



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NUMBER 561 OF 2015**

**(CONSOLIDATED WITH JUDICIAL REVIEW NOS. 335 AND JUDICIAL REVIEW NO. 418  
OF 2016)**

**BETWEEN**

**WYCLIFFE AMBETSA OPARANYA.....1<sup>ST</sup> PETITIONER**

**COUNTY GOVERNMENT OF KAKAMEGA.....2<sup>ND</sup> PETITIONER**

**COUNCIL OF COUNTY GOVERNORS.....3<sup>RD</sup> PETITIONER**

**PETER GATIRAU MUNYA.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE SENATE OF THE REPUBLIC OF KENYA.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. On 7<sup>th</sup> December, 2016, this Court directed that Petition No. 561 of 2015 be consolidated with Judicial Review Nos. 335 and 418 of 2016 as the issues raised therein were related.
2. According to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners herein, **Wycliffe Ambetsa Oparanya**, the Governor of the 2<sup>nd</sup> Petitioner, the County Government of Kakamega (hereinafter referred to as ‘the County’), and the Council of County Governors (hereinafter referred to as “the Council”), the 3<sup>rd</sup> Petitioner the decision of the 1<sup>st</sup> Respondent (hereinafter referred to as “the Senate”) to Summon the 1<sup>st</sup> Petitioner to answer questions on the Auditor General’s report without giving the County Assembly the opportunity to examine the report and make its conclusions in the first instance undermines the legislative and oversight powers of the County Assembly under Article 185 of the Constitution. It was therefore contended that the Senate cannot thus exercise its powers under Article 96 of the Constitution in a manner that cripples the oversight mandate of the County.
3. To the said Petitioners, when a county assembly is considering a report of the Auditor General prepared

under Article 229 of the Constitution, the Senate cannot exercise its powers under Article 96 of the Constitution to simultaneously consider the same report. In other words, if a County Assembly is considering a financial/auditor-general's report, the Senate should not be simultaneously seized of the matter in a manner that undermines or competes with the County Assembly. In this case, it was averred that the documents that the 1<sup>st</sup> Petitioner was being asked by the Senate to respond to are the same documents that were then before the County Assembly of Kakamega.

4. To the Petitioners, the Senate's oversight role over nationally collected revenue to counties is not identical to the County Assembly's oversight over the executive which means that the Senate cannot scrutinize county expenditures in the same way that the committees and general assemblies of the county legislatures can but can only scrutinize county financial and other records for purposes of making a determination with regard to an impeachment, intervention in a county, suspension of a county, or for purposes of developing national legislation necessary for more prudent management of finances at the county level. Their view was that it cannot be the primary oversight body for audit reports for county governments under Article 229 of the Constitution.

5. It was contended that it is in recognition of the primacy of the County Assembly in the oversight over financial management of county finances that the Constitution mandates the Controller of Budget to submit reports to both Houses of Parliament on implementation of both national and county budgets but subsequently grants the Auditor General the discretion of presenting its reports to Parliament or the relevant county assembly.

6. Based on Articles 228 and 229 of the Constitution it was the Petitioners' case that the Constitution expects the relevant County Assembly to consider the Auditor General's reports in the first instance failure to which Parliament is activated thus the discretion. In their view, since the Senate has oversight roles on national revenue allocated to counties only (it has no oversight over grants, loans, and revenue generated locally by counties), the Senate must thus strive to maintain a careful balance between intruding in county governance and performing its "national-scale" oversight role in county finances. In any event, though the Governor is not the accounting officer of Kakamega County, the Senate has insisted that only a governor must appear before it in total disregard of the existing legal and constitutional structures of county public finance management and accounting and relied on sections 148 and 149 of the **Public Financial Management Act, 2012** in which it is provided that the Accounting Officers of a County Government are designated by the County Executive Member for Finance the it as opposed to the Governor. To them, the accounting officers of the various departments within Kakamega County Government that have been impugned in the Auditor General Report have always been available to answer any questions raised.

7. However, the 2<sup>nd</sup> Respondent has refused to let members of the County Executive Committee and Chief Officers at the Counties (who are the actual accounting officers) to appear before it to answer audit questions arising from the Auditor General's report under Article 229 of the Constitution. They added that as the Chief Officer Finance is the overall accounting officer of the 2<sup>nd</sup> Petitioner, the insistence that only Governors should appear reeks of cheap politics.

8. It was disclosed that it is public knowledge that most of the Senators in this Committee have gubernatorial ambitions that can be supercharged by a televised confrontation with their local Governor with the Senators having the upper hand of oversight thereby a "champion" for the voters back home.

9. Whereas the Petitioners acknowledged that Article 125 (1) of the Constitution provides that either House of Parliament and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information, it was their position that Article 125 of the Constitution which the Senate relied on in isolation of the other relevant portions of the Constitution, limits its summoning powers which powers can only be exercised by the Senate when it is properly seized of a matter in execution of its constitutional mandate. To the Petitioners, the 2<sup>nd</sup> Respondent is bound to exercise its powers under Article 125 of the Constitution reasonably and only when it is properly seized of a matter and also in a manner that does not violate or usurp the oversight powers of the county

assemblies. In this case, the 2<sup>nd</sup> Respondent having exercised its summoning powers under Article 125 of the Constitution on a matter that it is not seized on, the 1<sup>st</sup> Petitioner cannot be said to have committed a crime under section 23(a) of the *National Assembly (Powers and Privileges) Act*, Chapter 6 of the Laws of Kenya.

10. It was asserted that owing to the doctrine of superiority of the Constitution over statute, summons issued in breach of the constitutional separation of powers between the two levels of government are null and void ab initio and cannot bestow legality on subsequent acts and therefore the Summons by the 2<sup>nd</sup> Respondent therefore does not constitute a lawful order within the meaning of section 131 of the Penal Code and no penal or criminal sanctions can lawfully stem from an unconstitutional act.

11. The Petitioners therefore sought the following orders in petition 561 of 2015:

**a) A declaration that the Director of Public Prosecutions abdicated his constitutional duty in allowing the prosecution of the 1st Petitioner for alleged failure to honour summons that were issued in violation of Article 226(2) of the Constitution.**

**b) A declaration that in allowing the prosecution of the 1st Petitioner, the Director of Public Prosecutions neglected and abdicated his constitutional duty under Article 157(11) of the Constitution to prevent and avoid the abuse of the legal process and state powers of prosecution.**

**c) A declaration that the 2nd Respondent cannot exercise its powers under Article 96 of the Constitution in a manner that cripples the oversight mandate of the County Assembly of Kakamega in violation of under of the provisions of Articles 6(2) and 189 (1) of the Constitution.**

**d) A declaration that when a county assembly is considering a report of the Auditor General prepared under Article 229 of the Constitution, the 2nd Respondent cannot exercise its powers under Article 96 of the Constitution to simultaneously consider the same report.**

**e) A declaration that the Senate is bound by the provisions of Article 189 (1) of the Constitution to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the County level.**

**f) A declaration that there is no prosecutable case that the Director of Public Prosecution can commence premised on an alleged failure to honour summons that were issued in violation of Articles 96 and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012.**

**g) A declaration that section 131 of the Penal Code must be construed and interpreted in conformity with the Constitution and no offence is prosecutable under the provisions of Article 125 of the Constitution.**

**h) A declaration that section 131 of the Penal Code is inconsistent with Article 125 (2) of the Constitution to extend that it seeks to criminalize non-attendance to witness summons issued by a legislative body.**

**i) An order of certiorari to quash the Criminal Charge preferred against the 1st Petitioner under section 131 of the Penal Code.**

**j) An order of prohibition directed at the Director of Public Prosecution prohibiting the prosecution of the 1st Respondent for the offence of disobedience of lawful orders under section 131 of the Penal Code.**

**k) An order of prohibition directed at the Chief Magistrates' Court from proceeding with and conducting the trial of the 1st Petitioner premised on the complaint by the 2nd Respondent.**

**l) There be no order as to costs.**

12. What triggered judicial review no 335 of 2016 was, according to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, a letter dated 30<sup>th</sup> June, 2016 from the Senate inviting the Governor of Kakamega County, **Wycliffe Ambetsa Oparanya**, the 1<sup>st</sup> Petitioner to appear before it on 19<sup>th</sup> July, 2016 to purportedly answer questions on the Report of the Auditor General on the Financial Operations of the Kakamega County Executive for the financial year 2013/2014. To that invitation, the 1<sup>st</sup> Petitioner responded reminding the Senate that it was acting *sub judice* as there were two cases pending in the Courts touching on the very subject matter of the invitation and as such the Governor could not attend.

13. According to the Petitioners, the first case was the **Chief Magistrate's Court at Nairobi Criminal Case No. 2051 of 2015** in which the Senate is the Complainant and involves criminal prosecution of the 1<sup>st</sup> Petitioner for alleged failure to honour Senate summons in 2015 similar to the ones issued by the Senate on 19<sup>th</sup> July, 2016 while the second case, **Constitutional Petition 561 of 2015: Wycliffe Oparanya & Council of Governors vs. The Office of the Director of Public Prosecutions & the Senate** challenges the constitutionality of summoning Governors on matters pertaining Auditor General's Reports whereas a Governor is not an accounting officer and of criminal prosecution of the Governor for failure of a party to honour summons issued under Article 125 of the Constitution, which matter was pending before this Court.

14. The Senate however through a Letter dated 19<sup>th</sup> July, 2016 responded that because the cases in Court dealt with a previous summon, despite the glaring similarity, the *sub judice* rule did not apply and the same day the Senate issued summons requiring the Governor to attend before it on 28<sup>th</sup> July, 2016 to which a similar response as the first one was made by the 1<sup>st</sup> Petitioner. Further, he reminded the Senate the question of whether a Governor is an accounting officer who can be summoned by the Senate to answer questions on Auditor General Reports was pending determination in Petition 561 of 2015 to which it is a party. In the above letter, the 1<sup>st</sup> Petitioner informed the Senate that the respective accounting officers of the various County departments designated under section 148 of the **Public Finance Management Act, 2012** were available and were willing to attend the Senate Committee on 28<sup>th</sup> July, 2016 to respond to audit queries for financial year 2013/2014 touching on their individual departments. The Senate however did not respond to this.

15. It was disclosed that on 28<sup>th</sup> July, 2016, the various accounting officers from the County attended the Senate Committee to answer queries raised in the Auditor General's Report but were not allowed to answer the queries raised and informed that the Senate Committee would instruct the Inspector General of Police to arrest and have the 1<sup>st</sup> Petitioner charged with failure to honour Summons. It was this threat, according to the Petitioners that provoked these proceedings.

