REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL APPLICATION NO.111 OF 2013

(AS CONSOLIDATED WITH PETITIONS NOS.320 AND 321 OF 2011)

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (6) AND (7) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SAMUEL KIMUCHU GICHURU…..……..……..……. 1ST APPLICANT

CHYRSANTHUS BARNABUS OKEMO.…….…….……..2ND APPLICANT

VERSUS

THE ATTORNEY GENERAL…….…… 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS…… 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT..……...…….. 3RD RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION…… INTERESTED PARTY

JUDGMENT

Background

1. On 26th May, 2011, the Attorney General of the Island of Jersey wrote a letter requesting Kenya's Attorney General, Amos Wako, to commence extradition proceedings against the two Applicants herein. While the letter was addressed to the Attorney General of Kenya, the authority to commence the extradition proceedings was in fact given by the Director of Public Prosecution (DPP) and ***Miscellaneous Application No.9 of 2011*** filed in the Chief Magistrates' Court at Nairobi to commence the said proceedings.

2. The subjects in those extradition proceedings (the Applicants herein) raised preliminary issues and specifically contested that the DPP had no power to institute extradition proceedings since they were not criminal proceedings but proceedings *sui generis*. They also sought the presence of six other people they deemed crucial for the fair determination of the matter before the Court; raised the issue of lack of fair hearing; and requested that the matter be referred to the High Court for determination of a number of issues they deemed constitutional.

3. In a ruling delivered on 5th February 2013, the Magistrate's Court dismissed their application to refer the said issues for determination by the High Court and the Court held that extradition proceedings were criminal in character and that the DPP has the constitutional mandate to institute and undertake criminal proceedings, and further that the DPP was right in commencing the said proceedings. It was also held that the role of the Court hearing the extradition matter was limited to deciding, on the evidence presented before it in support of the request and on behalf of a fugitive, whether a *prima facie* case to warrant extradition had been made.

4. It is that ruling which aggrieved the Applicants who moved this Court on 15th February 2013 by filing a Constitutional Application under **Article 165(6)** & **(7)** of the **Constitution, Section 19** of the **Sixth Schedule** to the **Constitution**, as read together with **Rule 2** of the ***Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006*** and all other enabling powers and provisions of the law.

5. They now seek the following Orders i.e. that:

a. ***This Honourable Court be pleased to call for the record of proceedings in Chief Magistrate' Misc. Application No.9 of 2011 at Nairobi.***

b. ***The orders issued on 5th February 2013 by the 2nd Respondent in Chief Magistrate' Misc. Application No.9 of 2011 at Nairobi be set aside, vacated and/or discharged.***

c. ***That an order directing that the following Constitutional issues stand referred to this Honourable Court for hearing and determination, namely;***

i. ***Whether due to the delay between occurrence of the alleged offences and commencement of the extradition proceedings, the Applicants can receive a fair hearing.***

ii. ***Whether due to passage of time, the extradition proceedings should be terminated forthwith.***

iii. ***Whether the Applicants' rights and freedoms under Articles 24, 27, 28 and 50 of the Constitution have been violated and shall be violated in the event that the applicants are extradited to Jersey or any foreign country based on the charges set out in the charge sheet or charges of a similar character.***

iv. ***Whether the Applicants' constitutional rights would be violated if a criminal trial were to be held in Jersey or any other foreign country based upon the proposed charge sheet or charges of a similar character.***

v. ***Whether Jersey or any other foreign country does have a legitimate public interest to undertake a prosecution based upon the charges set out in the charge sheet or charges of a similar character.***

vi. ***Whether the country entitled to conduct prosecution is Kenya to the exclusion of any other nation given that the offences in question were allegedly committed in Kenya.***

vii. ***Whether the Applicants are entitled to the personal attendance in court of the 5 named persons so as to ensure a fair extradition hearing, in any event.***

viii. ***Whether the Extradition (Commonwealth Countries) Act Cap.77 and/or sections thereof are compliant with the Constitution and whether the Act and/or sections thereof are void to the extent of that inconsistency.***

ix. ***Whether the Director of Public Prosecution has the power under Article 157 of the Constitution to sign an authority to proceed.***

x. ***Whether the pervasive publicity prior to the commencement of the extradition proceedings violated the Applicant's constitutional rights and if so, the remedy thereof.***

xi. ***Whether the extradition proceedings are "criminal in character" or whether the proceedings are sui generis. Arising therefrom, whether if the proceedings are sui generis, the right of appeal issued by the subordinate court is in error.***

xii. ***Whether the extradition proceedings are an abuse of power initiated after the Island of Jersey was unable to maintain an irregular freeze on the account of Windward.***

