesha refused to supply, telling me to apply for it from Court. I verily believe that the 1st and 2nd Respondents are selectively releasing some evidence while suppressing others such as the document referred to herein that would exonerate me. Furthermore, I verily believe that this is being done in order to fit the case into the desired narrative to sustain any kind of criminal charge against me."***

285. We note that neither CP Mwatsefu (Komesha) nor Mohamud responded to these allegations and they are thus uncontroverted. We must not, however, lose sight of our task. This is not the forum to test the veracity or otherwise of the evidence in detail. The allegation that there was a hand-written agreement in which the Receiver Manager acceded to the sale of L. R. No 3734/1129 will have to be tested against the evidence of Mohamud in which he states that the Interested Party failed to surrender the replacement charge and title to L. R. No. 3734/1129 to IBL as he was obligated to do by his undertaking. That detailed inquiry is not for this court.

286. Then there is the argument that the charge of false pretences cannot relate to a future event or occurrence. This charge is faulted because of the manner in which it is framed. The AG responds to this claim by observing that under section 214 of the CPC, a charge that is defective either in substance or form or both can be amended. We have considered this criticism by the Petitioner. Section 214 of the CPC provides that:

> ***214. Variance between charge and evidence, and amendment of charge***
>
> ***(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that—***
>
> > ***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
> >
> > ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

287. We agree with the AG that in so far as there is a factual and legal basis for preferring the charge, any deficiency in the substance or form of the charge can be cured by way of amendment under section 214.

288. Finally, we consider the challenge to the charges relating to the non-payment of stamp duty. The evidence is that the person responsible for payment of stamp duty was the Interested Party. Indeed, he is the one who was in possession of the documents alleged to be in support of the payments of stamp duty which the DPP says are forgeries. The Petitioner maintains that she gave the Interested Party money in cash towards the stamp duty. The Interested Party confirms this and there is no evidence to the contrary. Can it then be said that there is a prosecutable case against the Petitioner in this regard? We think not. The Petitioner's role in respect to the stamp duty ended upon her putting the Interested Party in funds.

289. The upshot of our findings above with respect to the charges against the Petitioner is that we are not satisfied with her claim that there was no legal or factual foundation to the charges against her. The only exception is with regard to the charges pertaining to the non-payment of stamp duty which we find cannot properly be levelled against her.

290. We now turn to consider the question whether it was proper for the DCI to investigate the offences alleged against the Petitioner, which she contends should have been done by EACC. In doing so, we observe that only count I, abuse of office, is an offence under ACECA, the rest being offences under the Penal Code.

Whether the Directorate of Criminal Investigations has the mandate to investigate economic crimes

291. The Petitioner challenges the DCI's mandate to investigate economic crimes. It is her contention that only EACC has the constitutional and statutory mandate to undertake such investigations. The DPP, the DCI and AG hold a contrary view, arguing that the Constitution and the NPS Act allow the DCI to investigate all crimes including economic crimes.

292. Article 244 (b) of the Constitution mandates the National Police Service to ***"prevent corruption and promote and practice transparency and accountability".*** The Directorate of Criminal Investigations, which is headed by the DCI, is established under section 28 of the National Police Service Act, 2011, and is placed under the direction, command and control of the Inspector General of the National Police Service. The functions of the Directorate, as provided for under section 35 of the National Police Service Act, include: -

> ***(a) …;***
>
> ***(b) undertake Investigations on serious crimes including homicide, narcotics crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes, and cybercrime, among others,***

293. The Constitution directs Parliament to pass legislation to establish an independent ethics and anti-corruption commission, an independent commission as provided under Chapter Fifteen of the Constitution, with the mandate to ensure compliance with and enforcement of the provisions of Chapter Six.

294. In obedience to Article 79, Parliament enacted the EACC Act, establishing the EACC, whose mandate is spelt out in section 11 to include investigation and recommendation to the DPP, the prosecution of any acts of corruption, bribery, economic crimes, violation of codes of ethics or other matters prescribed under the Act, the ACECA or any other law legislated under Chapter Six of the Constitution.

295. On the mandate of the EACC, as spelt out in the EACC Act, the court in **Alfred N. Mutua v Ethics & Anti-Corruption Commission & 4 Others [2016] eKLR,** said:

> ***'It is also not contested that the EACC is mandated under Section 11(1)(d) of the Ethics and Anti- Corruption Commission Act to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of the Constitution. Further, under the***

provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of Ethics and Anti-Corruption Commission Act, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not …'

296. A plain reading of the Constitution suggests that the DCI and the EACC have coordinate mandates to investigate economic crimes. It may be concluded, therefore, that investigations carried out by the DCI and recommendations made to the DPP cannot be faulted on account of not having been conducted by the EACC. With regard to economic crimes, the DPP can act on the outcome of investigations whether they are carried out by the DCI or the EACC. In **Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others** (supra), the court held that the DPP is at liberty to rely on any source of information in order to institute criminal proceedings, whether the information emanates from the EACC or not, as long as the source is not unlawful.

297. The question is whether the fact that the DPP relied on investigations from one agency and not the other in any way infringes the rights of an accused person to non-discrimination and equal benefit of the law. The Petitioner submits that the DPP and DCI must demonstrate compliance with sections 26-28 of ACECA. They should, in any event, show how the order made on 22nd June 2018 in **Miscellaneous Application No. 2225 of 2018** related to IBL (In Receivership) and the Petitioner. In the absence of that, the entire investigations, recommendations for prosecution and the charges related to the transactions with the Bank must be declared null and *void ab initio* and quashed.

298. Section 26 of ACECA states as follows:

26. Statement of suspect's property

(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(3) The powers of the Commission under this section may be exercised only by the Secretary.

299. At section 27 ACECA provides as follows, with respect to associates of persons suspected of corruption:

27. Requirement to provide information, etc.

(1) The Commission may apply ex parte to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) In subsection (1), "associate of a suspected person" means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.

(3) The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.

(4) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(5) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act (Cap. 80).

300. Section 28 gives the EACC power, in the course of its investigations to seek orders from court in the following terms:

28. Production of records and property

(1). The Commission may apply, with notice to affected parties, to the court for an order to—

(a) require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

(4) The six-month limitation in subsection (3) does not prevent the Commission from making further requirements for further periods of time as long as the period of time in respect of which each requirement is made does not exceed six months.

(5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.

(6) A requirement under this section to produce a record stored in electronic form is a requirement—

(a) to reduce the record to hard copy and produce it; and

(b) if specifically required, to produce a copy of the record in electronic form.

(7) In this section, "records" includes books, returns, bank accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.

(8) The Commission may by notice in writing require a person to produce for inspection, within

a reasonable time specified in the notice, any property in the person's possession, being property of a person reasonably suspected of corruption or economic crime.

(9) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act.

301. The Petitioner asserts that counts I and II are offences initiated pursuant to ACECA, and that they can only be sustained and justified under that Act. She argues that the DPP and DCI must demonstrate compliance with sections 26-28 of the Act which we have set out above. Our reading of these provisions, however, does not support this contention. Section 26 is, in our view, intended to aid EACC to expedite investigations by requiring certain information from a person suspected of corruption or economic crimes, after giving of due notice. We do not read this to mean that EACC is under an obligation to give that notice to all persons under investigation. The effect of section 27 is similar to that of section 26, but with respect to third party associates of a person suspected of corruption or economic crimes.

302. Section 28 provides a mechanism for EACC to access records and information with prior sanction of the court, but upon notice to the affected parties. Like sections 26 and 27, section 28 is intended to assist EACC when investigating corruption and economic crimes. To our understanding, all these provisions, which are in Part IV of ACECA which covers investigations, provide the tools and processes that EACC may use in the course of conducting investigations. We do not understand the sections to impose an obligation on EACC to use a particular method of investigation, and whether or not the provisions are applied will depend on the circumstances of each case. We are not satisfied therefore that the charges against the Petitioner can be impugned for non-compliance with sections 26-28 of ACECA.

303. In this case, the investigations were undertaken by the DCI. The powers under sections 26-28 of ACECA, the exercise of which we have found is not mandatory, are reposed in the EACC. We have found that both the EACC and DCI have the mandate to investigate economic crimes. The powers that are available to the DCI that are similar to the provisions under sections 26-28 are to be found in sections 118 -121 of the CPC and section 180 of the Evidence Act. We believe, from the depositions of the DCI which are confirmed by the Petitioner in her supplementary affidavit, that these are the provisions that were invoked and applied in **Miscellaneous Application No. 2225 of 2018** which ultimately led to the investigation of the Petitioner's accounts.