16. According to the Petitioners, it is apparent that the Senate, and especially the Senator from Kakamega who publicly instigated the previous prosecution, is highly desirous of a fresh prosecution of the 1<sup>st</sup> Petitioner following the stay issued by the Court. To them, the Senate as such is trying to compromise the pending cases by maliciously instigating prosecution of the Governor. If indeed the Senate was confident that it would prevail in Petition 561 of 2015 thereby allowing the existing prosecution to continue to finality, there would be no need to delay that Petition and at the same time pursue similar charges against the Governor. They asserted that the earlier summons of 2015 that led to the pending cases was issued by the same Committee to discuss the contents of the report of Auditor General submitted under Article 229 of the Constitution and that the current Summons are the subject of the same report. It was contended that just like last time, the Auditor General Report that the Senate wanted to examine was before the County Assembly of Kakamega for consideration and as such the Senate should not exercise its powers in manner to usurp the oversight authority of a County Assembly. To them, the question of whether the Senate can exercise its oversight powers over matters already placed before a County Assembly, as is the case herein,

is also pending determination in Petition 561 of 2016. Their position is that the Senate's oversight powers under Article 96 of the Constitution do not grant it appellate or concurrent jurisdiction over matters properly before a County Assembly and that Article 6(2) of the Constitution provides that the governments at the national and county levels are distinct and inter-dependent. Further, Article 189(1)(a) of the Constitution provides that Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level.

17. The Petitioners averred that in considering and making a determination on the queries raised in the Auditor General's Report tabled before it the County Assembly of Kakamega was properly exercising its oversight function under Article 185(3) of the Constitution and that the County Assembly of Kakamega and the Senate are distinct bodies with full legislative and oversight powers and cannot purport to sit in appeal of each other's decisions since none is inferior to the other. The Applicants contended that Article 10 of the Constitution enjoins the Respondents to ensure that the national principle of sharing and devolution of power, is discharged when exercising their powers and performing their duties and in their view, a cursory glance at Petition 561 of 2016 as filed will reveal that the current Summons and the desired prosecution is an attempted usurpation or bypassing of the High Court's mandate to determine the issues raised therein.

18. To the Petitioners, lack of jurisdiction, bad faith, unreasonableness, in violation of legitimate expectation, unfair or which result from or in abuse of power are strong grounds for judicial review.

19. The 4<sup>th</sup> Petitioner's case was, on the other hand provoked by the summons issued by the Senate dated 23<sup>rd</sup> August, 2013 by which the said Petitioner was required to appear on 5<sup>th</sup> September, 2016 to answer queries raised by the Auditor General on Financial operations of Meru County Executive for the Financial Year 2013/2014.

20. However due to the 4<sup>th</sup> Petitioner's engagement with the Council, he arranged for the County Minister of Finance and all Accounting Officers and other senior county governments responsible for finance and procurement to appear before the Senate on the said date but the said officers declined to give them audience insisting that the 4<sup>th</sup> Respondent appears in person. The Senate thereafter ordered the arrest of the 4<sup>th</sup> Petitioner. It was therefore the 4<sup>th</sup> Petitioner's case that the Senate Committee was not interested in the information it was purportedly seeking.

21. According to the 4<sup>th</sup> Petitioner, the County Government is a superstructure of various entities and despite he being the Chief Executive Officer of the County Government, there are various accounting officers, procurement and finance officers who make independent decisions and are constitutionally and statutorily responsible for them and that the 4<sup>th</sup> petitioner cannot interfere with their decisions as doing so would amount to abuse of office. To him when such officers appear they are better placed to answer to the specific audit/accounting queries in the county government and therefore should not be turned away.

22. The 4<sup>th</sup> Petitioner averred that prior to the said summons he had never received any communication from the Senate apart from media reports to that effect.

23. It was the 4<sup>th</sup> Petitioner's case that pursuant to Articles 226(2) and 229(8) of the Constitution, the said accounting officers had appeared before the County Assembly to answer audit issues for the year 2013/2014 and the said issues had been conclusively dealt with hence to summon him was irrational. Similarly, the decision to instruct the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to arrest him on account of the said summons was unreasonable, illogical, groundless and unjustifiable in the circumstances.

24. The Petitioners referred to Article 96(c) of the Constitution which provides as one of the functions of the Senate the exercise of oversight over national revenue allocated to the county governments hence the Senate is bound to exercise its powers strictly in accordance with this provision of the Constitution. The Petitioners further referred to Article 174 of the Constitution which provides the objectives of devolution amongst others as follows:-

- a. to promote democratic and accountable exercise of power;
- b. to foster national unity by recognizing diversity; and
- c. *to enhance checks and balances and the separation of powers.*

25. They also referred to Article 185(1) of the Constitution which provides that the legislative authority of a county is vested in, and exercised by, its county assembly and submitted that in the exercise of its powers, the Senate is obligated to respect the legislative power and institutional constitutional mandate of a county assembly. Further Article 185(3) provides that a county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organ. In the exercise of its powers, the Senate is obligated to respect the oversight powers of a county assembly while Article 226(2) of the Constitution provides that an accounting officer of a national public entity is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

26. In the Petitioners' submissions, this means that the County Assembly is the body that is constitutionally charged with the responsibility of ensuring that revenue that is devolved to a county government is spent in a manner that respects the principles of devolution and public finance. Therefore the decision of the Senate to summon the 1<sup>st</sup> Petitioner to answer questions on the Auditor General's report without giving the County Assembly the opportunity to examine the report and make its conclusions in the first instance undermines the legislative and oversight powers of the County Assembly under Article 185 of the Constitution. To them, the Senate cannot thus exercise its powers under Article 96 of the Constitution in a manner that cripples the oversight mandate of the County Assembly of Kakamega.

27. It was submitted that when a county assembly is considering a report of the Auditor General prepared under Article 229 of the Constitution, the Senate cannot exercise its powers under Article 96 of the Constitution to simultaneously consider the same report. At most, if a County Assembly is considering a financial /auditor-general's report, the Senate should not be simultaneously seized of the matter in a manner that undermines or competes with the County Assembly.

28. In this case the documents that the Governor was being asked by the Senate to respond to are the same documents that were then before the County Assembly of Kakamega. To the Petitioners, the Senate's oversight role over nationally collected revenue to counties is not identical to the County Assembly's oversight over the executive. This means that the Senate cannot scrutinize county expenditures in the same way that the committees and general assemblies of the county legislatures can. The Senate, they contended can only scrutinize county financial and other records for purposes of making a determination with regard to an impeachment, intervention in a county, suspension of a county, or for purposes of developing national legislation necessary for more prudent management of finances at the county level. It cannot be the primary oversight body for audit reports for county governments under Article 229 of the Constitution. To them, it is in recognition of the primacy of the County Assembly in the oversight over financial management of county finances that the Constitution mandates the Controller of Budget to submit reports to both Houses of Parliament on implementation of both national and county budgets but subsequently grants the Auditor General the discretion of presenting its reports to Parliament or the relevant county assembly. The Petitioners cited the relevant provisions of Articles 228 and 229.

29. In their view, the Constitution expects the relevant County Assembly to consider the Auditor General's reports in the first instance failure to which Parliament is activated thus the discretion. It is also telling that the Senate has oversight roles on national revenue allocated to counties only (it has no oversight over grants, loans, and revenue generated locally by counties). Therefore, the Senate must strive to maintain a careful balance between intruding in county governance and performing its "national-scale" oversight role in county finances.

30. It was however submitted that whereas the Governor is not the accounting officer of Kakamega

County, the Senate has insisted that only a governor must appear before it in total disregard of the existing legal and constitutional structures of county public finance management and accounting. In this respect they relied on Article 226(1) of the Constitution.

33. Pursuant to this, the ***Public Financial Management Act, 2012*** has been enacted which designates accounting officers and reporting/auditing of county government finances and referred to sections 148 and 149 of the ***Public Financial Management Act, 2012*** and submitted that it is accounting officers who are accountable for lawful use of county resources. It was submitted that the above section does not contemplate the Governor to be the accounting officer of any entity within the County Government. The accounting officers of the various departments within Kakamega County Government that have been impugned in the Auditor General Report have always been available to answer any questions raised. Therefore the insistence that only Governors should appear reeks of cheap politics. The Petitioners referred to Kerugoya Constitutional Petition Number 8 of 2014 - **International Legal Consultancy Group vs. The Senate, Clerk of The Senate and the Senate [2014] eKLR** and the ruling delivered by **Mumbi Ngugi, J** while determining the Chamber Summons application filed in this matter.

34. The Senate was in this case accused of having exercised its powers in the instance case in the most capricious, unreasonable and malicious manner in blatant disregard of the functions of the Kakamega County Assembly created under the Constitution.

35. The Petitioners appreciated that Article 125(1) of the Constitution provides that either House of Parliament and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information and that the Senate relied on Article 125 in isolation of the other relevant portions of the Constitution which limit its summoning powers. It was submitted that the powers to summon anyone under Article 125 can only be exercised by the Senate when it is properly seized of a matter in execution of its constitutional mandate and they relied on **Olum vs. Attorney General of Uganda (2002) 2 EA 508**, **Smith Dakota -vs- North Carolina 192 vs. 268 (1940)** and **Tinyefuza vs. Attorney-General Const. Pet. No 1 of 1996 (1997 UGCC 3)**, as quoted in **Community Advocacy and Awareness Trust & 8 others vs. Attorney General & 6 Others [2012] eKLR**.

36. In Supreme Court Advisory Opinion No. 2 of 2013 - **Speaker of the Senate & Another -vs- Hon. Attorney General & 3 Others** Mutunga, CJ. stated thus;

**“This is the same rule of interpretation that I previously alluded to in the Advisory Opinion on Gender, in stating that a Constitution does not subvert itself. I therefore reiterate what the majority opinion has stated – that it would be completely out of order for the Speaker of the National Assembly to interpret the powers of the National Assembly by only looking at Article 95 of the Constitution, without paying regard to Articles 96 and 110 of the Constitution which unequivocally incorporate the role of the Senate and of its Speaker.”**

37. Based on the foregoing it was submitted that the Senate should only exercise its powers to summon strictly when exercising its Constitutional roles.

38. The Petitioners also referred to Article 125(2) of the Constitution which provides that for the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise, to compel the production of documents and to issue a commission or request to examine witnesses abroad. In this case it was however submitted that the 1<sup>st</sup> Petitioner is not a witness and is not withholding any evidence. The accounting officers in the various county departments impugned by the Auditor General Report are the proper witnesses. In this respect they relied on **Kerugoya Constitutional Petition Number 8 of 2014** (supra).

39. It was submitted that the Senate is bound to exercise its powers under Article 125 of the Constitution reasonably and only when it is properly seized of a matter and also in a manner that does not violate or usurp the oversight powers of the county assemblies. In this case the Senate having exercised its summoning powers under Article 125 of the Constitution on a matter that it is not seized on, the 1<sup>st</sup>

Petitioner cannot be said to have committed a crime under section 23(a) of the *National Assembly (Powers and Privileges) Act*, Chapter 6 of the Laws of Kenya.

40. According to the Petitioners, owing to the doctrine of superiority of the Constitution over statute, summons issued in breach of the constitutional separation of powers between the two levels of government are null and void *ab initio* and cannot bestow legality on subsequent acts. The Summons by the Senate therefore does not constitute a lawful order within the meaning of section 131 of the *Penal Code* and no penal or criminal sanctions can lawfully stem from an unconstitutional act.

41. It was contended that the DPP intends to prefer a charge of Disobedience of a lawful order under section 131 of the *Penal Code* which charge is premised on alleged disobedience of a Witness Summons (Summons) issued by the Senate. However, the Petitioners' position is that failure to attend the Senate, even when proven, does not avail the application of the *Penal Code* as the *National Assembly (Powers and Privileges) Act* makes a provision for a charge and penalty under it. Section 131 of the *Penal Code* provides that where another statute deals specifically with a matter in question the rule is to apply the provisions of the specific Statute and not the *Penal Code* which is of a more general application.