6. The substantive Application was accompanied by a Chamber Summons application under a certificate of urgency seeking Orders that:

a. ***This Application be certified urgent and be heard ex-parte in the first instance.***

b. ***That the Originating Notice of Motion filed herein be certified urgent and be heard on such date as may be appointed by this honourable Court.***

c. ***An interim conservatory order be issued, ex parte at the first instance, to stay any further proceedings including taking of hearing dates or mention in the Chief Magistrates' Court at City Court or any other court subordinate to this Honourable court.***

d. ***A conservatory order do issue to stay any further proceedings including taking of hearing dates or mention in the Chief Magistrate's Court at City Court or any other court subordinate to this Honourable Court in relation to the Chief Magistrates' Misc. Application No.9/2011, Director of Public Prosecution –vs- Samuel K. Gichuru & Another pending the hearing and determination of the Originating Notice of motion filed herein.***

7. The Chamber Summons application was heard *ex-parte* on 15th February, 2015, certified urgent and an interim conservatory order of stay granted. The Applicants also filed a Notice of Motion Application dated 7th March 2013 seeking that **Petition No.90 of 2011** and **91 of 2011** which were subsequently renumbered **Petition No.320 of 2011** and **Petition No.321 of 2011** filed in the High Court be consolidated with this Application. The prayer for consolidation was allowed by consent on 12th March 2013 and the Attorney General as well as the Ethics and Anti-Corruption Commission were also enjoined to this Application as Interested Parties by the same consent order.

Submissions

a. ***The 1st Applicant's Submissions***

8. The 1st Applicant, Samuel Kimuchu Gichuru, through Counsel submitted that the Application was premised on **Articles 24(c), 27 (1), 28** and **50** of the **Constitution.** He urged that **Article 50 (2) (n) (i) & (ii)** of the **Constitution** provides for the non-retroactivity of offences and while the Magistrate's Court dismissed his application, it did not satisfy itself that the extradition proceedings had met the constitutional threshold, hence this application invoking this Court's jurisdiction under **Article 165(6)** and **(7).**

9. The 1st Applicant further submitted that under the *dual criminality* principle, the offence alleged to have been committed leading to extradition proceedings must be an offence both in Kenya and the Island of Jersey, which was not the case in this matter. In that regard, he argued that the offence of money laundering became an offence in 2009 when the Anti-Money Laundering law was enacted in Kenya while bribery and corruption are not offences in the Island of Jersey, neither is misconduct in public office. Citing the international law principle of *jus cogen* where international crimes like genocide are addressed, he urged that economic crimes do not fall within that category

of crimes.

10. While citing **Vasiljkovic vs Commonwealth [2006] HCA 40; 80 ALJR 1399; 228 ALR 447 (3 August 200)** and **Ferguson vs AG of Trinidad and Tobago,** the 1st Applicant argued that the right to liberty under our Constitution must be upheld during extradition.

11. Further, challenging the legality of the extradition proceedings as instituted, the 1st Petitioner submitted that the authority to proceed lies with the Attorney General and not the DPP, and therefore the proceedings in the Magistrate's Court are a nullity having been commenced by the DPP. He referred to **Vasiljkovic vs Commonwealth (supra)** and **Goodyer & Gomes v Government of Trinidad and Tobago (supra)** to buttress the submission that extradition proceedings involve international law and practice and that it is the Executive arm of Government that for example conducts Australia' foreign relations and extradition is therefore a matter of foreign affairs. That under our Constitution, it was argued that extradition falls within the Executive arm that deals with foreign affairs issues and the authority to proceed, it was submitted, is the very foundation of the extradition proceedings and if missing or defective, the proceedings are a nullity. He cited the Jamaican case of **Vincent Ashman vs Commissioner of Correctional Services and 2 others; In the Supreme Court of Judicature of Jamaica, Claim No. 2011 Hcv 06398** in further support of that proposition.