Effect of Investigation Pursuant to Orders in Miscellaneous Application No. 2225 of 2018

304. The Petitioner has argued that the DPP and DCI should show how the order made on 22nd June 2018 in **Miscellaneous Application No. 2225 of 2018** related to her and IBL (In Receivership). We have considered the order in question and note that it was addressed to the Manager, KCB Bank (K) Limited. It relates to an account for Blue Nile East Africa Ltd held in that bank. From the statement of Mohamud, he was served with an order of the court which he states allowed the DCI to investigate accounts domiciled at IBL through **Miscellaneous Application No. 2225 of 2018**. He was requested for the Bank's loan books, and thereafter for 10 client loan files, including the Petitioner's, a request he complied with. The only order shown to this court is the one directed to KCB which relates to the account of Blue Nile East Africa Ltd.

305. That being the case, it can be safely concluded that there was no order authorising the DCI to investigate the Petitioner's accounts at IBL. It follows therefore that the investigation into the Petitioner's accounts was not sanctioned by any court, and such evidence as was obtained would appear to be illegally obtained evidence.

306. What would be the implication of that apparently false start on the part of the DCI? Article 50(4) provides as follows:

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. (Emphasis added)

307. In its decision in **Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board; [2015] eKLR**, the Court of Appeal considered the issue of illegally obtained evidence and stated as follows:

"What does the law state regarding illegally obtained evidence" In the case of Karuma, Son of Kaniu V. The Queen [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that "the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how it was obtained" In that case the Privy Council decision was supported by the decision in Reg. V. Leatham (1861) 8 Cox C.C.C 498 which was referred to in the judgment. In Re. V. Leatham (supra), it was said "it matters not how you get it if you steal it even, it would be admissible in evidence" In Olmstead V. United States (1928) 277 US 438 the Supreme Court of the United States of America opined that "the common law did not reject relevant evidence on the ground that it had been obtained illegally." In Helliwell V. Piggot-Sims [1980] FSR 356 it was held that "so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."

52. There is no doubt that the documents relating to the appellant's vetting of 10th September 2012 are relevant as his case hinges on them. **Common law principles show that evidence, if relevant, is admissible even if it has been illegally obtained.** ***The case of Karume V. The Queen though a criminal case shows that common law principles developed in criminal law cases apply in civil cases."*** (Emphasis added

308. Our courts have not defined what amounts to *'otherwise detrimental to the administration of justice'* within this exclusion rule, but a similar provision in the South African Constitution was discussed in the South African case of **Gumede v S (800/2015) [2016] ZASCA 148**. The appeal concerned evidence obtained as a result of an unlawful search in violation of the right to privacy. In its decision, the court stated:

"[23] This court in S v Tandwa[7] made it clear that s 35(5) does not provide for automatic exclusion of unconstitutionality obtained evidence. In this regard it had this to say (paras 116 to 117):

'[116] . . . .

Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.

[117] In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised "by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons". Relevant factors include the severity of the rights violation and the degree of prejudice,

weighted against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant. …" (Emphasis added)

309. The court proceeded to quote the decision in ***S v Magwaza 2016 (1) SACR 53*** in which the court had held:

> ***'[15] Although s 35(5) of the Constitution does not direct a court, as does s 24(2) of the [Canadian] Charter, to consider "all the circumstances" in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered (Pillay at 433h). Collins lists a number of factors to be considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute, such as, for example, the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature; and would the evidence have been obtained in any event. In Collins (at 282) Lamer J reasoned that the concept of disrepute necessarily involves some element of community views, and "thus requires the Judge to refer to what he conceives to be the views of the community at large". Pillay (at 433d – e) accepted that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interests of the public.'***

310. The Kenyan position on the rule that there is no automatic exclusion of illegally obtained evidence is thus shared in other jurisdictions. In our view, the determination of the question whether to exclude illegally obtained evidence on the basis that it will render the trial unfair is a matter within the jurisdiction of the trial court. However, there is the broader question of whether the illegally obtained evidence is otherwise detrimental to the administration of justice, which is an issue that as a court dealing with a petition alleging violation of constitutional rights, we are under an obligation to consider. This is a duty that takes us beyond examining the question of fairness to this Petitioner and to the question whether there could be greater public policy implications arising from the conduct of the DCI.

311. The DCI in this matter obtained an order to examine an account in KCB Bank belonging to Blue Nile East Africa Ltd. In the course of examining the account the subject of that order, he may have stumbled on information that somehow led him to the Petitioner's accounts with IBL. If at that point he had reasonable cause to investigate the Petitioner's accounts, he had the option of accessing those accounts by invoking the aid of the provisions of sections 118-121 of the CPC and section 180 of the Evidence Act. Instead, the DCI appears to have misrepresented to Mohamud that the order in **Miscellaneous Application No. 2225 of 2018** empowered him to access and investigate accounts in IBL, including the Petitioner's.

312. The Petitioner is the second highest ranking officer in an arm of government, the judiciary. The DCI obtained access to her accounts on the basis of a misrepresentation, by using a court order that was not obtained in respect of her accounts. There is thus demonstrated a clear violation of the Petitioner's right to privacy guaranteed under Article 31. To countenance such conduct with respect to a person of the rank of the Petitioner must beg the question: how do the rights of ordinary citizens fare? In our view, the conduct of the DCI in this respect was so egregious and objectively unreasonable and deliberate that to allow reliance on any evidence obtained as a result would be detrimental to the administration of justice. We shall advert to the implications of this finding later in the judgment.

313. A related issue is whether conduct of investigations can constitute violation of rights. In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty. It was stated in **Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR**, that by undertaking investigations an investigating

entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes.

314. With regard to the process or manner of the conduct of investigations, the court in **Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission** (supra) went on to consider what an investigation process might entail. It stated that the person the subject of the investigation would be entitled to fair administrative action, so that before a decision is taken for the prosecution of the suspect, the investigative agency must observe that person's rights by granting him or her an opportunity to respond to the allegations. It was observed that there would be, as a matter of course, a preliminary inquiry, conducted internally, before the formal investigation, and that it should be at the formal investigation stage that the suspect would be entitled to be heard. The court cautioned that it ought not to set standards for review of complaints or of matters warranting investigation and suggested that courts should guard against interfering with the investigative mandate of agencies by prescribing investigative procedures. It stated that what courts should look out for should be condemnation of a person before he or she has had an opportunity to be heard and to respond to the charges levelled against him or her.

315. In the instant case, the question would be whether the manner in which the investigations were conducted by the DCI, in so far as affording time to the Petitioner and Interested Party to respond to the allegations against them in any way infringed on their rights. Their principal complaint is that they were not heard in the course of the investigations, if at all any investigations were conducted, and that the decision to prosecute them was arrived at before they were afforded a fair hearing. They aver that their statements were taken in a perfunctory manner and as a matter of mere formality, as at the time of their recording the DPP had already made the decision to charge them.

316. The Petitioner and the Interested Party were confronted for the first time on the allegations on the 27th of August 2018 when they were required to record statements. The Petitioner requested for time to access the relevant documents and was given until the following day. She elaborates the events of 28th August 2018 as follows. At about 9.30 a.m., she was called out of a meeting at the Supreme Court building and informed that the DPP and DCI needed to see her. At about 10.00 a.m., the DCI came to the board-room where she was with an intention to arrest her. She recorded a statement under inquiry at 12.30 p.m. She was subsequently arrested at about 1.30 p.m. and taken to DCI headquarters for further interrogation, then taken to court at about 4.30 p.m.

317. The Interested Party states that officers from DCI went to his office on 27th August 2018 and took his files and documents. Eventually they moved him to the DCI headquarters the same day where he was kept waiting until about 8.00 p.m., when he was required to record his statement. As he did not have his files, he simply stated that he had nothing to say. The following day, on 28th August 2018, he was joined by his lawyer at about 2.00 p.m. when the police provided him with some of his files and documents, and he was able to record his statement. Thereafter, he was taken to court at about 5.30 p.m.

318. From the material before us, both the Petitioner and Interested Party were confronted by the DCI for the first time in respect to this matter on 27th August 2018. This is confirmed by the affidavit of the Interested Party when he deposes at paragraph 9 (b) that while the officers from the Directorate of Criminal Investigations were in his office, he received a call from the Petitioner who informed him that other police officers were at her office. The Petitioner's request for time to put together her documents and to record her statement the following day was acceded to.

319. This is stated in the replying affidavit of CP Mwatsefu and has not been controverted by the Petitioner. The events of 28th August 2018, from the Petitioner's perspective, have also been set out above. The question is whether this series of events between 27th and 28th of August 2018 support the Petitioner's allegation that she was not granted sufficient opportunity to be heard, and that there was therefore a violation of her right to fair administrative action under Article 47 of the Constitution.