42. It was however submitted that since section 23(a) of the *National Assembly (Powers and Privileges) Act* already provides a specific penalty for dealing with a failure to attend the Senate, a charge under Section 131 of the *Penal Code* therefore cannot subsist. However, in view of the unconstitutional and unlawful nature of said Summons as illustrated earlier, a criminal charge under section 23(a) of the *National Assembly (Powers and Privileges) Act* and/ or the section 131 of the *Penal Code* cannot subsist.

43. They in any event submitted that allegations of failure to obey witness summons issued under Article 125 of the Constitution does not create basis for the exercise of prosecution powers under the *Penal Code* since section 125(2) of the Constitution provides a mechanism for the compellability of the witness to attend a legislative function without resorting to the *Penal Code*. They submitted that there is no precedence in the High Court's exercise of its powers to compel attendance of a witness where such a witness has been arrested and charged with disobedience under section 131 of the *Penal Code*. It was contended that the Senate's exercise of summoning powers at par with those of the High Court in its few years of existence cannot lead to a precedent that has never emerged in the decades in which the High Court has exercised similar powers. In this respect they referred to **Council of Governors & 6 others vs. Senate [2015] eKLR** which was categorical that the legislature cannot exercise its powers to enforce summons in a manner that the High Court would not thus:

**“Article 125 of the Constitution provides that where summons are issued by either House of Parliament and any of their committees, the House shall have the “same powers as the High Court – to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise.” Stoppage of withdrawal funds is certainly not one of the ways that this Court enforces the attendance of witnesses neither should the Senate purport to have such powers.”**

44. It was therefore submitted that since failure to honour High Court summons does not lead to prosecution under the *Penal Code*, failure to honour a legislative summon cannot lead to a criminal sanction of a nature that would not arise at the High Court. As such the only punitive power that the Committee of the National Assembly has in regard to a person not honouring summons is contempt proceedings similar to the High Court and sought support from section 5 of the *Judicature Act*. According to the Petitioners, in Australia where the British law and practice and contempt have been adopted by the national and provincial legislatures, failure to co-operate with a Committee leads to contempt proceedings. Even there, strong punitive powers of the legislatures are rarely exercised. They referred to *The Uncooperative Witness: The Punitive Powers Of Parliamentary Committees* by Patrick Dupont that:

***Strong committee punitive powers extend to all Australian jurisdictions except the ACT and include the power to fine or imprison individuals found to be in contempt. South Australia and Victoria have taken on all the powers of the Commons while in Queensland, Tasmania and Western Australia there are restrictions imposed on the power to punish with punitive powers***

*limited to certain offences (Campbell 1999, p197). Campbell also says that any sentence handed down by a house would potentially contravene Article 14 of the International Covenant on Civil and Political Rights to which Australia is signatory. Article 14 stipulates that persons charged with criminal offenses have a right to a 'fair and public hearing by a competent, independent and impartial tribunal established by law' (p199). However Australia and other countries have a history of ignoring international conventions so the point is a mute one. Moreover, Campbell says that even when houses have powers to fine and imprison they are very unlikely to impose such punishments (p203), with houses often content to record judgements and make admonitions or reprimands.*

45. In the Petitioners' view, in view of the mandatory provisions of Article 125(2) of the Constitution the Respondents cannot prefer criminal charges against the 1<sup>st</sup> Petitioner under section 131 of the **Penal Code**. To them, pursuant to Article 125(2) of the Constitution, the Senate does possess the power to call for evidence or information in aid of its legislative function. Failure to honour summons where a party is not a witness and no information is withheld does not attract any criminal sanctions under Article 125 of the Constitution or in actual practice in democracies across the world. With respect to the futility of punishing persons who don't honour summons they referred to elucidation in *The Uncooperative Witness: The Punitive Powers of Parliamentary Committees* (supra) as follows;

*To this end, committees are delegated powers from their respective houses, to summon witnesses and compel evidence as well as to pursue and punish any recalcitrant witnesses. While these powers appear prima facie to be strong enough to encourage witness cooperation, in practice punitive powers are rarely (if ever) exercised...Generally committees will opt to move on to more productive activities rather than choosing to pursue an uncooperative witness.*

46. It was further contended that as illustrated earlier the summons issued by the Senate would not constitute a 'lawful order, warrant or command' within the meaning of section 131 of the **Penal Code** having been in breach of the constitutional demarcation of oversight powers of the Senate and County Assemblies and therefore the decision to prosecute the 1<sup>st</sup> Petitioner has no reasonable or lawful basis. In their view, section 131 of the **Penal Code** must be construed and interpreted in conformity with the Constitution no offence is prosecutable under the provisions of Article 125 of the Constitution.

47. It was submitted that Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not be under the direction or control of any person or authority in the exercise of his functions while Article 157(11) of the Constitution provides that 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. In this case the impugned Summons against the 1<sup>st</sup> Petitioner was issued by a Committee of the Senate that is chaired by **Honourable Boni Kwalwale**, the Senator representing Kakamega County who had publicly declared his intention to vie for Kakamega County Governor position against the 1<sup>st</sup> Petitioner in the 2017 election cycle. It was submitted that as the said Summons was issued by a Committee that is chaired by a vindictive Senator with fundamental intrinsic negative interests against the 1<sup>st</sup> Petitioner to advance an unlawful purpose, the abuses of the legal process is apparent from the chain of events that led to the prosecution of the 1<sup>st</sup> Petitioner.

48. It was contended that to approve charges in light of the apparent abuses of the legal process that is apparent on the face of the face of the evidence indicates that the DPP did not act independently and was directed to prefer charges by the Senate as political payback. To the Petitioners, the decision to prefer a criminal charge against the 1<sup>st</sup> Petitioner under section 131 of the **Penal Code** when a simple perusal of the **National Assembly (Powers and Privileges) Act** reveals that refusal to honour a proper summons has already been penalized therein points to collusion with the Senate. The decision of the DPP is in breach of the constitutional duty to prevent and avoid abuse of legal process. The Director of Public Prosecutions further abdicated his constitutional duty in allowing the prosecution of the 1<sup>st</sup> Petitioner for alleged failure to honour summons that were issued in violation of Article 226 (2) of the Constitution

49. It was submitted that an objective and impartial analysis of the factual and political matrix of this matter leads to the conclusion that no reasonable prosecutor acting competently, independently and professionally could have reached the decision to prosecute the 1<sup>st</sup> Petitioner on the basis of the complaint by the Senate's Committee chaired by Senator of Kakamega County who is the prime mover in the prosecution and persecution of the 1<sup>st</sup> Petitioner. The decision to charge the 1<sup>st</sup> Petitioner is therefore an abuse of the state powers of prosecution under the Constitution. In their view, the prosecution of the 1<sup>st</sup> Petitioner has been designed, calculated and intended to achieve extraneous a collateral purpose and not for the legitimate purposes of the criminal justice system and this Court should not allow the same to proceed as the same violates Article 47(1) of the Constitution which provides that every person has the right to administrative action that is lawful, reasonable and procedurally fair. The decision to prosecute was not lawful, reasonable or procedurally fair.

50. With respect to the fresh summons dated 19<sup>th</sup> July, 2016, it was submitted that the Senate through a Letter dated 30<sup>th</sup> June, 2016 invited the Governor of Kakamega County to appear before it on 19<sup>th</sup> July, 2016 to purportedly answer questions on the Report of the Auditor General on the Financial Operations of the Kakamega County Executive for the Financial year 2013/2014. The Governor through a letter dated 14<sup>th</sup> July, 2016 responded to the invitation by reminding the Senate that it was acting *sub judice* as there are two cases pending in the Courts touching on the very subject matter of the invitation and as such the Governor could not attend. Owing to the weighty constitutional issues raised in the current Petition, the Court saw it fit on 9<sup>th</sup> February, 2016 to stay criminal proceedings against the 1<sup>st</sup> Petitioner in the Criminal Court pending the hearing and determination of the Petition. However, the Senate through a Letter dated 19<sup>th</sup> July, 2016 responded that because the cases in Court dealt with a previous Summon, despite the glaring similarity, the *sub judice* rule did not apply. Thereafter, the Senate issued summons on the same day requiring the Governor to attend before it on 28<sup>th</sup> July, 2016.

51. It was disclosed that on 25<sup>th</sup> July, 2016, the Governor responded to the Senate's letter of 19<sup>th</sup> July, 2016 and Summons by reiterating that the matter was indeed *sub judice* and as such he would not be attending the Senate's Committee on 28<sup>th</sup> July, 2016. Further, he reminded the Senate the question of whether a Governor is an accounting officer who can be summoned by the Senate to answer questions on Auditor General Reports was pending determination in this Petition to which it is a party. In the above letter, the Governor informed the Senate that the respective accounting officers of the various County departments designated under Section 148 of the **Public Finance Management Act, 2012** were available and were willing to attend the Senate Committee on 28<sup>th</sup> July, 2016 to respond to audit queries for financial year 2013/2014 touching on their individual departments. The Senate did not respond to this.

52. It was disclosed that on 28<sup>th</sup> July, 2016, the various accounting officers from the County attended the Senate Committee to answer queries raised in the Auditor General's Report. However, they were not allowed to answer the queries raised and informed that the Senate Committee would instruct the Inspector General of Police to arrest and have the Governor charged with failure to honour Summons.

53. According to the Petitioners, it is apparent that the Senate, and especially the Senator from Kakamega who publicly instigated the previous prosecution, was highly desirous of a fresh prosecution of the Governor now that the previous instance had stayed by the Court. To them, the earlier summons of were issued by the same Committee to discuss the contents of the report of Auditor General submitted under Article 229 of the Constitution. The fresh Summons are about the Report too. The fresh Summons and the desired prosecution was an attempted usurpation or bypassing of the High Court's mandate to determine the issues raised herein. From the above, it is apparent that the fresh Summons of 19<sup>th</sup> July, 2016 was issued in bad faith.

54. The Petitioners relied on Article 229(4) as read with Article 229(8) of the Constitution that require Parliament to dispose of the Auditor General Report's report within 3 months after receipt of the report which is required to be prepared within 6 months at the end of each financial year. However, the Senate has summoned the Governors to answer audit queries with respect to the 2013/2014 financial year well outside the Constitutional deadline as prescribed in Article 229(8) of the Constitution.

55. In regard to the 4<sup>th</sup> Petitioner, it was submitted that as the issues with respect to the 2013/2014 financial year have already been conclusively addressed by the County Assembly as per Article 229(8) of the Constitution, the said Summons are thus unconstitutional.