12. The Application was also grounded on alleged abuse of process and the 1st Applicant in that regard urged that the Court hearing and extradition proceedings should consider whether the circumstances obtaining in the foreign jurisdiction are such that if a local prosecution were to be commenced in similar circumstances, the criminal trial would be considered unfair and/or oppressive. If so, extradition should be declined, he urged.

13. The 1st Applicant in addition submitted that the genesis of the belated decision to prosecute him was a civil dispute between him and *Walbrook Trustees*, persons with whom he had a fiduciary relationship, and it was the tussle for the release of funds due to him that gave rise to the criminal process to frustrate his endeavors, and therefore the extradition proceedings were an abuse of process.

14. The 1st Applicant also urged that the delay in this matter is inexcusable because for 5 years after his bank accounts were informally frozen and almost four years since he was interrogated, no action had been taken by the Jersey authorities. He cited **Githunguri vs Republic [1986] KLR, Republic vs Attorney General & another ex parte Ng'eny and Republic vs Kamleshi Mansulal Pattni [2005] eKLR** in this regard and submitted that where there was delay, the burden is on the State to prove that there will be no unfairness in continuing the criminal proceedings.

15. Relying on **Article 50(1)** of the **Constitution**, the 1st Applicant submitted that he is entitled to an impartial Court and making reference to the Affidavit of Mr. Simon Young, a Jersey Lawyer, he stated that there is lack of impartiality and fairness in the Jersey system as the system does not uphold the doctrine of Separation of Powers. For instance, he submitted that the Bailiff of Jersey is also the Chief Justice, Speaker of the National Assembly and Chief Executive of Sorts. Further, that the Attorney General, Mr. Luckok, who signed the warrant against the 1st Applicant has a fiduciary relationship with the said Applicant and this leads to a perception of prejudice, lack of fairness and issues of conflict of interest would necessarily arise.

16. Finally, on the burden and standard of proof, the 1st Applicant submitted that in extradition proceedings, when the subject claims likelihood of violation of his rights, the burden and threshold of proof is a lower one. In that regard, he cited the case of **Saadi vs Italy (Application No. 37201/06)** and **Vincent Brown aka Vincent Bajinja and others vs The Government of Rwanda & The Secretary of State for the Home Department [2009] EWHC** to make the point that the continuation of the extradition proceedings would be a violation of the Constitution and

the same should be terminated.

b. ***The 2nd Applicant's Submissions***

17. The 2nd Applicant, Chyranthus Barnabus Okemo, in agreement with the 1st Applicant also questioned the passage of time without action on the part of authorities in the Island of Jersey. He argued in that regard that the offences against him were allegedly committed between 1998 and 2002, when he had a bank account in Jersey and where certain transactions took place. That there has therefore been a period of inertia of 9-12 years in which he had never been asked for an explanation regarding that bank account or told that he was under enquiry by Jersey authorities. That he was a public figure in Kenya and was always available to answer any questions but none were asked of him. That further, he has never had any Court case with Jersey authorities and knows nothing leading to his extradition there.

18. The 2nd Applicant also urged that in this Application, this Court was exercising powers donated by the **Constitution,** the **Extradition (Commonwealth Countries) Act, Cap.77** (hereinafter "the Act") and the Common law. In that regard, he submitted that **Article 50** of the **Constitution** requires trial within reasonable time and cited **Torroha vs Republic [1989] KLR 630** in arguing that extradition cannot happen where there is no fair trial guarantees. He also relied on **Harry Cobb & Anor vs USA** to argue that an extradition judge had the duty to invoke the Charter and Common Law and if no principles of fairness are guaranteed, the judge will refuse extradition. Further, that under **Section 10(3)** of the **Act** the High Court may terminate proceedings if they appear unjust and oppressive.

19. The 2nd Applicant also agreed with the 1st Applicant's position that the DPP cannot authorize and institute extradition proceedings and that the said power lies with the Attorney General.