320. It is the Petitioner who, on 27th August 2018, not being ready to record her statement, requested for her statement to be recorded the following day. That request was accepted, and it is common ground that her statement was taken the following day, 28th August 2018. We do not hear a specific complaint that the opportunity granted to her was inadequate. Instead, the Petitioner deposes at paragraph 61 that:

> ***"61. My statement was taken by the investigating officer on 28/8/2018 on the directions of the 1st Respondent in what for all practical purposes was a mere perfunctory exercise towards charging me, irrespective of whatever explanation I had to give on the facts militating against the institution of the said charges. Again, the speed and manner in which the consent to prosecute me was given by the 1st Respondent on 28/8/2018 (from the Supreme Court Building within minutes of my arrest and the taking of my statement) does not exhibit a proper exercise of constitutional duty by the 1st Respondent."***

321. This is a complaint that whatever she said would be disregarded, not an allegation that she was not given adequate time or opportunity to give her side of the story. Given our observation, and that the law does not set out specific timelines within which persons who are subject of investigations should give their responses to allegations against them, we are unable to find a violation of Article 47 of the Constitution with respect to the Petitioner. However, even in the event that we were in error in our analysis and conclusions on this point, we do not believe that would be sufficient ground to bar a prosecution.

Manner of arrest of the Petitioner

322. After a complaint has been made to the police, they are required to carry out investigation and upon conclusion, they may make recommendations to the DPP who determines whether to prefer charges or not. Thereafter, the police may arrest the suspect for the purpose of presenting him or her to court. Under sections 29, 30 and 32 of the CPC, a police officer may, without an order from a magistrate and without a warrant, arrest any person. Under section 29, a police officer can arrest without warrant if the persons are suspected of committing cognizable offences. "Cognizable offence" is defined under section 2 of the CPC as ***"an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant."***

323. The manner in which police may effect an arrest is provided for under Part III of the Criminal Procedure Code. The general provision in section 21 is that the arresting officer may touch or confine the body of the person arrested unless he submits, by word or action, to the arrest. The police may use all means to effect arrest only if a person resists or attempts to evade arrest.

324. In addition, there are guidelines on the manner of effecting arrests in subsidiary legislation. Under section 10 of the **National Police Service Act**, the Inspector-General is empowered to issue and document Service Standing Orders. Chapter 15 of the **National Police Service Standing Orders** issued pursuant to this section makes provision for the manner of effecting an arrest.

325. Standing Order No. 1(2) provides for arrests in general, while No. 4(1) is in respect of arrest of persons in the public service. These provisions are as follows:

> ***1(2) An investigating officer shall not arrest any suspect unless it is necessary to do so …***
>
> **…**
>
> ***4(1) In case of an arrest of a person employed in a government institution, the following procedure shall be followed—***
>
> > ***(a)where it is necessary to arrest a person in employment of a Government institution, or State Corporation, the head of such person's department, or a senior member of the***

department, shall, where possible, be informed;

and

(b) in minor cases of violation of national and county legislation by Government, or State Corporation employees, the employee may be summoned through the head of department, or local head of department, of his or her department in accordance with section 95 of the Criminal Procedure Code, 2009.

(2)…

326. We believe that the design of the protocols set out in these provisions is to avoid embarrassing the government institution and disrupting its operations. It may also be intended to respect the dignity of the office occupied by the officer concerned.

327. Implicit in this Petition is the question whether the Petitioner, as a judge, should have been accorded a different manner of arrest from that of an ordinary person. It is not suggested in the Petition that when judges find themselves in conflict with the law, they are not liable to arrest and prosecution. Judges have been arrested and prosecuted in Kenya in the past. We will only consider one such incident where a sitting Judge was arrested in Kenya and subjected to a criminal trial.

328. In October 2008, Justice GBM Kariuki was arrested and charged in **Nairobi Magistrate's Court Criminal Case No. 1655 of 2009** with attempted murder and causing grievous bodily harm contrary to sections 220 and 234 of the Penal Code. He was tried and subsequently acquitted. Upon his acquittal, he sued the state for malicious prosecution. In his decision in **GBM Kariuki v Attorney General (2016) eKLR**, Odunga J considered the question of the manner of the arrest of the Judge and stated:

"12. ***To the plaintiff despite having given his telephone contacts, his arrest was effected by police officers in not less than two vehicles who were armed with AK 47 rifles in the company of the press. Instead of ringing the bell the police officers climbed over the gate hence his contention that the arrest was conducted in a commando style. On being arrested the plaintiff was taken to Gigiri and thereafter to Kamkunji Police Stations … In this case it is clear from the above discourse that the arrest and arraignment of the Plaintiff was done in haste and prematurely and I daresay recklessly. Further from the evidence adduced by DW2, it would seem that the intention of the investigators was to "nail" the plaintiff. Though a final decision was made by the Court, according to DW2, justice was not done to the complainant. In her view, "justice" would only have been done by the conviction of the Plaintiff."***

329. The court then considered the manner in which the arrest had been effected as it had emerged from the defence witnesses and observed as follows:

"From the prosecution's own evidence, the investigations were incomplete, the condition of the complainant had not yet been ascertained, all the necessary evidence had not yet been gathered, both versions had not been considered and the decision to arrest and charge the Plaintiff was not made by the investigators but by a third party. According to the judgement of the trial Court, DW2 admitted that the arrest was conducted by a contingent of police officers, some from the Flying Squad, armed with AK 47. According to DW1, they were in at least two vehicles.

No wonder the Plaintiff alleged that he was arrested commando style. It was not contended that the police officers camouflaged their presence. One therefore did not need to call the members of the Fourth Estate to alert them that a major operation was in the offing."

330. The court went further to observe that:

"Whereas this Court does not propagate special treatment of some members of the society, it is my holding that since we believe in the doctrine of presumption of innocence, the manner in

which the police conduct their lawful duties including arrest must accord with the constitutional principles. Under Article 10(2)(b) of our current Constitution, one of the values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies the law is human dignity. Under Article 19(1) of the Constitution it is expressly provided by the Supreme Law of the land that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals. More importantly under Article 28 of the Constitution, every person has inherent dignity and the right to have that dignity respected and protected.

331. Odunga J concluded his analysis as follows:

"124. It is therefore my view that in effecting arrest, the same must be done in a manner that accords the suspect his right to dignity and unless there are reasons to believe that the arrest is likely to be resisted, to assemble a whole battalion in order to effect arrest of a Judge as opposed to a "most wanted criminal" or a terrorist, with the result that unnecessary publicity is thereby aroused may well be evidence of malice"'

332. In South Africa, the same standards are applicable. A judge, just like any other citizen, can be arrested and charged with a criminal offence. In **Motata v S. (A345/2010) 2010 ZAGPJHC 134(29 November 2010)**, the court considered the question of the manner in which a judge should be arrested. The case concerned Judge Nkola Motata of the High Court in South Africa who was arrested, charged and prosecuted, before a regional court in Johannesburg for contravening the provisions of the relevant South African traffic law that prohibited driving a motor vehicle while under the influence of intoxicating liquor. At the time of his arrest, he refused to alight from his vehicle when requested to do so by the police and used foul language against the complainant whose wall he had damaged. The police had to handcuff him in his vehicle and lift him out. He was convicted and sentenced. On appeal, the conviction and sentence were upheld.

333. In India, judges can be arrested and prosecuted. The Supreme Court of India in **Delhi Judicial Service Association Tis Hazari Court, Delhi State of Gujarat and ors 1991 AIR 2176** laid down guidelines that ought to be the minimum safeguards to be observed in the arrest of a judicial officer. It stated:

'The facts of the case demonstrate that a presiding judge can be arrested and humiliated on flimsy and manufactured charges which could affect the administration of justice. in order to avoid such situations in future, we consider it necessary to lay down guidelines which should be followed in the case of arrest of a judicial officer. No person whatever his rank, or designation may be, is above the law and he must face the penal consequences of infraction of criminal law. A Magistrate, Judge or any other judicial officer is liable to criminal prosecution for an offence like any other citizen but in the view of the paramount necessity of preserving the independence of the judiciary and at the same time ensuring the infractions of law are properly investigated, we think that the following guidelines should be followed.

(1) If the judicial officer is to be arrested for some offence, it should be done under the intimation to the District Judge of the High Court as the case may be.

(2) If the circumstances necessitate the immediate arrest of a judicial officer of the subordinate judiciary, a technical or formal arrest may be effected.

(3) The facts of such arrest should be immediately communicated to the district and sessions Judge of the concerned District and the Chief Justice of the High court.

(4) The judicial officer so arrested shall not be taken to the police station without the prior order or directions of the District & Sessions Judge of the concerned district, if concerned.

(5)Immediate facilities shall be provided to the judicial officer to communicate with his

family members, legal advisers and judicial officers including the District & Sessions Judge.