56. The Petitioners therefore prayed that the consolidated Petition be allowed.

57. In a summary the orders which the Petitioners sought were as follows:

**1) A declaration that the Director of Public Prosecutions abdicated his constitutional duty in allowing the prosecution of the 1<sup>st</sup> Petitioner for alleged failure to honour summons that were issued in violation of Article 226(2) of the Constitution and his constitutional duty under Article 157(11) of the Constitution to prevent and avoid the abuse of the legal process and state powers of prosecution.**

**2) A declaration that the 2<sup>nd</sup> Respondent cannot exercise its powers under Article 96 of the Constitution in a manner that cripples the oversight mandate of the County Assembly of Kakamega in violation of under of the provisions of Articles 6(2) and 189 (1) of the Constitution.**

**3) A declaration that when a county assembly is considering a report of the Auditor General prepared under Article 229 of the Constitution, the 2<sup>nd</sup> Respondent cannot exercise its powers under Article 96 of the Constitution to simultaneously consider the same report and that the Senate is bound by the provisions of Article 189(1) of the Constitution to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the County level.**

**4) By way of Judicial Review an Order of Prohibition be issued directed against the 1<sup>st</sup> Respondent prohibiting it from summoning Wycliffe Oparanya the Governor, Kakamega County in respect of matters under consideration by the County Assembly of Kakamega.**

**5) A declaration that there is no prosecutable case that the Director of Public Prosecution can commence premised on an alleged failure to honour summons that were issued in violation of Articles 96 and 226(2) of the Constitution of Kenya and section 148 of the *Public Financial Management Act 2012*.**

**6) A declaration that section 131 of the Penal Code must be construed and interpreted in conformity with the Constitution and no offence is prosecutable under the provisions of Article 125 of the Constitution.**

**7) A declaration that section 131 of the Penal Code is inconsistent with Article 125(2) of the Constitution to extend that it seeks to criminalize non-attendance to witness summons issued by a legislative body.**

**8) An order of certiorari to quash the Criminal Charge preferred against the 1<sup>st</sup> Petitioner under section 131 of the Penal Code.**

**9) An order of prohibition directed at the Director of Public Prosecution prohibiting the prosecution of the 1<sup>st</sup> Petitioner for the offence of disobedience of lawful orders under section 131 of the Penal Code.**

**10) An order of prohibition directed at the Chief Magistrates' Court from proceeding with and conducting the trial of the 1<sup>st</sup> Petitioner premised on the complaint by the 2<sup>nd</sup> Respondent.**

**11) By way of Judicial Review an Order of Prohibition be issued directed against the 2<sup>nd</sup> and**

3<sup>rd</sup> Respondents prohibiting them, their agents and assigns from arresting and preferring fresh charges against Wycliffe Oparanya, the Governor, Kakamega County.

12) By way of Judicial Review an order of Certiorari be issued to remove and bring to this Honourable Court for purpose of quashing and quashing the Summons of the Senate to Wycliffe Oparanya, the Governor, Kakamega County dated 19<sup>th</sup> July, 2016.

13) An Order of Prohibition directed against the 1<sup>st</sup> Respondent prohibiting it from summoning Peter Gatirau Munya, the Governor of Meru County in respect of the Auditor General's Report of the Financial year 2013/2014.

14) An Order of Prohibition directed against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prohibiting them, their agents and assigns from arresting Peter Gatirau Munya, the Governor of Meru County in execution of the instructions of the 1<sup>st</sup> Respondent that are based Auditor General's Report of the Financial year 2013/2014 and summons of the 1<sup>st</sup> Respondent dated 23<sup>rd</sup> August, 2016.

15) An Order of Certiorari to remove and bring to this Honourable Court for purpose of quashing the Summons of the Senate to Peter Munya, the Governor, Meru County dated 23<sup>rd</sup> August, 2016.

16) Costs of this application be provided.

### 1<sup>st</sup> Respondent's Case

58. In opposition to the petition and the applications the 1<sup>st</sup> Respondent filed the following grounds of opposition:

1) No sufficient grounds have been advanced to warrant

59. According to the 1<sup>st</sup> Respondent, the DPP, the grounds as stated by the Petitioner are not grounds for issuance of orders sought.

60. It was contended that on the 24<sup>th</sup> day of November 2015, the DPP received a letter from the Office of the Clerk of the Senate vide ref No. DLS(S)/GEN-CORR/75 whose subject was '**Failure to Honour Summons: Hon. Wycliffe Oparanya, Governor of Kakamega County**' and on 25<sup>th</sup> November 2015 the DPP wrote a letter vide ODPP/CAM/1/566 to the Director- Directorate of Criminal Investigations (DCI) directing him to take steps in regard to the Senate letter. Pursuant to investigations by the DCI, witness statements were recorded and upon analysis of the evidence on record, the DPP established that the evidence on the record disclosed that the 1<sup>st</sup> Petitioner had committed the offence of Disobeying Lawful Order contrary to section 131 of the **Penal Code**.

61. According to the DPP, Article 157(6), the Director of Public Prosecutions *exercises State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed*". Article 157(10) provides that the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of any criminal proceedings and the exercise of power shall not be under direction or control of any person or authority. It was averred that **Webster's New World College Dictionary, 5<sup>th</sup> Edition** defines a summons as;

***'An order or command to come, attend, appear, or perform some action. A written notice for a person to appear before a court under penalty of having a judgment entered against that person for failing to appear; a written notice to a person to appear for jury duty; a written notice to appear in court to testify as a witness in a case.***

62. The DPP also relied on *Law Dictionary's* definition of an order as; ***'A mandate. Precept; a command or direction authoritatively given; a rule or regulation. It is a mandatory act'. Similarly,***

63. The DPP also relied on ***Travers vs. Baltimore Police Department (1997)*** where it was stated that ***'... It is recognized elsewhere that an "order" is a mandate or precept, or a command or direction authoritatively given'*** and ***Potter vs. Janus Investment Fund (2007)*** for the holding that ***"the ordinary and plain meaning" of the term "order".."(a) a command, direction or instruction"...(arriving at a similar construction of the meaning of the term "order" as employed in the statute: "a...mandate, percept, command or direction authority given, rule or regulation.'***

64. According to the DPP, summons are lawful orders and as such the decision to charge the 1<sup>st</sup> Petitioner under section 131 of the *Penal Code* are legal and proper and this court should not interfere with the decision of the DPP to charge the petitioner and reliance was placed on Misc. Civil Appl. No. 152 of 2006 - ***Republic vs. The Chief Magistrate Nairobi Law Courts Ex-parte Helmuth Rame*** and it was contended that since the decision of the DPP was a quasi-judicial decision, the court should not quash prosecution of this case since according to the DPP, the prosecution is not illegal and is not abuse of office. In support of this position he relied on ***Teh Cheng Poh vs. Public Prosecutor [1979] 1 MLJ 50 at 56*** where Lord Diplock said:

***"... Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such discretion is conferred upon the Attorney General of Malaysia by Article 145(3) of the [Malaysian] Constitution ..." "If indeed the Attorney General [of Malaysia] was possessed of a discretion to choose between prosecuting the appellant for an offence [under] section 57(1) of the [ISA 1960], or for an offence under the Arms Act [1960] ... and the Firearms (Increased Penalties) Act [1971], ... there is no material on which to found an argument that in the instant case he exercised it unlawfully. But, in their Lordships' view, although he had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the appellant but not proceeded with), once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the [ISA 1960]."***

65. It was averred that based on Article 157 sub Article 6 the 1<sup>st</sup> Petitioner had not demonstrated that the decision to prefer the charges under the *Penal Code* is unlawful and support or this position was sought from ***Ramalingam Ravinthran vs. Attorney General [2012] SGCA 2*** where the court stated that:

***'...The prosecutorial power is part of the executive power, although, under existing constitutional practice, it is independently exercised by the Attorney-General as the Public Prosecutor. In view of his high office, the courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of whether he was acting alone or in concert with other offenders), the Attorney-General does so in accordance with the law. In other words, the courts should presume that the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise.'***

66. It was submitted that there is separation of Powers between the Director of Public Prosecutions and the Judiciary and or Courts. Both Prosecutions and Judiciary are regarded as separate hence there is a presumption that the decisions made by DPP are constitutional and in this respect the DPP relied on ***Quick Hock Lye vs. Public Prosecutor (2012) 2 SLR at 28*** where it was stated that:

***"it is not the function of the court to prefer charges against an accused brought before it. The courts exercise its judicial power in relation to the charge or charges brought by the Public Prosecutor against an accused person."***

67. In this case it was submitted that since the DPP has preferred a charge of disobeying lawful Orders contrary to section 131 of the Penal Code, the Court cannot intervene or encroach on prosecutor's powers

to charge under section 131 of the **Penal Code** unless the Petitioner demonstrates that the decision to charge and exercise of prosecutorial powers is unconstitutional which has not been demonstrated. In this respect the DPP relied on High Court Civil Case No. 61 of 2006 and 196 of 2006 - **Bryan Yongo vs. Hon. Attorney General**. It was submitted that in charging the Petitioner there has been no abuse of the court process and that a decision to prosecute was based on evidential test and public interest and has a probable chance of conviction. And reliance was placed on **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323**.

68. To the DPP, it is in the public interest that a crime is brought to book before competent court of law. The decision to prosecute is subject to the evidentiary and the public interest test. Indeed the DPP independently evaluates the evidence on the file submitted by the CID and makes a decision as to whether to prosecute or not. Indeed Article 157(6) of the Constitution vest state powers of prosecution to the Director of Public prosecutions, while Article 159 vests judicial powers to the courts and he relied on **Thuita Mwangi & 2 Others vs. Ethics & Anti-Corruption Commission & 3 Others [2013] eKLR** and submitted that the Petitioner has not demonstrated how DPP has abdicated his duties under Article 157(11) of the Constitution.

69. According to the DPP, a *prima facie* case is made out if on the evidence the court can convict if the accused person does not call evidence in rebuttal. See **Ramanlal Trambaklal Bhatt vs. Republic (1957) EA 332**. According to the DPP, although the High Court should not go into the merits of the case, the Petitioners have to a large extent made reference to the facts and evidence in the file largely albeit to try and prove to this Court that there is no evidence to support the offence of Disobeying Lawful Order contrary to section 131 of the **Penal Code**. To the DPP, the question here is whether the Petitioner obeyed the summons. Without necessarily going through the entire prosecution's evidence it is clear that the CID carried out investigations and recorded statements from seven (7) witnesses, collected exhibits and or documents and further recorded the Petitioners statement under inquiry. The upshot is that the evidence on record is overwhelming against the Petitioner that the Petitioner did not obey the Senate summons. It was submitted that this court has clearly stated that it is the duty of the trial court to take the evidence both from the prosecution and the defence and to weigh that evidence and determine the case one way or another and as was held in **Mexiner & Another vs. The Attorney General, Civil appeal No. 131 of 2005**, sufficiency or otherwise of evidence to support the charges were matters of evidence and that:

**“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”**

70. Similarly in **Beatrice Ngunyo Kamau & 2 others v Commissioner of Police and the Director of Criminal Investigations Department & Another Petition 251 of 2012 [2013] eKLR**, Lenaola J., captured this balance as follows:

**The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.”**

71. It was the DPP's case that the accuracy and correctness of the evidence/facts gathered in the investigation can only be tested by the trial court during the hearing. To him, all the matters of facts deposed to in the supporting affidavit of the petitioner herein were matters of evidence for consideration by the trial court during a full trial and on the basis of which the guilt or otherwise of the applicant would be determined by that court.