20. On inertia, it has been submitted that the 2nd Applicant has not contributed to it and it should not be attributed to or used against him. He therefore relied on the decision in **Kakis vs Government of the Republic of Cyprus [1978] WLR 779** in which inertia to prosecute for murder for over 4 years and 8 months led Lord Diplock to discharge Mr. Kakis stating that his extradition after such a long time would be unjust and oppressive. The 1st Applicant argued that he has never been to Jersey and saw no reason to retain his bank account there and so the inertia on the part of Jersey authorities should not favour them. He added that if he had committed any offence, he was ready to be tried in Kenya and not Jersey.

21. On dual criminality, the 2nd Applicant urged that no criminal action could be taken before the relevant Act on money laundering had been enacted and he also agreed with the 1st Applicant on the peculiar Court system of Jersey and submitted that it was not a conducive place for his trial, if at all.

22. Further, he challenged the affidavit of Mr. Howard Sharpe, Solicitor General, claiming that it has the handwriting of an Advocate, one Mr. White who only signed it. That this fact alone should invalid that affidavit as the law on affidavits in Jersey is that an affidavit must be signed by the deponent and it is an offence to make an affidavit by the signature of another person and therefore the affidavit of Mr. Sharpe is not admissible in any Commonwealth as a public notary ought to have notarized such a document.

For the above reasons, he sought termination of the extradition proceedings.

c. ***The Attorney General's Submissions***

23. The Attorney General, Prof. Githu Muigai, in his Affidavit deponed that extradition proceedings are special international legal proceedings of a *sui generis* nature and that public international legal processes only recognise the office of the Attorney General as the authority to undertake

such proceedings. He added that the office of the DPP had conduct of the extradition proceedings merely because public prosecution was a department in the office of the Attorney General under the **Repealed Constitution** and this was so when the request from the Island of Jersey was received. The AG urged that the fight against economic crimes must be based on constitutionalism and the rule of law, including competence and integrity of relevant institutions. That therefore the office with authority to seek an order to proceed is the AG's and not the DPP's as argued by the latter.

24. In further response to the DPP's Affidavit which stated that the AG's previous conduct with regard to extraditions estopped him from further seeking the issuance of an authority to proceed, the AG argued that estoppel cannot be used to override clear and concise constitutional legal provisions. That both offices are creatures of the Constitution and have distinct powers and that the authority to proceed is a question of law and if wrongly issued, no other agency should proceed with the matter. He also cited Parliament's *Hansard* during the enactment of the ODPP Act, in which the Original Bill of that Act at **Section 31(1)** deemed all extradition proceedings as criminal but that provision was deleted when the Act was enacted.

25. On the nature of extradition proceedings, the AG agreed with the Applicants that these were matters of international relations involving States and therefore such matters create a ministerial responsibility and the AG was the minister so responsible and not the DPP. He argued further that extradition is a process and not a prosecution in itself and in any event, extradition is extra-territorial and the DPP has no such mandate, the DPP's powers being confined to those in **Article 157(6)** of the **Constitution.**

The AG in a nutshell took a neutral position on the proceedings save on the matters summarized above.

d. ***The Ethics and Anti-Corruption Commission's Submissions***

26. The Interested Party, the EACC, informed the Court that pursuant to its mandate under **Section 11(1)** of the **EACC Act, 2011** it was conducting investigations on the subject matter of the extradition proceedings and upon conclusion of the same it will make appropriate recommendations to the DPP. That it had forwarded a Mutual Assistance Request to Jersey through the AG in August, 2014 and was awaiting a request in that regard. It declined to enter the fray on all other matters raised in the Application.

e. ***The Director of Public Prosecutions' submissions***

27. The Director of Public Prosecution (DPP) is the only party which directly opposed the Applications. It relied on the Affidavits of the DPP, Mr. Keriako Tobiko filed on 17th June 2013; Lillian Obuo sworn on 8th March 2013 and Geoffrey Obiri sworn on 15th July 2013 and that of Howard Sharpe QC sworn on 11th July 2014.