(6) No statement of a judicial officer who is under arrest [should] be recorded…nor any medical tests conducted except in the presence of the legal adviser of the Judicial officer concerned or another judicial officer of equal or higher rank.

(7) There should be no handcuffing of a judicial officer. If, however, violent resistance is offered and there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case immediate report shall be made to the district & sessions Judge concerned and also to the Chief Justice of the High Court."

334. The Kenyan jurisprudence has not developed guidelines similar to the ones from India set out above with regard to the arrest of judicial officers. We hold the view, however, that the position stated in **GBM Kariuki v Attorney General** (supra) underscores the requirement that the manner in which police conduct arrests, whether of judicial officers or any other person, must accord with constitutional principles, which include the presumption of innocence and the preservation and protection of the dignity of the individual guaranteed under Article 28.

335. While the Petitioner complains about the manner of her arrest, she has not demonstrated how it breached her right to dignity. We note that the DPP and DCI went to the Supreme Court building and informed the Chief Justice about the intended arrest, and there is no evidence that there was any form of mishandling of the Petitioner. Our analysis of the facts of this case, the Constitution, the National Police Service Standing Orders, local and persuasive jurisprudence from other jurisdictions set out above leads us to the conclusion that the manner of arrest of the Petitioner was in accordance with the law and did not subject her to humiliation or embarrassment in violation of Article 28.

Whether the media publicity violated the Petitioner's right to a fair trial

336. We turn to consider whether the press statement by the DPP and the media publicity on the arrest and intended prosecution of the Petitioner compromised her right to the presumption of innocence, fair trial and equality before the law.

337. The Petitioner argues that there was an ulterior motive and malice at the heart of the investigation and prosecution against her. She refers to the widespread media coverage of her intended and subsequent arrest and arraignment which she attributes to the DPP and DCI. She contends that this publicity was deliberately orchestrated by the DPP and DCI even before she was made aware of the investigations. She bases this contention on the fact that information and documents that were only in their possession and which she had no prior access to or knowledge of were being leaked to and published by the media. She laments that this was intended to create the impression in the mind of the public that she was guilty. She argues that the adverse publicity violated her right to the presumption of innocence and the right to fair trial.

338. The Petitioner refers specifically to the public statement by the DPP issued on the afternoon of 28th August 2018 when she was still at the Directorate of Criminal Investigations headquarters prior to her arraignment. She also cites the alarming newspaper headlines and articles as a demonstration of the predominant ulterior motive, malice and bad faith intended to humiliate her given the depth of the statement and the details leaked to the media.

339. The DPP denies the Petitioner's allegations. He points out that Article 34 of the Constitution guarantees freedom of the media and the right to receive and disseminate information. He contends that this right can only be limited as contemplated under Article 24. It is his position that the case has generated considerable publicity because of the Petitioner's office. He further argues that he and the DCI have no control over the media and are not responsible for any reports emanating from the media on the Petitioner's case. He contends that in any event, adverse publicity cannot influence the mind of the trial

court.

340. We have considered the arguments by the Petitioner and the response by the DPP and the DCI. We have also perused the pleadings as well as the annexures. It is true that just before the Petitioner's arrest, the *Daily Nation* newspaper published a number of articles on the investigations and later on the Petitioner's arrest. It is also true that the DPP issued a statement and addressed the media on the Petitioner's impending arrest and prosecution. He gave a detailed statement on the nature of the investigations and justification for the decision to arrest and prosecute the Petitioner.

341. It is not disputed that the investigation and subsequent arrest of the Petitioner attracted intense media publicity given the office she holds. It is also true that when criminal cases get wide pre-trial media coverage, particularly of an adverse kind, it creates the perception of tension between the public's right to information and freedom of the media under Article 34 on one hand, and the individual's right to fair trial under Article 50(2) of the Constitution on the other.

342. We use the term *'perception of tensions'* deliberately. This is because the question of the effect of adverse pre-trial publicity on the rights of an accused person has been considered in various decisions in our courts. In **Republic v Attorney General & 3 others *ex parte* Kamlesh Mansukhlal Damji Pattni** (supra) the court discussed the issue and held that the Constitution guarantees freedom of the media, freedom of expression and, where applicable, the right of access to information and limitations to the exercise of these rights and therefore media freedom can only be limited as prescribed in Article 24 of the Constitution.

343. Similarly, in **William S.K. Ruto & Another v Attorney General** (supra), the court observed that a criminal trial is conducted by qualified, competent and independent judicial officers who are not easily influenced by statements made to the press and that courts are able to rise above such publications and utterances.

344. In its decision in **Republic v Director of Public Prosecution & another *ex parte* Chamanlal Vrajlal Kamani & 2 others [2015] eKLR**, the court found that there was no allegation of a risk that as a result of the adverse publicity generated, the applicants' right to fair trial was threatened and there was no allegation against the trial court.

345. What emerges from these decisions is that in a criminal justice system such as ours in which the trial is conducted by a judicial officer as opposed to trial by jury, pre-trial media publicity or any media publicity cannot influence the mind of the trial court which is manned by a competent and independent judicial officer. It follows therefore that such publicity would not be deemed to be in violation of the right of an accused person to the presumption of innocence and the right to a fair trial. That is the position in this Petition.

Whether infringements of fundamental rights or contraventions of the Constitution have been established

346. At the commencement of our analysis, we indicated the Articles of the Constitution that the Petitioner alleged infringement or contravention of. These are Articles 27, 28, 47, and 50(2) (a), (b) (c),(j) and (k), as well as Article 157(11). The infringements and or contraventions were alleged to have occurred due to the initiation of the investigations, the manner in which the investigations were carried out, and the decision to prosecute. It has been argued that the entire process from investigation, decision to prosecute, the manner of arrest and the media publicity surrounding the investigations, arrest and arraignment violated the Petitioner's constitutional rights as enumerated above.

347. However, as emerges from the analysis above, we have found that there was a factual and legal basis for the prosecution in respect to counts I and II. Further, that contrary to the Petitioner's assertions, the charges were not defective for lack of a complainant as the Republic, through the National Police Service, is a proper complainant. We have also found that the media coverage and publicity did not affect the Petitioner's right to a fair trial or infringe on her right to dignity, nor was there violation of the right to

fair administrative action guaranteed under Article 47 with regard to the period of investigation.

348. Further, given the above findings, the decision of the DPP to prosecute and to direct for the arrest and arraignment of the Petitioner was not in contravention of Article 157(11). The decision was based on the factual and legal basis informing the charges and was in accord with both the Constitution and the National Prosecution Policy. While we are unable to find any irrationality or unreasonableness in the decision of the DPP to prefer charges against the Petitioner, does this mean the pending criminal proceedings ought to proceed?

349. The answer to this question must be in the negative. Whereas, on the material before us, we cannot fault the decision of the DPP to prosecute the Petitioner in respect of counts I and II, the same cannot be said of the conduct of the DCI. We have held that the manner in which the DCI obtained access to the Petitioner's accounts with IBL was through acts of misrepresentation and misuse of a court order that rendered the evidence thereby obtained, and which formed the bedrock of the charges against the Petitioner, illegal in a manner that is detrimental to the administration of justice. The DCI violated the Petitioner's right to privacy contrary to Article 31 of the Constitution. While this violation was not pleaded by the Petitioner, we deem it critical to assert that in light of Article 50(4), the conduct of the DCI has irredeemably broken the foundation on which the criminal case against the Petitioner was built, and the Petition must, to that extent, succeed.

350. There are two important issues that remain for our consideration in the event that we are in error on the conduct of the DCI and its effect on the substratum of the charges against the Petitioner. These are, first, the allegation by the Petitioner that the intended prosecution is an attempt to remove her from office in contravention of the Constitution, and second, whether the DPP should await a decision of the JSC with respect to the allegations against the Petitioner, before proceeding with the prosecution.

Whether the intended prosecution is an attempt to remove the Petitioner from office

351. The Petitioner challenges her arrest and prosecution on the basis of her position as a judge and as the Deputy Chief Justice of the Republic of Kenya. She contends that the intended prosecution is an attempt on the part of the executive to remove her from office, as part of the execution of the threat of the President that the decision of the majority in the Presidential election petition shall be 'revisited'. She further contends that as a judge, she can only be removed from office in accordance with the provisions of Article 168 of the Constitution.

352. The response from the DPP, DCI and AG is that the Petitioner is not immune from criminal prosecution for acts done outside the scope of her judicial functions. In their view, judicial officers, like other citizens, are subject to the penal law and the mere fact of institution of criminal prosecution against her is not, contrary to the assertion by the Petitioner, a threat to judicial independence.

353. A consideration of the submissions of the parties on this issue reveals a need to consider two sub-issues. The first is whether the prosecution of the Petitioner should await a decision of the JSC. Its corollary, which emerges from the submissions of the DPP, is whether the Petitioner, judges of superior courts and judicial officers are immune from criminal prosecution.