72. It was the DPP's position that the Petitioner had not demonstrated how his rights have been contravened by the 1<sup>st</sup> Respondent as no specific allegations have been made in regards to the above mentioned Articles of the Constitution, 2010. They have merely listed the Article and the alleged particulars do not constitute breach of their constitutional rights. Indeed they have failed to demonstrate

how the DPP violated their rights. In this respect the DPP relied on **Matiba vs. AG (1990) KLR 666, Anarita Karimi vs. AG (1979) KLR 54** and **Civil Suit No. 1192 of 2005 - William S. K Ruto & Another vs. AG.**

73. In the DPP's view, an investigation into the commission of an offence is not an infringement of the Petitioner's rights. An offence has been committed and it is in the public interest that the said is investigated and prosecuted. The respondent submits that the applicant's rights are not absolute but are subject to the rights of the public.

74. With respect to the challenges taken to section 131 of the Penal Code, It was averred that Article 125 vests the power to call for evidence on either House of Parliament. Subsection (2) further gives it the same powers as the High Court in respect of: - Enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise, compelling the production of documents; and Issuing a commission or request to examine witnesses abroad. Section 131 of the **Penal Code** provides for the offence of disobeying lawful orders. This does not interfere with the powers under Article 125 of the Constitution to call witnesses since section 131 of the **Penal Code** provides:

***Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or any person acting in any public capacity and duly authorized in that behalf, is guilty of a misdemeanor and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years.***

75. In addition, section 15(1) of the **National Assembly (Powers and Privileges) Act** provides for attendance to be by way of summons and states:

***Any order to attend to give evidence or to produce documents before the Assembly or a committee shall be notified to the person required to attend or to produce the documents by a summons under the hand of the Clerk issued by the direction of the Speaker.***

76. Furthermore, section 23 of the **National Assembly (Powers and Privileges) Act** provides that it is an offence for one to disobey orders made by the National Assembly. To the DPP, summons are orders made by the Parliament, therefore making it mandatory for one to appear before any Committee when summoned and failure to which an offence is committed. The DPP relied on **The Council of Governors and 6 Others vs. The Senate** - Petition 413 of 2014.

77. It was submitted that the wording of Section 131 based on the simple and ordinary meaning may be interpreted to mean that unless any other penalty is prescribed one is liable to two years imprisonment. That is to say the wording of this section does not prevent the prosecution from charging for the offence of disobeying a lawful order. Rather it protects the accused against double jeopardy. The DPP relied on the decision of Majanja, J in **Commission for The Implementation of The Constitution vs. Parliament of Kenya and Another Nairobi Petition No. 454 of 2012 [2013] eKLR** that:

***“Parliament does not legislate in a vacuum but within an overall framework of existing laws and institutions framework and unless it is clear that a latter statute intends to repeal or otherwise replace the corresponding existent legislation, each legislative enactment continues to have the full force of law and is enforceable accordingly.....[69]. Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established.” “The court can only deal with the legislative results of Parliament. The legislature is therefore entitled to adopt different levels of penalties to satisfy certain policy objectives. The question of severity of punishment cannot of itself render a statute unconstitutional. The substance of legislation including the sentence to be meted out is within the realm of the legislature and the court's role is limited and will not interfere unless it is shown that such sentence violates any of the known Constitutional rights and freedoms.”***

78. It was therefore submitted that section 131 of the **Penal Code** is not inconsistent with Article 125(2)

of the Constitution. Furthermore, contrary to the submissions by the Petitioner that no offence is prosecutable under the provisions of Article 125 of the Constitution, section 131 of the **Penal Code** provides for a prosecutable offence and unless it is clear that a latter statute intends to repeal or otherwise replace the corresponding existent legislation, each legislative enactment continues to have the full force of law and is enforceable accordingly. Hence preferring charges under **Penal Code** is legal as the same has not been repealed by section 23 of the **National Assembly (Powers and Privileges) Act**.

79. Based on Civil Appeal No. 266 of 1996 – **Kenya National Examinations Council vs. Republic, Ex-Parte Geoffrey Gathing Njoroge**, it was submitted that the Petitioner had not demonstrated that the Director of Public Prosecutions lacks authority or acted in excess of his authority.

80. With respect to the prayer for declaration that there is no prosecutable case premised on article 96 and 226(2) of the constitution and section 148 of **Public Finance Act, 2012**, the DPP's position was that in order to address this issue it is necessary to firstly consider the role of the Senate. Article 96 of the Constitution rightly defines the role of Senate as to be twofold; to protect the interests of the Counties at the national level and to exercise oversight of national revenue allocated to Counties by the National Government. He submitted that the High Court in interpreting this provision on the role of the Senate stated as follows in **Kerugoya H.C. Petition No.8 of 2014**:

**“... The Senate also determines the allocation of National revenue among counties and exercises oversight over National revenue allocated to the County Governments.”**

81. Further the court while seeking an understanding of the scope, extent and nature of the said oversight role found it fit to firstly interpret the term ‘oversight’. It stated that:

**“...in our interpretation, oversight implies a procedural and substantive function for the Senate. Procedural in the sense that the Senate is involved in the process leading to division and sharing of national revenue as between the National and County Governments as envisaged under Article 202 and 203 of the Constitution. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under Article 205 of the Constitution....substantive oversight would also, in our view, mean that the Senate would be mandated to get explanations on how Counties spend the National revenue allocated to them in the event audit queries are made by the Auditor General in his report made pursuant to the provisions of Article 229 of the Constitution”.**

82. Therefore the Senate by having substantive oversight is mandated to get explanations from the County Governments. It is in this regard that the Senate has powers to summon witnesses on how Counties spend the National revenue allocated to them. The issue that then arises is to whom this summons should be directed. In this regard we shall consider whether the Senate has power to summon Governors. Article 125 empowers both Houses of Parliament, and any of its committees to summon any person to appear before it for the purpose of giving evidence or providing information and he relied on **Petition No. 413 of 2014** where the court stated that; “...*the Senate or its Committees has the power to summon any person to appear before it for purposes of giving evidence or providing information*” as well as **Kerugoya H.C. Petition No.8 of 2014**

83. In determining the issue whether the Senate ought to summon both the County Executives and the Governor the DPP relied on **Kerugoya H.C. Petition No.8 of 2014**.

84. It was therefore submitted that Governors are the Chief Executive Officers of the Counties and a County Executive Committee Member of Finance is an appointee of the Governor *albeit* with the approval of the County Assembly; while an Accounting Officer is designated by the County Executive Member of Finance. That a Governor is answerable to the Senate for the portion of the national resources that the Senate has horizontally allocated to the Counties and takes personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office of Governor. That as such, the Senate, in carrying out its mandate of exercising oversight over national revenue allocated to the County governments, is required to summon County Governors to

ensure financial prudence and probity in usage of county funds.

85. To the DPP, when appearing before the Senate's Committee, a Governor may appear with such officers as he deems necessary to answer the relevant questions under considerations. Such officers include the Executive Committee Member responsible for matters of finance and the designated accounting officers as they are the persons whom the Constitution has mandated to deal with financial matters. (**Petition No.413 of 2014**).

86. It was therefore contended that there is therefore no specific requirement that the Senate ought to summon both the County Executive Member for Finance and the Governor respectively. The governor is accountable to the Senate for the portion of national resources that Senate allocated to the County. That is to say by the Senate summoning the governor it is discretionary on him to appear in the company of the County Executive Member of Finance or any other members to whom he may feel have relevant information. In light of the above, it was submitted that there is no breach of the Petitioners Constitutional rights and or procedure/s since the Senate has the power to summon the governor to attend. This mandate is not conditional such that the Senate has to summon both the governor and the County executive. Therefore this makes the decision of the Senate to summon the governor proper in law. Furthermore, having established that summons are mandatory commands and thus lawful orders the prosecution may charge under Section 131 of the **Penal Code**.

87. Finally Article 157 of the Constitution vests the DPP with prosecutorial powers. It is within the discretion of the prosecution to charge the Petitioner under the **Penal Code**.

88. It was therefore averred that the Petition in its entirety lacks merit and the same should be dismissed with costs to the 1<sup>st</sup> Respondent.

### **2<sup>nd</sup> Respondent's Case**

89. According to the Senate pursuant Article 128 of the Constitution and the **Parliamentary Service Act**, the Senate Sessional Committee on County Public Accounts and Investments Committee ("the Committee") is established by the Senate Standing Order No. 212 of the Senate Standing Orders with the mandate to exercise oversight over national revenue allocated to the county governments pursuant to Article 96(30) of the Constitution; Pursuant to Article 228(6) of the Constitution to examine the report of the Controller of Budget on the implementation of the budgets of the county governments; pursuant to Article 229(7) and (8) of the Constitution, to examine the reports of the Auditor General on the annual accounts of the county governments; To examine special reports, if any, of the Auditor General on county governments funds; To examine reports, if any, of the Auditor General on the county public investments; and To exercise oversight over county public accounts and investments.

90. It was averred that by a letter dated 12<sup>th</sup> August 2015 the Committee invited the 1<sup>st</sup> Petitioner to appear before it on 15<sup>th</sup> and 16<sup>th</sup> September, 2015 to answer matters relating to the Report of the Auditor General on the Financial Operations of Kakamega County Executive for the Financial Year 2013/2014. Despite the 1<sup>st</sup> Petitioner receiving the invitation he failed to appear before the Committee and a subsequent letter dated 15<sup>th</sup> September, 2015 was again sent to the 1<sup>st</sup> petitioner. Due to the failure by the 1<sup>st</sup> Petitioner to honour another request was made to him for appearance on 2<sup>nd</sup> October but he failed to appear despite receiving the invitation.

91. As a result the Committee issued witness summons to the 1<sup>st</sup> Petitioner for appearance on 13<sup>th</sup> November, 2015 at 2.30pm but once against the 1<sup>st</sup> Petitioner failed to appear. It was as a result of this that the Committee decided to write a letter dated 24<sup>th</sup> November to the 1<sup>st</sup> Respondent, the DPP, seeking that appropriate action be taken against the 1<sup>st</sup> Petitioner for failure to honour lawful summons.

92. The Court was referred to Articles 117 and 125 of the Constitution and sections 4 and 5 of the **National Assembly Powers and Privileges Act** and it was averred that the Senate was merely exercising

its constitutional mandate under Articles 96 of the Constitution and powers granted by Article 125 of the Constitution in undertaking all the actions stipulated above. It was the Senate's position that it is within its constitutional right to pass a resolution and the High Court has no jurisdiction to question what the Senate resolved.

93. To the Senate, its resolution is a declaration of opinion or purpose and cannot be challenged in Court. In this respect it referred to the House of Commons of Canada in its official website about resolutions of a House of Parliament.

94. In support of its position, the Senate referred to Kerugoya Constitutional Petition Number 8 of 2014 - **International Legal Consultancy Group vs. The Senate, Clerk of The Senate and the Senate [2014] eKLR** where it was held that:

**“the Senate acted within its constitutional mandate under Article 96(3) and Article 125 of the Constitution when it issued the summons dated 8<sup>th</sup> February 2014 to the Governors and the County Executive Members of Finance of the respective counties with regard to the report of the Controller of Budget.”**

95. A similar position was adopted in High Court Constitutional Petition No. 413 of 2014 – **Council of Governors vs. the Senate**. It was therefore contended that the petitioners herein, being aware of the aforementioned decisions of the High Court, are in contempt of the orders of this Court and the lawful authority of the Senate to summon Governors. It was further contended that this petition is an abuse of process and seeks to prosecute matters that have previously been settled by this Court.