28. The DPP firstly urged the point that the Application was incompetent as the issues now raised were before the Subordinate Court where objections were raised and a ruling given, which ruling had not been appealed or reviewed. Further, that any other issues regarding extradition should be raised during the extradition proceedings proper and it is the extraditing Court that is to consider *inter-alia* any restriction for surrender set out in **Section 6** of the **Act** and the Applicants have therefore jumped the gun. Further, that under **Section 10** of the said **Act** there is a process under which the High Court can address the issues now raised by the Applicants which process has been prematurely invoked.

29. As regards the authority to proceed, it was the DPP's position that extradition proceedings are principally criminal in nature and under **Article 156** of the **Constitution** the AG has no role in criminal proceedings, and therefore the DPP's office is the proper office to commence such proceedings. That although **Section 7** of the **Act** gives power to the AG to issue an authority to

proceed, the **Act** was enacted before the promulgation of the **Constitution 2010** and **Section 6** of the **Sixth Schedule** to the Constitution provides that the law is to be applied in a manner consistent with the Constitution. Further, while under **Section 26** of the **Repealed Constitution,** the AG was the principal legal adviser of Government and exercised State powers and functions of prosecution, under the **Constitution 2010,** the office of the DPP is vested with all powers to conduct criminal proceedings. That in addition, under **Article 2** of the **Constitution**, the Constitution is supreme and **Section 7** of the **Sixth Schedule** provides that all laws in force before the promulgation of the Constitution are to be read to bring them into conformity with the Constitution. That means that extradition proceedings, being criminal in nature, fall within the powers of the DPP.

30. The DPP also questioned the AG's challenge as not warranted since, while this matter was pending determination, the AG has continued to refer all subsequent extradition requests to the DPP. This must have been done in recognition of the fact that the ODPP is the proper institution to deal with extradition matters, so he argued.

31. As regards the principle of *dual criminality*, while in agreement that the Anti-laundering Law came into effect in Kenya in 2009, under **Section 4** of the **Act,** an offence includes an offence against the law in the Extraditing State howsoever described and therefore offences need not have the same terminology.

32. On Jersey's judicial system, it was submitted that no law from Jersey was presented before the Court to show that the Applicants may not be granted bail or fair trial. That Jersey is a signatory to the **European Convention on Human Rights** and obligations of States under the Law of Treaties is well known.

33. Further, the DPP urged that the Affidavit of Mr. Howard Sharpe should be admitted as properly on record as it meets the expectations of Affidavits. He referred to the case of **Malindi Civil Application No.19/2013** where it was held that pleadings should not be struck out if no prejudice to the other party has been occasioned. He also referred to **Article 159(2)(d)** of the **Constitution** on the principle against a focus on technicalities in proceedings before a Court of Law.

34. On alleged inertia, the DPP submitted that the cause of delay in commencing the extradition proceeding had been explained in Mr. Sharpe's Affidavit and the complexity of the issues and the nature of the offences have also been explained. In any event, that there has been no delay in the extradition proceedings in Kenya.

35. On the issue of fair trial, he argued that in the European Convention on Human Rights that Jersey is a party to, the issue of fair trial within reasonable time has been provided for but it does not apply to delays in investigation but to the actual trial. Further, that this issue can be dealt with by the Jersey Courts and there is no evidence that the said Courts will not be fair to the Applicants. In addition, that the 1st Applicant had filed cases in the Jersey Judicial system, twice, and had received favourable orders. That he cannot now say that the system is not fair with those facts in mind. That because the trial had not begun and delay is not an issue, the submissions on those matter should not be sustained. The DPP therefore prays that the extradition proceedings should be allowed to continue.

Determination

36. From the Parties' submissions above and the pleadings filed in this Court, the following issues emerge for determination;

i. Whether the extradition proceedings before the Magistrate's Court are a nullity having been instituted by the DPP.

ii. Whether the alleged offences meet the dual criminality test.

iii. Whether the constitutional rights and freedoms of the Applicants have been violated or will be violated in the event that they are extradited to Jersey.

iv. Whether there has been delay in the extradition proceedings and whether delay has been proved

v. The legitimacy of the Jersey legal system.

vi. Whether the Magistrate's Court erred in failing to order the attendance of five other people as requested by the Applicants.

vii. The effect of alleged prior publicity to the extradition proceedings.

viii. Whether the extradition proceedings are an abuse of the Court process.