Whether prosecution of the Petitioner should await a decision of the JSC

354. This question invites us to consider the power of the DPP to prosecute serving judges for crimes vis a vis the power of the JSC, in exercise of its constitutional mandate, to investigate complaints of misconduct against judges and judicial officers. This is not a simple question. The response to it has serious implications for the independence of the judiciary and administration of justice.

355. There is a rational basis for making specific provision for the independence of the judiciary in the Constitution. We believe that there is a need to safeguard that independence to enable judges and judicial officers discharge their judicial functions without fear of reprisals from the executive or any other quarter. This is in line with the constitutional scheme on the separation of powers and checks and balances. Under Article 1(3) of the Constitution, the people of Kenya have delegated their sovereign power to the three arms of government in the following terms:

> ***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

356. Chapter 10 of the Constitution vests judicial authority in the courts and provides the manner for the exercise of such power. This is expressly provided for in Article 159 which states that:

> ***159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

357. The independence of the judiciary has been recognised and underscored in our constitutional scheme. Article 160 provides that

> ***160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.***

358. The importance of judicial independence and its implications for the rule of law cannot be overemphasised. It has also been recognised in various international instruments, to which Kenya is a party, that underscore the central place of such independence in ensuring the protection of human rights and the rule of law.

359. The Universal Declaration of Human Rights provides at Article 10 that ***"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*** Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is in similar terms.

360. The Bangalore Principles on Judicial Conduct underscore the centrality of judicial independence when it states in the Preamble that ***"a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law"***.

361. Principle 1 of the Bangalore Principles which makes provisions with respect to judicial independence states that:

> ***"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.***

362. With respect to the application of the principles, Principle 1 states that:

> ***Application: 1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.***
>
> ***1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.***
>
> ***1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.***
>
> ***1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.***
>
> ***1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.***
>
> ***1.6 judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence."***

363. The constitutional and international principles on judicial independence are reflected in the Judicial Code of Conduct prescribed under the Judicial Service Act. Paragraph 4(6) of the Code replicates the Bangalore Principles and states that:

> ***(6)A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.***

364. It is also recognised that in order to secure independence of the judiciary, judges are called to account by bodies or institutions that are themselves independent. In the Preamble, the Bangalore Principles note that:

> ***These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.***

365. The people of Kenya were cognisant of the need for an independent institution, and in their views to the **Constitution of Kenya Review Commission (CKRC)** recommended an independent institution to receive and investigate complaints against judges and judicial officers and staff. These recommendations are contained in the **Final Report of the Constitution of Kenya Review Commission (CKRC)** dated 10th February 2005 paragraph 13.5.4-13.5.6 of the report.

366. Under the Constitution, the JSC has been vested with power under Articles 168 and 172 to deal with issues relating to misconduct by judges and judicial officers. Article 172 of the Constitution sets out the functions of the JSC as follows:

> ***172. (1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—***
>
> ***(a) recommend to the President persons for appointment as judges;***
>
> ***(b) review and make recommendations on the conditions of service of—***
>
> ***(i) judges and judicial officers, other than their remuneration; and***
>
> ***(ii) the staff of the Judiciary;***
>
> ***(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;***
>
> ***(d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and***
>
> ***(e) advise the national government on improving the efficiency of the administration of justice.***

367. Article 168 provides as follows:

> ***168. (1) A judge of a superior court may be removed from office only on the grounds of—***
>
> ***(a) inability to perform the functions of office arising from mental or physical incapacity;***
>
> ***(b)a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;***
>
> ***(c) bankruptcy;***
>
> ***(d) incompetence; or***
>
> ***(e) gross misconduct or misbehaviour.***
>
> ***(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.***
>
> ***(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.***
>
> ***(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.***
>
> ***...***
>
> ***(6) Despite Article 160 (4), the remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office.***

368. Like other human beings, judges are afflicted with frailties, vulnerabilities and temptations that may from time to time cause them to falter and fall afoul of the law. These afflictions may also lead to conduct that falls short of the ethical and professional standards their oath of office requires. Such behaviour may sometimes amount to criminal conduct. At other times, it may be misconduct that is in breach of ethical and professional standards. On occasion, that behaviour may well fall into both categories. Sometimes, however, the line between criminal and ethical misconduct may be blurred. The question may then arise as to which process is appropriate to address the conduct of the judge or judicial officer-whether it is the criminal justice process of the state or the disciplinary process within the judiciary. We seem to find ourselves in this position with regard to this petition.

369. Happily, this situation is not peculiar to this jurisdiction. Other jurisdictions, some with legal systems and constitutions similar to ours, have had to grapple with the question.

370. We begin with the position in the USA. We were referred by the Petitioner to the article by **Steven W. Gold** titled **"Temporary**

Criminal Immunity for Federal Judges" in which he proposes a basis for "temporary criminal immunity" for judges as facilitating an independent unbiased judiciary. He notes that the scope of immunity for prosecution of federal judges is wide and that public policy suggests that temporary criminal immunity for a sitting judge outweighs the detriment to society because it facilitates an independent judiciary. He concludes that the prosecution of a sitting judge, which effectively results in removal, violates the constitutional mandate of impeachment as the sole method of removal.

371. Gold observes as follows with respect to the preference for the process of impeachment as opposed to prosecution:

> ***"Moreover, if the executive is allowed to prosecute federal judges, a judge might fear that a decision adverse to the government might trigger an unrelated investigation against him. This might bring about a bias in federal court rooms where the government is a party. Temporary immunity from criminal prosecution would reduce the potential for bias when a judge fears retaliation by the government."*** (Emphasis added)

372. From India, the decision in **K. Veeraswami v Union of India and others (supra)** was cited to us. The court stated as follows in that decision:

> ***"The purpose of previous sanction before prosecuting a public servant including a Judge of the High Court or of the Supreme Court is to protect the judge from unnecessary harassment and frivolous prosecution more particularly to save the judge from biased prosecution for giving judgement in a case which goes against the Government or its officers though based on good reasons and rule of law."***

373. That notwithstanding, in dismissing the appeal, the majority of the court held that a judge of a High Court or of the Supreme Court is a 'public servant' within the meaning of s. 2 of India's Prevention of Corruption Act, 1947. Further, that prosecution of a judge of a High Court, including the Chief Justice or a judge of the Supreme Court, can be launched after obtaining sanction of the competent authority as envisaged by s. 6 of the Prevention of Corruption Act. In the case of a judge, such sanction would be given by the Chief Justice. In the case of the Chief Justice, a judge or judges of the Supreme Court would be consulted before a prosecution is launched. The court in that case observed that:

> ***"But we know of no law providing protection for Judges from Criminal prosecution. Article 361(2) confers immunity from criminal prosecution only to the President and Governors of States and to no others. Even that immunity has been limited during their term of office. The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of bribes or with regard to the offence of corruption the sanction for criminal prosecution is required."***

374. Nigeria has a constitution that is similar to ours with respect to the question of how to deal with issues of alleged misconduct and removal of judges. Paragraph 21 of the **Third Schedule** to the **Constitution of the Federal Republic of Nigeria 1999** provides that:

> ***21. The National Judicial Council shall have power to -***
>
> > ***(b) recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph and to exercise disciplinary control over such officers;…***

375. Both the Petitioner and the DPP have referred us to the decision in **Nganjiwa v FRN (supra).** In that case, Honourable Justice Hyeladzira Ajiya Nganjiwa was, by a fourteen-count information, charged for offences ranging from unlawful enrichment by a public officer to making false information. upon being served with that information, the appellant challenged the jurisdiction of the trial court to hear the case against him mainly on the ground that conditions precedent to the filing of the information had not been fulfilled. the trial court dismissed the preliminary objection and the appellant preferred an appeal to the court of appeal. 376. the issues before the appellate court were whether the trial court could validly exercise criminal jurisdiction over a sitting judicial officer while he was still occupying such office without first satisfying the condition precedent of subjecting such judicial officer to the disciplinary jurisdiction of the National Judicial Council as provided for in the Constitution. A second issue was whether, in view of the constitutionally guaranteed doctrine of the independence of the judiciary, the trial court was right in reaching the conclusion that the executive arm of government could directly prosecute a sitting judicial officer without following due process as provided for in the Constitution, by first referring the matter by way of petition to the National Judicial Council. In its decision, the Court of Appeal held:

> ***"Whenever a breach of judicial oath occurs, it is a misconduct itself, then the NJC is the appropriate body to investigate such breaches by the judicial officer and if found to be so, such judicial officer shall face disciplinary action and the NJC may recommend the removal of such a judicial officer to the appropriate authority which is either the President in the case of Federal Judicial Officer or the Governor of the State in the case of a State Judicial Officer and/or take other action appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the Constitution, then the relevant law enforcement Agent or Agency is at liberty to make the said judicial officer face the wrath of the law."*** (Emphasis added)