96. It was therefore contended that the orders sought herein seek to interfere with the mandate of the DPP granted under Article 157 of the Constitution. The said orders, it was contended seeks to exempt the 1<sup>st</sup> petitioner from accountability for public funds which would therefore result in a violation of Article 10 of the Constitution.

97. The Court was therefore urged to dismiss the petitions with costs.

98. It was submitted that Article 96(1) and (2) of the Constitution entrust the Senate with the duty to safeguard devolution and Senators are meant to represent the counties and make laws to affect the County Governments. Article 96(3) gives the Senate the mandate to determine allocations of national revenue to the counties as well as oversight the national revenue allocated to counties. It was therefore submitted that the Senate has the responsibility to monitor how money allocated to the counties is spent and ensure that such money is spent without any unnecessary wastages. Where there is reason to get clarifications on the spending of such monies, the Senate as one of the Houses of Parliament, can summon the county governor as well as other members of the County Executive Committee and seek clarification on matters concerning county funds. In this respect the Senate relied on **International Legal Consultancy Group vs. The Senate, Clerk of The Senate and the Senate** (supra).

99. The Senate relied on Article 185 of the Constitution and submitted that the wording of Article 185(3) of the Constitution cannot be interpreted to mean that oversight by the County Assemblies stops the Senate from exercising its mandate. To the Senate nothing in the Constitution stops the Senate and the County Assemblies from exercising their oversight mandate concurrently since its oversight mandate is independent of the oversight role of the County Assemblies.

100. It was its case that the summons issued by it to the 1<sup>st</sup> Petitioner have the same effect as those issued by the High Court, hence defying them amounts to an offence under section 131 of the Penal Code. The Senate contended that this honourable court lacks jurisdiction to deal with this matter since it does not raise a question of constitutionality. Instead, it is challenging the powers given to different constitutional bodies as well as independent constitutional offices.

101. It was contended that since the Senate is one of the houses in the bicameral Parliament in Kenya, based on the doctrine of separation of powers, it has a role in over sighting other arms of government and

it relied on Article 96 of the Constitution. The Senate therefore, has the responsibility to monitor how money allocated to the counties is spent and ensure that such money is spent properly without any unnecessary wastages. In its view, where there is any reason to get clarifications on the spending of such monies, the Senate, as one of the houses of Parliament, can summon the county governor as well as any other member of the County Executive Committee and seek clarifications on matters concerning county funds and in this respect the Senate relied on **International Legal Consultancy Group Vs. The Senate and Clerk of the Senate, High Court Constitutional Petition No. 8 of 2014.**

102. To the Senate the County Assemblies on the other hand, are given the mandate oversight the county executive by Article 185 of the Constitution. Therefore the wording in Article 185(3) cannot be interpreted to mean that oversight by the County assemblies stops the Senate from exercising its mandate. Nothing in the Constitution stops the Senate and the County Assemblies from exercising their oversight mandate concurrently. Therefore, the prayer by the Petitioners that the 2<sup>nd</sup> Respondent cannot have an inquiry into a report issued by the Auditor General when the County assembly is inquiring into it, is a gross misinterpretation of the Constitution.

103. With respect to effect of the summons issued and legality of the arrest, it was contended that the Senate issued the summons against the Petitioners under Article 125 of the Constitution of Kenya. Hence the summons issued therefore have the same effect as orders issued by the High Court of Kenya as stated under Article 125(2) of the Constitution. The Senate therefore relied on ***the February 2016, House of Commons Guide for Witnesses Giving Written or Oral Evidence to a House of Commons Select Committee*** in which it was stated that one of the powers of the Parliamentary Select Committees in the House of Commons in the UK as *the power to gather evidence*. In elaborating on this power, the guide stated that,

***'When gathering evidence, almost all select committees have a power to send for "persons, papers and records". This means that committees can insist upon the attendance of witnesses and the production of papers and other material'.***

104. Further reliance was placed on a ***Joint Committee on Parliamentary Privilege in the United Kingdom***, in its report in April 1999, in which it considered what was meant by contempt of either House in which after providing an overview, the Committee provided a broad overview of what Parliamentary Contempt entails as follows:

***"para 264. Contempt comprises any conduct (including words) which improperly interferes, or is intended or likely improperly to interfere, with the performance by either House of its functions, or the performance by a member or officer of the House of his duties as a member or officer. The scope of contempt is broad, because the actions which may obstruct a House or one of its committees in the performance of their functions are diverse in character. Each House has the exclusive right to judge whether conduct amounts to improper interference and hence contempt."***

105. According to Erskine May's publication, ***Parliamentary Practice, 24<sup>th</sup> Edition 2011:***

***"Acts or omissions which obstruct or impede the work of a committee or any of its members or officers, or which tend, directly or indirectly, to produce such results, may be treated as a contempt of the House and investigated and punished, as appropriate...In the past witnesses who have refused to be sworn or take upon themselves some corresponding obligation to speak the truth, who have refused to answer questions, who refused to produce or destroyed documents in their possession, who have prevaricated, given false evidence, wilfully suppressed the truth, or persistently misled a committee have been considered guilty of contempt."***

106. The Senate also relied on **Patrick Dunpont**, in his article, ***The Uncooperative Witnesses: The Punitive Powers of Parliamentary Committees***, published in ***Australasian Parliamentary Review for Spring 2011 Vol 26(2) 114-123***, in which he explains the powers of the select committees in the Australian Parliament by stating that one of the core functions of the Australia's state and national

parliamentary committees is to conduct inquiries. To this end, they have been vested with the powers to summon witnesses, compel evidence and punish any uncooperative witnesses. He further states that in the absence of jurisdiction-specific parliamentary powers, Australian parliamentary officers will generally fall back on the practices of the British House of Commons as outlined in **Erskine May** who offers the following for officers confronted with non-cooperative witnesses.

*Any disorderly contumacious or disrespectful conduct in the presence of either House or a committee will constitute a contempt, which may be committed by strangers, parties or witnesses...any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence. (Erskine May 2004, p128)'.*

107. According to the Senate, some of the powers enjoyed by the Australian Parliamentary Select Committees are further explained as follows;

*"...There is a power to order or even compel the attendance of persons, to compel evidence to be given and to compel the production of papers, books and other documents...The committee has the power to require evidence to be given upon oath and a person may not refuse to answer on the grounds of self-incrimination, but as a form of protection, nothing they say may be used against them in a court of law. A refusal of a person including a minister to provide papers to a House Committee may be punished. (Clark 2007, p149)".*

108. The Senate cited section 131 of the **Penal Code**, under which a lawful order includes:

*'...any order, warrant or command duly made, issued or given by any court, officer or any person acting in any public capacity and authorized in that behalf...'*

109. Relying on the provisions of Article 125(2) of the Constitution which gives both houses powers to summon witnesses and call the evidence at the same status as the High Court of Kenya, it submitted that the summons indeed fall within the meaning of lawful orders under section 131 of the **Penal Code**. Therefore, by failing to honour the summons issued by the Senate, the 1<sup>st</sup> Petitioner committed an offence under section 131 of the **Penal Code**, hence giving the DPP jurisdiction to have the 1<sup>st</sup> Petitioner arrested and charged in a court of law.

110. Therefore the Court was urged to decline the Petitioners' prayers to have the issuance of summons by the Senate and subsequent arrest and charging by the DPP declared unconstitutional or otherwise.

111. According to the Senate, the Court lacks jurisdiction to entertain these proceedings by virtue of the doctrines of parliamentary privilege, and Separation of powers. It was submitted that parliamentary privilege is entrenched in Article 117 of the Constitution of Kenya 2010, which position is further fortified in section 12 of the **National Assembly (Privileges and Immunities) Act** (Chapter 6) Laws of Kenya. As to what constitutes "**proceedings or decisions of the Assembly**" the Senate relied on **R vs. Chaytor & Others (2010) UKSC 52**, in which the Supreme Court of England considered the question of whether parliamentary action can be impeached by the courts. As to the meaning of proceedings in Parliament the court observed that "...*Erskine May, Parliamentary Practice, 23<sup>rd</sup> ed (2004)*, summarizes the position as follows at pp 110-111:

*The term 'proceedings in Parliament' has received judicial attention, (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. Nevertheless, a broad description is not difficult to arrive at. The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is*

*debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking'.*

112. It was submitted that the immunity provided under section 12 of the ***National Assembly (Powers and Privileges) Act***, operates as a safeguard of the separation of powers and the sovereignty of Parliament, in that it prevents the other two branches of government, the Executive and the Judiciary, calling into question or inquiring into the proceedings of the legislature. This immunity is absolute, when applied in acts of Parliament that are necessary for its survival as well as for the performance of its functions.

113. It was therefore submitted that the Senate issued the summons and subsequently forwarded the matter to the DPP for appropriate action as part of dispensing with its constitutional mandate of overseeing the use of revenue allocated to the counties. This is an act of Parliament that is necessary for its survival as well as for the performance of its functions.

114. To the Senate, the role of the court in such an instance is to consider whether Parliamentary privilege applies and once it finds in the affirmative it can do no more and relied on Dixon J's decision in the Australian case of **R vs. Richards; Ex parte Fitzgerald and Browne [1955] HCA 36** which stated thus:

**"...it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise."**

115. The issue of parliamentary privilege has been the subject of debate and litigation in many jurisdictions, including Kenya. The Senate cited severally works and cases in support of this submission.

116. It was submitted that this court's jurisdiction is only limited to the question of constitutionality of decisions taken by the Legislature, where the Senate belongs. Further, the DPP is one of the independent offices under the Constitution and therefore, the court cannot lawfully give orders for the Director of Public Prosecution not to prosecute.

117. In view of the foregoing, the Senate submitted that this honourable court lacks jurisdiction to grant the orders sought by the Petitioner and the Applicant and it was urged to dismiss the Petition together with the Judicial Review Applications with costs.

### **Determinations**

118. In have considered the issues which were raised in these consolidated causes.

119. The question whether Governors can be summoned by the Senate was dealt with in **The Council of Governors and 6 Others vs. The Senate** - Petition 413 of 2014 where it was held that:

**"Every officer in every State organ and at both levels of Government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible. The Court under Article 259 must therefore interpret the Constitution in a manner that promotes good governance through transparency and accountability. Put in another way, when persons in charge of the managing County finances are not held to account, the objectives of devolution set out under Article 174 which includes promoting democratic and accountable exercise of power; and to enhance checks and balances of powers, will be defeated. The position advanced by the Petitioner that the County Governors cannot be summoned by the Senate by virtue of Article 226(2) of the Constitution, Section 148 of the Public Finance Management Act, 2012 and Section 30 of the County Government Acts 2012 is therefore untenable...[We] are fully in agreement with the learned judges (in Petition no. 8 of 2014). We would however wish to say that we have seen the witness**

**summons reproduced elsewhere above. In so appearing before the Senate's Committee, a governor may appear with such officers as he deems necessary to answer the relevant questions under consideration. In our view, such officers include the Executive Committee Member responsible for matters of finance and the designated accounting officers as they are the persons whom the Constitution has mandated to deal with financial matters."**

120. In other words nothing bars the Senate from summoning the Governors pursuant to Article 125 of the Constitution. I therefore agree with the decision in **Kerugoya H.C. Petition No.8 of 2014** where it was held that:

**"... that the County Governor as the overall head of the county is accountable for the utilization of county resources including the National revenue allocated to his or her respective County. Since the accounting officers at the county are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under Section 30(3)(f)? In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under Section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of Section 30(3) (f) of the County Governments Act, 2012 as read together with Article 10(2)(c) on the National values and principles of governance. The Governors being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments."**

121. To that extent the position adopted by the Respondents that Governors are the Chief Executive Officers of the Counties are answerable to the Senate for the portion of the national resources that the Senate has horizontally allocated to the Counties and takes personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office of Governor must be correct. As such, the Senate, in carrying out its mandate of exercising oversight over national revenue allocated to the County governments, has the power to summon any person who in their view can shed light on how the said revenue is being utilised in order to ensure financial prudence and probity in usage of county funds and such persons include the Governor. It is however my view that it is not mandatory that it is the Governor who must in all instances be summoned.