37. In determining the Application and in addressing the above issues, I deem it fit to merge some of the issues as they interlock each other and require a common analysis and finding.

38. In the above context, the Application is brought under **Articles 165(6)** and **(7)** of the **Constitution** which clothes the High Court with supervisory powers over proceedings in subordinate Courts It provides;

> ***"165(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."***
>
> ***"(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration justice."***

39. In exercise of that jurisdiction, and the jurisdiction of the High Court to address constitutional matters, the Applicants want this Court to call for the record of the extradition proceedings before the Chief Magistrate's Court and set aside, vacate or discharge the order made on 13th February, 2013. In that regard, the power of this Court under **Article 165(6)** and **(7)** has been affirmed in various decisions. In **Githu Muigai & another vs Law Society of Kenya & another (2015) eKLR**, this Court reaffirmed an earlier decision on the jurisdiction of the High Court in the following words;

"In the case of **Andrew Kibet Cheruiyot & Another vs Medical Practitioners and Dentists Board & 2 Others, Petition No 260 of 2013**, the Court observed as follows:

> ***"[61] Article 165(6) gives the High Court jurisdiction over bodies such as the 1st respondent by providing that the High Court shall have supervisory jurisdiction over "subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function".***
>
> ***[64] The petitioners allege violation of their constitutional rights and invoke the jurisdiction of the Court set out above. It cannot, in my view, in the face of the above provisions, be in dispute that the Court has jurisdiction to entertain the present petition. Whether in the exercise of its jurisdiction to enforce and protect fundamental rights or to supervise the functioning of inferior tribunal such as the 1st respondent, the jurisdiction of the Court cannot be validly disputed." (Emphasis added)***

40. **The Applicants, particularly the 1st Applicant, have in the above context cited the violation of Articles 24 (limitation of rights and fundamental freedoms); 27 (equality and freedom**

from discrimination); 28 (human dignity); and 50 (fair hearing) in alleging contravention of their constitutional rights and freedoms and it is my view that they have legitimately invoked this Court's jurisdiction. However and having so found, this Court is cautious that its jurisdiction under Article 165(6) and (7) of the Constitution should not be abused but should instead be exercised judiciously and not whimsically. This is why in Republic vs Douglas Patrick Barasa [2014] eKLR it was held that; *"It would be incumbent upon this Court to satisfy itself that the application is not an abuse of process before entertaining it."* While this Court should not and will not shy away from exercising its supervisory mandate, the Court must always guard against abuse of that power so that it is not used as a judicial fiat to curtail and bar those whom the High Court is to supervise from exercising their constitutional mandate where their acts are not *ultra vires* the Constitution. The power was never meant to suffocate those institutions but to guard them from falling off the narrow path that is the constitutional one.

It is the above approach that shall guide my analysis and findings below.

a. ***Validity of the Magistrate's Court proceedings***

41. The validity of the extradition proceedings i.e. ***Miscellaneous Application No.9 of 2011*** lies at the core of the determination of this Petition. In resolving this issue, the Court will consider the following sub-issues:

i. *What is the nature of extradition proceedings and are they criminal or proceedings sui generis?*

ii. *Who has the authority to issue the authority: the Attorney General or the Director of Public Prosecutions (DPP)?*

42. It was the Applicants' case and that of the Attorney General that extradition proceedings are not criminal in nature and therefore the DPP has no power to issue the authority to proceed. They further submitted that such proceedings are of an international law nature and are *sui generis* which fall within the mandate of the Executive arm of Government that deals with international law and foreign relations. Consequently, that they fall within the scheme of duties that the Attorney General, as a minister in the Executive arm of Government, deals with. The authority to proceed in this matter having been issued by the DPP, it is argued, then the proceedings before the Magistrate's Court should be declared a nullity as the DPP has no power to issue such an authority since the Act expressly gives the same to the Attorney General.

43. The DPP's response was that extradition proceedings are criminal in nature and as a consequence fall within his powers as provided for by the **Constitution 2010** in **Article 157(6).** That the Magistrate's Court in its ruling agreed with the DPP's submission in that regard and that is the correct position in law.