377. The Court went on to state that:

> ***"There cannot be any nascent democracy if judicial officers are placed in a precarious situation wherein they are exposed to potential intimidation, threats, harassment or incessant arrest for any alleged act or conduct carried out in discharging their judicial functions or an allegation of official misconduct without following the due process/procedure."***

378. However, with respect to the distinction between matters which can be tried directly, and those which need to be first referred to the NJC, the court stated:

"It must be expressly stated that if a judicial officer commits theft, fraud, murder or manslaughter, arson and the likes, which are crimes committed outside the scope of the performance of his official functions, he may be arrested, interrogated and prosecuted accordingly by the State DIRECTLY without reference to the NJC. These classes of criminal acts are not envisaged and captured by the provisions of Paragraph 21, Part 1 of the Third Schedule. On the other hand, if any Judicial Officer commits a professional misconduct within the scope of his duty and is investigated, arrested and subsequently prosecuted by security agents without a formal complaint/report to the NJC, it will be a usurpation of the latter's constitutionally guaranteed powers under section 158 and paragraph 21 Part 1 of the Third Schedule thereby inhibiting, and interfering with obstructing the NJC from carrying out its disciplinary control over erring judicial officers as clearly provided by the Constitution. This will thus amount to a violation of the constitutionally guaranteed independence of (a fundamental component) of the judiciary.

…

For the avoidance of doubt, may I state clearly that no judicial officer is covered by immunity from prosecution under the Constitution as the Constitution only grants the powers to discipline judicial officers for official misconduct to the NJC."

379. From the above analysis, the following principles emerge. First, in the absence of an express statutory or regulatory provision requiring prior approval or sanction from another authority in order to prosecute, a judge or judicial officer will face trial directly in the event that he or she is alleged to have committed an offence. However, and this is the second principle, where there is a specific legal framework for dealing with misconduct and/or removal of judges, cases involving misconduct with a criminal element committed in the course of official judicial function or so closely proximate or linked to the judicial office must first be referred to the body responsible and the disciplinary or removal process commenced.

380. Implicit in the above principle is a third: that where acts of a criminal nature are committed outside the scope of official judicial function, then the judge or judicial officer can be investigated, arrested and prosecuted directly, without recourse to the disciplinary or removal process. Thus, cases such as theft, fraud, arson, rape or murder fall in this category. A judicial officer or superior court judge against whom charges in respect of such offences is made must face trial directly and the court will not interfere with the mandate of the prosecutorial authorities.

381. Which leads us to the corollary to the main issue of whether judges and judicial officers should be tried directly by the state or should be subjected to the JSC process. This is whether superior court judges and judicial officers are immune from criminal prosecution. The answer to this issue has already emerged from the discussion above, and it is partly yes.

382. In considering this issue, we bear in mind the words of the Privy Council in **Sharma v Deputy Director of Public Prosecution & Others** (supra):.

"(29) The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed."

383. The law does not make a distinction between prosecution of a suspect with regard to their designation, or position or status in society. Indeed, under the CPC, any person can be arrested and arraigned in court for prosecution arising from alleged criminal conduct.

384. The Constitution provides limited immunity for judges and judicial officers in Article 160(5) which states:

A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

385. This provision is echoed in section 6 of the Judicature Act. Titled "***Protection of judges and officers,"*** it is couched in the following terms:

No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.

386. The courts have, in several decisions, addressed their minds to what constitutes that immunity, and its rationale and scope; and considered whether or not it includes immunity from criminal prosecution. Generally, the courts have drawn the line between judicial immunity from civil liability for acts done in good faith in the course of judicial functions and immunity of judicial officers from criminal prosecution. The issue was comprehensively addressed in **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR** in which the Court of Appeal stated:

"I have no difficulty whatsoever in holding that judicial officers are under Article 160(5) immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words "good faith" and "lawful" in the sub-article are a qualification or limitation of the immunity for the rather obvious reason that so long as a judge is acting in a judicial capacity and exercising his usual jurisdiction, there is a commonsensical presumption that he is acting lawfully and in

good faith. There exists an implicit covenant of good faith binding judges. That has to be the a priori position for to hold otherwise would lead to the absurd position of the good faith bases of judges? actions being debatable points and open to an intolerable deluge of litigation, each unhappy litigant suing judges left right and centre as wounded pride dictates.

I think that even though judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that in the end justice is served. I also harbor no doubts that where a judge's conduct consists in egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and can be triggered in appropriate cases. I am satisfied that those mechanisms suffice to guard the integrity of the judicial process and to protect the rule of law and the rights of litigants. They ensure that judicial immunity, which is laudable and necessary for the protection of judicial independence does not morph into judicial impunity or some form of Frankenstenian tyranny against the law and the people."

387. In **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & 5 Others [2016] eKLR** the court observed that:

"It is however my view that a judicial officer is not immuned in respect of all actions and inactions done or omitted by himself or herself unless such omission or commission occurs in the course of performance of his or her judicial functions. Article 160(5) of the Constitution of Kenya which provides that:

"A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

101. However Article 160(1) of the Constitution provides as follows:

"In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

102. It therefore follows that members of the judiciary, in carrying out their judicial functions must adhere to the dictates of the Constitution and the law. As long as they do that their actions cannot be the subject of civil and criminal litigation."

388. Our courts have also held that judicial immunity does not shield a judicial officer from criminal prosecution. The court was confronted with that question in **Abdulkadir Athman Salim ElKindy v Director of Public Prosecutions & another [2017] eKLR** in which it was stated:

'3. The petition raises a fundamental question, namely, whether or not the immunity granted to judicial officers by the law extends to shield them from criminal prosecution….

…

28. The test in Article 160 (5) is that the judicial officer must have done the thing complained of or omitted to do it in good faith in the lawful performance of a judicial function. Lawful in this context means "conforming to, permitted by, or recognized by law or rules."

389. After considering the various meanings ascribed to the word 'lawful', section 6 of the Judicature Act and authorities from various jurisdictions, the court observed that a judicial officer cannot be held to be under any civil liability for actions done in good faith in the course of his judicial functions. The court expressed the view, however, that the said section did not extend to criminal acts and stated:

"34. However, this being so, the provisions of Article 160 of the Constitution compel me to conclude that the fundamental principle of judicial independence cannot simply be equated with a principle of immunity of judicial officers from criminal prosecutions for all acts and/or omissions in the exercise of their judicial functions, irrespective of the circumstances of the individual case.

35. It goes almost without saying that the criminal prosecution of judicial officers for such acts and/or omissions will – and must – remain an extraordinary and exceptional step. Any decision by the office of the DPP to prosecute a judicial officer must be taken with the utmost caution, due regard being had to the fundamental principle of judicial independence, but also to the related principle that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution, in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions.

36. Clearly, judges – like any other person – should be punished for any crimes they commit, be they general crimes, for example causing a car accident in a state of drunkenness, or specific crimes related to the judicial function, such as taking bribes for handing down favourable judgments or interfering with the administration of justice for which alone they swore to uphold. …

37. The justification for immunity for judicial officers-where it exists-cannot be to protect the judicial officer from criminal prosecution, but only from false accusations that are levelled against a judicial officer in order to exert pressure on him or her. It is my view, that a contrary interpretation will have the inescapable effect of conferring an extra-constitutional immunity on judicial officers.

38. Thus, where an impropriety has been committed of the nature of criminal conduct which may include violations of law, or breach of court rules or abuse of office or interfering with the flow of justice, then, such immunity cannot stand." (Emphasis added)

390. Arising from the above precedents, it is our conclusion that a superior court judge, or a judicial officer, does not enjoy any privilege or immunity for criminal actions committed either within the scope of their duty as judicial officers or in their personal capacity. We note, however, that the Petitioner does not claim any sort of immunity from prosecution, and we accordingly need not say more on this issue.

391. The findings of the court set out above with respect to the question of judicial immunity, as well as the principles culled earlier from decisions in other jurisdictions, point to the practice in Kenya as tending towards the practice adopted in **Nganjiwa v FRN**. This is that where there is a specific legal framework for dealing with misconduct and/or removal of judges, cases involving misconduct with a criminal element *committed in the course of official judicial functions*, or which are so inextricably connected with the office or status of a judge that they, perforce, must be deemed to be official misconduct, must first be referred to the body responsible and the disciplinary or removal process commenced.