122. In his appearance the Governor may of course be accompanied with such officers as he deems necessary to answer the relevant questions under considerations who may include the Executive Committee Member responsible for matters of finance and the designated accounting officers as they are the persons whom the Constitution has mandated to deal with financial matters.

123. It is however trite that that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade** in his book ***Administrative Law*** as cited in **R vs. Somerset County Council, ex parte Fewings and Others [1995] 1 All ER 513 at 524:**

**"The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a**

public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

124. As was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240 while citing Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC:

“A power which is abused should be treated as a power which has not been lawfully exercised...Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

125. Therefore the Senate in exercising in oversight power must do so in conformity with the law and in good faith. As was held in Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:

“A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be

**taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute”**

126. Since the Senate in exercising its oversight role is exercising quasi-judicial role, it is imperative that it must not act in bad faith, must not act on extraneous considerations which ought not to influence it, and it must not plainly misdirect itself in fact or in law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

127. It follows that if the decision to summon the 1<sup>st</sup> Petitioner was informed by the motive of score-settling between the 1<sup>st</sup> Petitioner and **Senator Bonny Khalwale**, that would obviously be wrongful exercise of constitutional power and that would call for intervention by this Court notwithstanding the principle of separation of power between the judiciary and the legislature. As was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC):**

**“What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O’Regan J explained in a recent minority judgment, ‘the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.’ In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; [w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid’. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the ‘Constitution is supreme...; law or conduct inconsistent with it is invalid’. ...”. [Emphasis added].**

128. The role of the three arms of the Government was aptly explained by **Twinomujuni, JA** in **Masalu and Others vs. Attorney General [2005] 2 EA 165 (CCU)** as follows:

**“The Constitution, the supreme law, vests all judicial power of the people in the Judiciary and whether the dispute involves the interests of the Judiciary or individual judicial officers or not, it is only the judiciary which is vested with judicial power to resolve it. However the judiciary must resolve the dispute “in the name of the people and in conformity with law and with the values, norms and aspirations of the people”...The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive and the judicial in separate department, each relatively independent of the others; and it was recognised that without this independence if it was not made both real and Enduring, the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially the legislature...The executive not only dispenses honour but holds the sword of the community. The Legislature not only commands the purse, but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary on the contrary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement. This simple view of the matter suggests several important consequences. It proves incontestably that the Judiciary is beyond comparison the weakest of the three**

departments of power; that it can never attack with success either of the two; and that all possible care is requisite to enable it defend itself against their attacks. The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, it is one, which contains certain specified exceptions to the legislative authority; such as for instance that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without all this, all the reservations of particular rights or privileges would amount to nothing...A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary.”

129. With respect to Parliamentary privilege, it was contended that since the Senate is privileged pursuant to Article 117 as read with section 12 of the *National Assembly (Powers and Privileges) Act*, this Court has no power to enter into an investigation of the said parliamentary proceedings. On this issue I wish to refer to Article 2 of the Constitution which provides that:

*(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.*

*(2) No person may claim or exercise state authority except as authorised under this Constitution.*

130. Further, I defer to the words of Kasanga Mulwa, J in *R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000* that:

**“Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution.”**

131. In my view, if any of the state organs steps outside its mandate, or invokes its lawful mandate for the achievement of improper purpose, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in *Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011* where it expressed itself as follows:

**“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”**

132. Subsequently, the same Court in *Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR* stated that:

**“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent**

democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. ”

133. The Court went on to state as follows;

**“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.”**

134. In my view whereas, the Governors cannot decline to honour summons issued by the Senate simply because there are other officers who are better placed to deal with the issues being raised, it is an abuse of power for the Senate to dismiss the officials from the County simply because the Governor has not presented himself. The Senate ought to inquire as to whether the officials before them are competent to deal with the issues being raised. In other words there is no magic in dragging the Governors before the Senate simply because it is fashionable to do so. It is in this respect that I agree with the decision in Constitutional Petition Number 8 of 2014 - **International Legal Consultancy Group vs. The Senate, Clerk of The Senate and the Senate [2014] eKLR** that:

**“The summons should also be issued against persons who are reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration...we wish to point out that the first persons of contact with regard to any issue of financial management of a county would be the accounting officers appointed at the county level. We note that these officers are accountable to the County Assemblies by virtue of Article 226(2) of the Constitution and Section 149 of the Public Finance Management Act of 2012.”**

135. In the said decision the Court expressed itself as hereunder:

**“As stated earlier Article 125 of the Constitution grants the Senate and the National Assembly and their respective Committees the power to summon any person to give evidence or provide information with regard to a matter they are seized of. This Constitutional power must be respected by all public officials at all times. However, it is the respectful view of this Court that when these powers are exercised in reference to members of the County Government, there must be a measure of restraint by the Senate. Put another way, when the Senate uses its powers to summon with regard to its oversight mandate under Article 96(3) of the Constitution, it must not do so arbitrarily and capriciously. It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level. It must endeavor to sustain the spirit and letter of the Constitution as enshrined in Article 6(2) of the Constitution.”**

136. The Court further stated:-

**“The Senate is therefore required by the Constitution under Article 6(2) when exercising its oversight powers over the County Governments under Article 96(3) of the Constitution to do so in a manner that fosters and nurtures the principles of devolution in the new Constitutional dispensation. We opine therefore that before resulting to summons, the Senate should have sought consultations or mediation with the respective County Governors with regard to the concerns raised by the Controller of Budget’s report issued with deference to implementation of County budgets. In order to promote harmonious co-existence between the Senate and the County Governments for the sake of harnessing the fruits of devolution for the benefit of the people of Kenya, the Senate should only issue summons to Governors or other Officers of the County Government as a matter of last resort where it is clear that the County Governors and other County Officials have declined an invitation by the Senate or its Committee(s) to answer to matters of oversight of County Funds. The Senate should endeavor to improve accountability at the County level and not cripple the County Governments.”**

137. Furthermore, the court emphasized as follows:-

**“The Senate which is one of the organs of the National Government and County Governments need to co-operate and engage on a platform of mutual relations and consultation as opposed to engaging in adversarial relations with regard to any matter touching on devolution. The Courts, therefore be used as a last point of call with respect to any dispute concerning the functional areas of any State organ under the new Constitutional dispensation.”**

138. I also associate myself with the decision of **Mumbi Ngugi, J** in while determining the Chamber Summons application filed in this matter, where the Learned Judge expressed herself thus:

**“The Court appreciates that the Senate has an important role to play in the implementation of the Constitution, particularly so with regard to devolved government. However, just like all other state organs, it is bound by the Constitution, and it cannot arrogate to itself powers that it has not been given under the Constitution. On the material before me, and taking into account the provisions of Article 226(2), the Senate may have overstepped its mandate in purporting to summon the Governors and the County Finance Committees. While it does have the power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily in isolation. Put differently, the provisions of Article 125 cannot be read in isolation, but it must be read in conjunction with other provisions of the Constitution which allocate the functions and powers to the various organs created by the Constitution”**

139. That brings me to the issue of the consequences of failure by the Governor to honour the summons issued by the Senate. Article 125(2)(a) of the Constitution provides as follows:

***(2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—***

***(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;***

140. What then are the powers of the High Court with respect to enforcement of attendance of witnesses? Order 16 rule 10 of the **Civil Procedure Rules** authorises the Court where a witness fails to attend to issue a proclamation and also issue a warrant of arrest against the person defaulting to attend Court. This power in my view resonates with the position of Erskine May in **Parliamentary Practice, 24<sup>th</sup> Edition 2011** when he states that:

***'In the Commons, the offender, if he is in attendance, is brought to the Bar of the House forthwith by the Serjeant at Arms, and is there reprimanded by the Speaker in the name and by the authority of the House. The offender is then discharged. If, however, he is not in attendance, he may be ordered either to be taken into the custody of the Serjeant and brought to the Bar the following or some later day, there to be reprimanded and discharged, or to attend the House on a***

*future day to be reprimanded'.*

141. Whereas the Court is empowered to impose fines there is no such power conferred upon the Senate. Therefore the practice described by **Patrick Dunpont**, in his article, ***The Uncooperative Witnesses: The Punitive Powers of Parliamentary Committees***, published in ***Australasian Parliamentary Review for Spring 2011 Vol 26(2) 114-123***, that the powers of the select committees in the Australian Parliament include the powers to summon witnesses, compel evidence and punish any uncooperative witnesses cannot be swallowed in our jurisdiction hook, line and sinker.

142. In any case the failure to honour summons cannot in my view amount to “*disorderly contumacious or disrespectful conduct in the presence of either House or a committee*” so as to constitute a contempt by strangers, parties or witnesses though it may well be deemed as an act or omission which obstructs or impedes either House of Parliament in the performance of its functions, and to that extent may be treated as a contempt.

143. Since in our jurisdiction the Senate does not have the powers impose fines what then are the options available to the Senate where its summons are not honoured? Section 23(a) of the ***National Assembly (Powers and Privileges) Act*** provides as follows:

***Any person who—***

***(a) disobeys any order made by the Assembly or a committee for attendance or for production of papers, books, documents or records, unless his attendance or production is excused under section 17;***

***shall be guilty of an offence and liable, on conviction before a subordinate court of the first class, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.***

144. However the 1<sup>st</sup> Petitioner was charged under section 131 of the ***Penal Code*** which provides as follows:

***Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or any person acting in any public capacity and duly authorized in that behalf, is guilty of a misdemeanor and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years.***

145. Since the provisions of section 131 of the ***Penal Code*** deals with general disobedience of any order, warrant or command and that section expressly excepts provisions specially designed to deal with specific circumstances, I agree that the correct provision under which a person accused of disobeying summons issued by the Senate ought to be section 23(a) of the ***National Assembly (Powers and Privileges) Act***. Whereas the Court does not relish dictating to the DPP the kind of charge to be preferred, as was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006**:

***“It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants’ fundamental rights.”***

146. I agree with the position of **House of Commons of Canada** in its official website about **resolutions of a House of Parliament** as follows:

***A motion is adopted if it receives the support of the majority of the Members present in the House at the time the decision on it is made. Every motion, once adopted becomes either an order or a resolution of the House. Through its orders, the House regulates its proceedings or***

***gives instructions to its members or officers, or to one of its committees. A resolution of the House is a declaration of opinion or purpose; it does not require that any action be taken, nor is it binding. The House has frequently brought forth resolutions in order to show support for an action or outlook.***

147. I however am of the view that practices in other jurisdictions cannot be a basis for ignoring or nullifying an express provision of the law.