392. However, if acts of a criminal nature are committed *outside the scope of official judicial function*, the judge or judicial officer can be investigated, arrested and prosecuted directly, without recourse to the disciplinary or removal process. Accordingly, serious offences such as theft, fraud, arson, rape or murder fall in the latter category

393. By way of illustration of this position, in 2008, Justice GBM Kariuki was arrested and charged with the offence of attempted murder and causing grievous bodily harm, contrary to sections 220 and 234 of the Penal Code in **Nairobi Magistrate's Court Criminal Case No. 1655 of 2009**,. He was a sitting judge of the High Court at the time of the alleged offence, and at his arrest and arraignment. While there was a removal process under section 62 of the former constitution, he was arrested, charged and prosecuted directly without recourse to the removal process.

394. Under the provisions of Article 168(1) of the Constitution one of the grounds upon which a judge may be removed from office is for gross misconduct or misbehaviour. As stated earlier such misconduct or misbehavior could be criminal in nature. Yet, because proceedings triggered under Article 168(2) can lead to the removal of the judge, allegations of misconduct within the scope of duty or which otherwise amount to official misconduct must first be processed by the JSC. To allow allegations of that nature to be determined through a criminal trial without initial recourse to JSC would be to expose judges and judicial officers to the possibility of harassment and intimidation from executive agents in a manner that would be incompatible with the Constitution and inimical to the independence of the judiciary.

395. The rationale for this approach is premised on the doctrine of the separation of powers and the principle of the independence of the judiciary which is explained as follows in **Nganjiwa**:

"Any act or action by any agency of the Executive Arm of Government that any part of the Federation which tends to or may be seen as an attempt to cow a vital component of the judiciary from performing its constitutional functions as envisaged under the Constitution must not be encouraged or allowed, if the tenets of democracy and the true and correct doctrine of separation of powers is to be entrenched. There cannot be any nascent democracy if Judicial Officers are placed in a precarious situation wherein they are exposed to potential intimidation, threat, harassment or incessant arrest for any alleged act or conduct carried out in discharging their judicial functions or an allegation of official misconduct without following the due process/procedure,"

396. We should emphasise that the fact that a judge or judicial officer may, in criminal offences committed outside the scope of the judicial function, be arrested and charged directly, does not bar the JSC from initiating disciplinary or removal proceedings. Prudence, though, would suggest that there should not be parallel proceedings on the same issue.

397. Similarly, where a judge has committed judicial or official misconduct that discloses criminal elements, the DCI is not precluded from investigating and bringing evidence of such misconduct to the JSC for appropriate action under Article 168(2).

398. We now turn to consider the facts of the present case in light of the above conclusions. The Petitioner is a judge of the Supreme Court and the Deputy Chief Justice of the Republic of Kenya. At the time material to the charges that she faces, she was a judge of the Court of Appeal. The charges against her on abuse of office, if established, would also be in violation of the Judicial Code of Conduct. Count 1 is ***"Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003"***. The particulars are that between 15th August 2013 and 23rd October 2013, at IBL headquarters in Westlands, being a person employed in the public service as a judge of the Court of Appeal used the said office to improperly confer a benefit to herself of Kshs 12,000,000.00 from IBL.

399. Part II of the Judicial Code of Conduct sets out the rules of conduct and ethics for judges. On integrity, paragraph 6(4) states that ***"A Judge shall not use the judicial office to improperly enrich himself, herself or other person.."*** Paragraph 7 on propriety, so far as is relevant for present purposes, provides at paragraph 7(2) and 7(11) as follows:

(2) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

...

(11) A Judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judicial office, or involve the Judge in transactions with lawyers and other persons likely to come before the court in which the Judge serves.

400. Paragraph 10 of the Code, which is titled ***"Accountability and prohibition against corrupt practices"*** states at sub-paragraphs 2 and 3 that:

> ***(2) A Judge or any member of the Judge's family, shall neither ask for, nor accept, any bribe, gift, loan, hospitality, advantage, privilege or favour in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties, or which might reasonably be perceived as being intended to influence the performance of judicial duties.***
>
> ***(3) A Judge shall maintain an honest and impeccable conduct in and out of court, whether in official or private capacity and shall at all times uphold the dignity and integrity of the judiciary to enhance confidence of the public, the legal profession and litigants in the impartiality of the Judge and of the judiciary.***

401. To the vexing question: Is count I a matter for which prosecution against the Petitioner can be commenced directly without recourse to JSC? Looking at the charge sheet, the allegation is in respect to conferment of a personal benefit to the Petitioner. It is also an allegation that it was improperly conferred on her in abuse of the office she held. Abuse of office by a judge or judicial officer can be committed within or outside the scope of judicial function.

402. For instance, a judge or judicial officer may, in the course of proceedings before the court, seek to obtain an improper advantage from one of the parties in order to determine a matter in a particular way. At other times the improper benefit would not be directly related to the performance of her or his judicial duty. However, by its very nature, the offence of abuse of office presupposes that the person is improperly using or misusing his or her public office or status to obtain a benefit. The commission of the offence is intertwined with use, abuse if you like, of the public office. Even when committed outside the ordinary scope of duty, the offence has to be deemed to be official misconduct because it relates to an advantage obtained by virtue of the person's official, as opposed to personal, capacity. In that sense abuse of office which is also frowned upon by the Judicial Code of Conduct must, in the first instance, be referred to JSC.

403. At count II, it is alleged that on 12th January 2016 at IBL headquarters, jointly with the Interested Party, and with intent to defraud, induced Mohamud Ahmed Mohamud to execute a discharge of charge for L. R. Nos. 3734/202 and 3734/209 being securities for a loan of Kshs 60,000,000.00 granted to her on the pretext that a substitute security over L. R. No. 3734/1129 would be provided. These are the particulars that are said to form the basis of the charge of obtaining execution of a security by false pretences contrary to section 314 of the Penal Code. From the particulars, it can be gleaned that the offence is alleged to have been committed within the context of a customer-banker relationship. It was therefore outside the scope of the Petitioner's judicial duties and functions.

404. Counts III-VII all relate to failure to pay stamp duty upon purchase of various properties. All these charges are for unlawful failure to pay taxes payable to the KRA contrary to section 45(1)(d) as read with section 48 of the ACECA. The charges have no link or connection with the Petitioner's judicial functions. The same can be said with respect to counts VIII, X, and XI which are charges of forgery contrary to section 345 as read with section 349 of the Penal Code. However, as we found earlier in this judgment, there is no legal foundation for preferring all the charges touching on non-payment of stamp duty and forgery, against the Petitioner.

Whether this court can grant substantive orders in respect of the Interested Party

405. The core issue that we must address our minds to in respect of the Interested Party is whether an interested party who has not filed a separate petition but has been joined as such by the petitioner can benefit from the orders sought in the petition or can seek reliefs different from those sought by the petitioner. We have set out elsewhere in this judgment the prayers that the Interested Party seeks from this court.

406. The Interested Party seeks to persuade us that we can issue the orders that he seeks in his affidavit in support of the Petition. He relies on Article 159(2)(d) of the Constitution which requires that justice be administered without undue regard to procedural technicalities, as well as Article 22(3)(b) which provides that:

> ***(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—***
>
> ***…;***
>
> **(b)** ***formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;***

407. The Interested Party also relies in support on the **Mutunga Rules** which are made pursuant to Article 22(3). He submits that he elected to support the Petition and filed an application dated 29th August 2018 seeking to have the interim orders issued in favour of the Petitioner extend to him, which was not opposed by the Respondents and was allowed by the Court. He contends that filing an application to be joined as a co-petitioner would lead to absurdities as the Petitioner would be compelled to amend the Petition to accommodate him as a new party. His position is that a party who is already joined in the Petition as an interested party need not file a separate petition to raise issues that can be legitimately addressed within the existing petition. He cites the decision in **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others** (supra) in support.

408. The DPP, DCI and AG counter that the Interested Party sought to introduce a case outside the four corners of the Petition, which an interested party cannot do. That in any event, Article 159(2)(d) cannot be construed as permitting a claim on the basis of a replying affidavit and the Interested Party should have filed a cross-petition.

409. To determine the question of what reliefs an interested party is entitled to, we consider first his or her place in a constitutional petition.

This question has been addressed in various cases in our jurisdiction. First, however, we note that **Black's Law Dictionary 9th Edition, page 1232** defines an interested party as ***"A party who has a recognizable stake (and therefore standing) in the matter."***

410. Secondly, Rule 7 of the Mutunga Rules contains the substantive provisions with respect to joinder of an interested party, while Rule 2 defines an interested party as follows:

> ***"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation".***

411. The Interested Party has referred us to the decision in **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others (supra)**, in particular to the following passage in which the court stated:

> ***"Regarding the exercise of the court's discretion on its own motion in applications of this nature, like all discretions, it must be exercised judiciously based on sound principles. Importantly, the main purpose of joining parties is to enable the court to deal with matter brought before it and to avoid multiplicity of suits. It is a fundamental consideration that before a person can be joined as party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the suit would directly and legally affect the party seeking to be enjoined. It must be emphasized that, among others, the purpose of joinder of parties is to avoid multiplicity of suits. It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit in the case at hand be determined finally and completely to avoid litigating over the same matters again; which dictates that the Applicant be joined as a party to the suit."*** (Emphasis added)

412. In its ruling dated 27th February 2014 in **Trusted Society of Human Rights v Mumo Matemo & 5 others [2014] eKLR**, the Supreme Court held that:

> ***"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***

413. However, in its ruling dated 28th January 2016 in **Francis Karioko Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR** the Supreme Court pronounced itself as follows:

> ***"42. Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."***

414. In its most recent decision touching on this issue, the Supreme Court in **Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR** was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an interested party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:

> ***"[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution..***
>
> ***…***
>
> ***[53] … Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):***
>
> ***"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.***
>
> ***Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court.***

…

[54] In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):

> ***"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."***

415. What emerges from the above decisions is that an interested party is a peripheral party and cannot introduce new issues for determination by the court. Further, that in determining the matters before it, the court will only consider the issues raised in the pleadings by the principal parties. This rule will be particularly unyielding when the matter before court is a private as opposed to a public interest claim.

416. Notwithstanding that the Interested Party before us was joined in the matter from the outset by the Petitioner, he is still only an interested party within the meaning ascribed to that phrase by the law and judicial precedents which we have set out above. His joinder *ab initio* does not elevate his position in the matter. The court can only grant reliefs as sought by the Petitioner or as it deems appropriate as provided under Article 23(3) of the Constitution.

417. We now turn to consider the arguments made by the Interested Party in light of the principles set out above. We note that the Interested Party supports the Petitioner's case in several respects. The first issue is whether the decision to prosecute is flawed right from the investigations process which did not take into account the totality of the evidence. He contends in this regard that CP Mwatsefu, who was in charge of the investigations, claimed that by 8th August 2018, the DCI had completed investigations and submitted the file to the DPP. He points out that by that date, the police had not interviewed him and that they contacted him for the very first time on 27th August 2018, when he was arrested.

418. To demonstrate that the investigations were incomplete, the Interested Party refers to the statement of Julius Chege Macharia, an employee of KRA, who stated that the DCI asked KRA to undertake an investigation into the stamp duty question through a letter dated 9th August 2018.

419. As a further demonstration that the investigations were incomplete, the Interested Party makes reference to the documents purported to support payment of stamp duty, which are alleged by KRA to be forgeries. This claim forms the substance of counts VIII, X -XIII in the charge sheet. The charges relate to alleged forgery of KRA Stamp Duty Declaration, Assessment and Pay-in slips purporting them to be genuine and valid. He contends that no tax was assessed. It is his argument that a statement recorded by an official of KRA only after being prompted by the police does not constitute an assessment of unpaid tax. We understand the Interested Party to be arguing that an assessment and a formal audit needed to be done, with notice to the taxpayer, to establish whether the tax had been paid or not.

420. With regard to the allegations that stamp duty was not paid, it is the Interested Party's contention that there is no evidence that the said slips were presented to KRA for scrutiny to confirm their authenticity. He asserts that in any event, the transfers were effected and it is inconceivable that a transfer would be registered without payment of stamp duty. He further argues that it is not even alleged that there was an under declaration of stamp duty payable. In his view, it is the duty of the Collector of Stamp Duty and the Registrar of Titles to be satisfied that duty was paid before the documents were registered.

421. The Interested Party also complains that the raid of his office, carting away of documents, and his subsequent arrest was *'carried out with such great urgency, and in such a synchronised…hurried manner'* leaving him in a confused state. We understand the Interested Party to be saying that had the investigations not been carried out in haste, and if there had been adequate time to properly audit his documents to establish their authenticity, then the forgery charges would not have been preferred against him.

422. We have already determined that the question of non-payment of stamp duty and the allegation of forgery of the documents in relation thereto could not be laid at the feet of the Petitioner, who is the principal party in this petition. The less said about this issue in this petition the better.

423. The Interested Party protests the delay in being taken to court after arrest, contending that Article 49(1)(f) of the Constitution makes it mandatory for the police to present an arrested person in court not later than 24 hours from the time of arrest. He laments that his constitutional rights were violated because he was arrested on 27th August 2018 at 1 p.m., but not presented in court until 5:30 p.m. on 28th August 2018 which was clearly beyond the 24 hours. He describes this as a demonstration of existence of ulterior motives in the arrest. That this is aggravated by the fact that the Interested Party was not admitted to police bond to appear in court the following day. Mindful of the holding of the Supreme Court in the **Methodist Church** case, we hold that this issue being outside the pleadings by the principal parties, is beyond the purview of this Petition.

424. The same fate must befall the Interested Party's arguments about the invasion and search of his office, confiscation of documents and infringement of Advocate/Client relationship. Accordingly, and guided by the binding decisions of the Supreme Court, it is our finding and we so hold, that we are unable to grant any of the orders sought by the Interested Party in his affidavit in support of the Petition.

Conclusion and Disposition

425. This Petition raised challenging questions relating to the manner in which allegations of criminal conduct against a sitting judge of a superior court should be addressed. The Petitioner alleged that the manner in which she was dealt with by the Respondents threatens not only her position as Deputy Chief Justice but also the independence of the judiciary. Balancing the competing challenges that require that the

independence of the judiciary is protected, while endeavouring not to immunise judges and judicial officers from liability for criminal conduct, is no mean feat. At the end of anxious deliberations on the issues, we have come to the following conclusions:

(i) We have found no violation of Articles 27, 28, 47, and 50(2) (a), (b,) (c),(j) and (k), as well as Article 157(11) of the Constitution with respect to the decision to prosecute the Petitioner;

(ii) There was a factual and legal basis for the initiation of the charges in respect to counts I and II against the Petitioner;

(iii) The charges were not defective for lack of a complainant as the Republic, through the National Police Service, is a proper complainant;

(iv) There was no factual or legal basis for initiation of the prosecution of the Petitioner on counts III, IV, V, VI, VII, VIII, X, XI and XII;

(v) The media coverage of the investigations, arrest and intended prosecution did not affect the Petitioner's right to a fair trial or infringe on her right to dignity;

(vi) The decision of the DPP to prosecute the Petitioner was not taken in contravention of Article 157(11) and was not tainted by any irrationality or unreasonableness;

(vii) Judicial immunity does not shield a judicial officer from criminal prosecution;

(viii) Acts of a criminal nature committed outside the scope of official judicial function may be investigated and the judicial officer arrested and prosecuted directly without recourse to the disciplinary or removal process;

(ix) While the DCI is not precluded from investigating criminal misconduct of judges, there is a specific constitutional and legal framework for dealing with misconduct and/or removal of judges. Consequently, cases of misconduct with a criminal element committed in the course of official judicial functions, or which are so inextricably connected with the office or status of a judge, shall be referred to the JSC in the first instance;

(x) The offence of abuse of office in count I of the charges against the Petitioner may amount to official misconduct as it relates to an alleged advantage obtained by virtue of her office as a Judge of the Court of Appeal and if proved, is in breach of the Judicial Code of Conduct, and ought, in the first instance, to have been referred to JSC;

(xi) Count II of the charges relates to obtaining of execution of security by false pretences contrary to section 314 of the Penal Code. The circumstances were outside the scope of the Petitioner's judicial duties and functions and it could therefore be tried directly without recourse to JSC.

426. Having found, however, that the DCI illegally obtained evidence against the Petitioner by gaining access to her accounts with IBL through the use of a court order that had no bearing on her accounts and having found that the DCI thereby misrepresented facts and misused the court order, we have come to the conclusion that the prosecution against the Petitioner cannot proceed. For this limited reason, we allow the Petition and grant the following orders:

a. A declaration be and is hereby issued that the evidence underpinning the intended prosecution of the Petitioner in Nairobi Chief Magistrate's Court ACC Criminal Case No. 38 of 2018 Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima was illegally obtained in a manner that was detrimental to the administration of justice;

b. An order of certiorari be and is hereby issued to quash the criminal proceedings in Nairobi Chief Magistrate's Court ACC Criminal Case No. 38 of 2018 Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima as against the Petitioner.

427. In view of our findings with respect to the peripheral role that an interested party plays in a constitutional petition, we are unable to issue any orders in respect to the Interested Party.

428. Each party shall bear its own costs of the Petition.

Dated Delivered and Signed in Nairobi this 31st day of May 2019

H. A. OMONDI

JUDGE

.....

MUMBI NGUGI

JUDGE

.....

FRANCIS TUIYOTT

JUDGE

.....

W. M. MUSYOKA

JUDGE

.....

E. C. MWITA

JUDGE