148. Article 229(7) and (8) of the Constitution provides as follows:

***(7) Audit reports shall be submitted to Parliament or the relevant county assembly.***

***(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.***

149. From the foregoing it is clear that the Auditor General can either submit his reports to Parliament or the relevant County Assembly. By employment of the word “or” the provision does not contemplate a situation where the report is submitted to both Assemblies at the same time. To my mind therefore the provision does not contemplate a situation where the report is discussed before both Houses concurrently. In my view this must be so in light of Article 6(2) of the Constitution which provides as follows:

***The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.***

150. To conduct proceedings in respect of the same audit report concurrently faces the risk of different finding being arrived by the two Assemblies, a situation which would not promote the spirit of Article 6(2) of the Constitution. This position in my view is what the drafters of the Constitution had in mind when they formulated Article 189(1)(a) which provides that:

***Government at either level shall—***

***(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.***

151. I therefore agree that the Senate ought not to perform its oversight role under Article 96(3) in a manner that cripples the functions of the County Assemblies.

152. Under Article 10 of the Constitution, one of the national values and principles of governance is sharing and devolution of power. The said Article binds all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. In other words the Senate which is a State organ is bound by *inter alia* the principle of sharing and devolution of power whenever it is applying or interpreting the Constitution or making or implementing public policy decisions. In my view in exercising its powers of oversight the Senate is both applying and interpreting the Constitution and implementing public policy decisions. In so doing, the Constitution mandates it to ensure that its takes into account the principle that sharing and devolution of power must be promoted.

153. In my view promoting the sharing and devolution of power cannot be attained when the Senate takes over a matter which is lawfully being undertaken by a County Assembly under the pretext that it is undertaking its oversight power under the Constitution. Whereas I appreciate that the Senate has the power pursuant to Article 96(3) of the Constitution, of oversight over national revenue allocated to the county governments, in determining the manner in which such power is to be exercised the Court must adopt the approach that was restated by the Supreme Court in Advisory Opinion No. 2 of 2013 - **The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR**, in

which the Honourable Chief Justice at paragraph 184 quoted the Ugandan Case of Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3) where it was held that:

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

154. In Masalu and Others vs. Attorney General [2005] 2 EA 165 it was held that:

**“The Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual’s the full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purpose construction...While it is not disputed that it is the duty of every citizen to play certain roles in a society under Article 17, the judicial officer’s role and duties are unique and different. Judicial officers are charged with safeguarding the fundamental rights and freedoms of the citizenry and in the performance of their duties, they are entrusted with checking the excesses of the Executive and the Legislature. These duties require insulation from any influence direct or indirect that may warp their judgement or cause them to play into the hands of corrupt elements, especially when there is a climate of political excitement. It is noteworthy that the administration of justice is the firmest pillar of Government...When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim.”**

155. In Supreme Court Advisory Opinion No. 2 of 2013 - Speaker of the Senate & Another –vs- Hon. Attorney General & 3 Others, the Court, with regard to the separation of powers doctrine, thus remarked (paragraph 49):

**“Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution.”**

156. It is important to note that under Article 185(3) of the Constitution

***A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.***

157. It is therefore clear that both the Senate and the County Assemblies have oversight powers over county governments. However whereas the oversight role of the County Assemblies is over the county executive committee and any other county executive organs generally, the oversight role of the Senate pursuant to Article 96(3) of the Constitution is limited to national revenue allocated to the county governments. Here there is an attempt to create distinction between the roles of the two organs. The oversight powers of the County Assemblies as was held in The Council of Governors and 6 Others vs. The Senate (supra) is limited in scope and its application is discretionarily to the County executive organs and does not apply as regards the wide powers the Senate and National Assembly have over national revenue as seen from both Articles 96(3) and 95(4)(c) of the Constitution. However the oversight powers of the Senate are also restricted to national revenue. In other words the County Assemblies superintend the County executive organs as opposed to the management of the finances by the County Governments generally and in so doing nothing bars it from oversighting even the manner in which the revenue allocated by the national government is being spent by the County Executive. However where such expenditure has been made by other organs other than the County Executive and they fall with the revenue allocated by the national government, it is the Senate that has the oversight function. On its part the Senate cannot oversight revenue other than those allocated by the national government. This is the whole idea behind Article 6(2) of the Constitution which provides that the governments at the national and county levels are distinct and inter-dependent as read with Article 189(1)(a) of the Constitution that Government at either level shall perform its functions, and exercise its powers, in a manner that respects

the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level.

158. It is important in determining this petition to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been held is a transformative Constitution due in part to the national values and principles of governance in Article 10. Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in *The Constitution of the Federal Republic of Germany* thus:

**“...the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.”**

159. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010**:

**“A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a “social orientation”, and as its main theme, “rights, welfare, empowerment”, and the Constitution offers these values as the reference-point for governance functions.”**

160. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

**“Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”**

161. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

**“But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must**

apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”

162. The foregoing position was aptly summarised by the South African Constitutional Court in Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC) in the following terms:

“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: ‘The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.’ The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”

163. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as ‘a transformative instrument’ is the key instrument to bring about a better and more just society”. See **Michaela Hailbronner** in *Traditions and Transformations: The Rise of German Constitutionalism*.

164. It is my view that our position is akin to the one described by the German Constitutional Court in BVverfGE 5, 85 that:

“Free democratic order of the Basic Law...assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects.”

165. I therefore associate myself with the views of **Mohamed A J** in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) to the effect that:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

166. Article 174 of the Constitution identifies some of the objects of the devolved system of governance as to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them and to recognise the right of communities to manage their own affairs and to further their development.

167. The importance of the devolved system of governance was appreciated by the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR in which **Mutunga, CJ** expressed himself as follows:

“The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established

by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state...”

168. The learned President of the Supreme Court continued:

“Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d’être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.....National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act*.”

169. Adopting the above approach, it is my view and I hold that in order to uphold and promote the spirit of devolution under Article 6(2) and 189(1)(a) of the Constitution as long as either the County Assembly or the Senate is seized of a matter which properly falls within its jurisdiction in the exercise of its oversight role where the Auditor General has submitted its report to it, the other organ ought not to concurrently seize the same. However, it is my view that the County Assembly does not have the final word on such a report when it touches on the national revenue allocated to the County Governments. Since the Senate has the power of oversight over such revenue, nothing bars the Senate from considering a report of the auditor subsequent to the conclusion of the debate by the County Assembly on the same and may take into account the findings of the County Assembly in respect thereof. In my view the complementary oversight roles of the County Assembly and the Senate ought not to be interpreted in a way that divests the other of the Constitutional powers vested in it. This, it is my view of the holding in **The Council of Governors and 6 Others vs. The Senate** (supra) where it was held that:

“We find this provision to be plain, simple and clear; that an accounting officer for a County should be able to explain his decisions for financial management to a County Assembly. “Accountable” and “oversight” are two different terminologies. The drafters of the Constitution could not have used the two to mean the same thing. Had they intended that a County Assembly would exercise an oversight role over national revenue allocated to Counties, nothing would have been easier than for them to say so. We are aware in that regard of the rule of constitutional interpretation that several provisions of the Constitution

**must be read together and no one particular provision destroying each other but each sustaining the other - See *Tinyefunza v Attorney General* Petition no. 1 of 19967 (1997 UGCC 3). This rule is now popularly known as the rule of harmony.**

**In our view, a Constitution does not subvert itself and we therefore find that it would be completely out of order given the clear provisions of Article 95(4)(c), 96(3) and 226(2) of the Constitution to allude that County Assemblies exercise an oversight role over national revenue allocated to the Counties to the exclusivity of the Senate. This therefore in our view means that a County Assembly does not have the mandate to exercise oversight over the national revenue allocated to the Counties because that is the exclusive mandate of the National Assembly and the Senate and we shall say why, later in this judgment.”**

170. Whereas I agree that the Governor can be summoned by the Senate to shed light on the queries arising from the report of the Auditor General in respect of national revenue allocated to the County Governments including the expenditure of the said revenue, I also agree with the decision in **Kerugoya H.C. Petition No.8 of 2014**, that:

**“The powers to summon anyone under Article 125 can only be exercised by the Senate when it is properly seized of a matter in execution of its constitutional mandate.”**

171. In this case, since the matter was before the County Assembly, in deference to the principle of sharing and devolution of power, the Senate ought to have held its horses in the matter. Of course the County Assemblies are expected to deal with the Auditor’s reports expeditiously and where they take too long to do so recourse may be had to legal measures instead of carrying out a concurrent investigation contrary to the spirit of the Constitution. Article 189(2) and (3) of the Constitution for example provides that:

***(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.***

***(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.***

172. It is therefore my view that to the extent that the 4<sup>th</sup> Petitioner’s case was premised on the fact that he had been exonerated by the County Assembly and therefore the Senate ought not to have summoned him, that case was misconceived and unmerited.

173. With respect to the second application by the 1<sup>st</sup> Petitioner, I find that the 2<sup>nd</sup> summons were substantially hinged on the circumstances that were covered by the first petition. The Senate therefore ought not to have invented a cause of action with a view to circumventing the existing court order barring it from summoning the 1<sup>st</sup> petitioner.

## **Order**

174. **In the premises I issue the following orders:**

- 1) A declaration that the Director of Public Prosecutions decision in allowing the prosecution of the 1<sup>st</sup> Petitioner for alleged failure to honour summons was unlawful.**
- 2) A declaration that the 2<sup>nd</sup> Respondent cannot exercise its powers under Article 96 of the Constitution in a manner that cripples the oversight mandate of the County Assemblies in violation of the provisions of Articles 6(2) and 189 (1) of the Constitution.**
- 3) A declaration that when a county assembly is considering a report of the Auditor General**

prepared under Article 229 of the Constitution, the 2<sup>nd</sup> Respondent cannot concurrently exercise its powers under Article 96 of the Constitution to simultaneously consider the same report and vice versa.

4) A declaration that the Senate is bound by the provisions of Article 189 (1) of the Constitution to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the County level.

5) An order of certiorari to quash the Criminal Charge preferred against the 1st Petitioner under section 131 of the Penal Code.

6) An order of prohibition directed at the Director of Public Prosecution prohibiting the prosecution of the 1st Respondent for the offence of disobedience of lawful orders under section 131 of the Penal Code.

7) An order of prohibition directed at the Chief Magistrates' Court from proceeding with and conducting the trial of the 1st Petitioner premised on the complaint by the 2nd Respondent under section 131 of the Penal Code.

8) There will be no order as to costs.

175. Orders accordingly.

Dated at Nairobi this 29<sup>th</sup> day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ashitiva with Mr Wanyama, Mr Kagimu and Miss Kaburu for the Petitioners

Mr Ashimosi for the 1<sup>st</sup> Respondent

Miss Thanji and Miss Radoli for the 2<sup>nd</sup> Respondent.

CA Mwangi