44. The Extradition (Commonwealth Countries) Act is the starting point in determining the nature of extradition proceedings. The Act in its preamble states that it is;

> ***"An Act of Parliament to make provision for the surrender by Kenya to other Commonwealth countries of persons accused or convicted of offences in those countries, to regulate the treatment of persons accused or convicted of offences in Kenya who are returned to Kenya from such countries; and for purposes incidental thereto and connected therewith."***

45. The two striking words from the above definition are *accused* and *conviction*. These words find their place well in the criminal realm of the law because for a person to be accused and convicted, he must have committed an offence which is prescribed by the penal law of the land. Penal offences are necessarily the cornerstone of criminal law and proceedings and so the Act is concerned with regulating the proceedings of individuals *accused* or *convicted* of offences prescribed by the penal laws of either of the two States involved.

46. Further, the chain of activities that lead to extradition proceedings or the making of a request by one State to another is worth evaluating. In that regard, one must have been accused or convicted of an offence for such proceedings to be commenced. Both an accusation and conviction can only be legitimately made before and by a Court exercising criminal jurisdiction. It is such a Court that has the jurisdiction to convict an accused person if proved, to the requisite standard, as having committed the offence with which he is charged with. In addition, upon institution of any criminal proceedings, the next step in the chain of events will ordinarily be the extradition proceeding to ensure the attendance of the subject in a Court of the requesting State. At this juncture, it must be noted that the criminal element in such a case is not lost.

45. Having said so, although it is true that the International Law as regards the relations between States comes into play, the criminal chain of the initial charge cannot be said to have been broken. The extradition proceedings that are undertaken, continue bearing the criminal nature of the initial criminal proceedings in the requesting country.

46. I am persuaded in the above regard by the House of Lords holding **in R vs Governor of Brixton Prison, ex p Levin,** as cited by the DPP, where is was held that extradition proceedings are criminal proceedings. Lord Hoffmann who wrote the lead judgment held as follows;

> ***"Finally, I think extradition proceedings are criminal proceedings. They are of course criminal proceedings of a very special kind, but criminal proceedings nonetheless."***

Lord Hoffmann further held that;

> ***"Secondly, [in] the Extradition Act 1989, Section 9(2) and para 6(1) of sch 1 require that extradition proceedings should be conducted 'as nearly as may be' as if they were committal proceedings before the magistrates. Committal proceedings are of course criminal proceedings and these provisions would make little sense if the metropolitan magistrate could not apply the normal rules of criminal evidence and procedure."***

47. The above approach and holding is further fortified by **Section 9** of the **Act** which deals with '*proceedings for commital'*. It provides in part;

> **9(3***) For the purposes of proceedings under this section, the Court shall have the jurisdiction and powers, as nearly as may be, as it has in a trial.*

48. This reference to '*jurisdiction and powers as nearly as may be in a trial'* can only be pragmatically interpreted to be in reference to criminal proceedings within which a trial is conducted. This is why I agree with the decision in **Dorothy Manju Henry & Another versus Republic, Nairobi High Court, Criminal Application No.917 of 2002 (unreported)** where the Court stated thus;

> ***"… [I] hold that extradition proceedings are criminal in character even though no formal charges are laid before the extraditing court."***

49. The 1st Applicant referred to **Vasiljkovic vs Commonwealth (supra)** and **Goodyer & Gomes v Government of Trinidad and Tobago** (supra) to buttress his submissions that extradition proceedings involve international law and practice an in answer to that submission and as a matter of fact, those decisions only confirm the international law element in extradition proceedings but do not say that they are also not criminal proceedings. The decisions only seek to appreciate that the national differences in constitutional imperatives and in administration of criminal law should be adhered to. That is why the Court in **Vasiljkovic** held thus;

"Writing at the time of the adoption of the Constitution, Quick and Garran remarked:

"Extradition is the surrender or delivery of fugitives from justice by one sovereign State to another. <u>It is justified by the principle that all civilized communities have a common interest in the administration of the criminal law and in the punishment of wrongdoers</u>.

It has long been the case that pursuit of that common interest cannot effectively be confined within national boundaries. However, any comprehensive extradition law must allow for national differences both in constitutional imperatives and in the administration of the criminal law under, for example, what are often contrasted as the common law and civilian systems." (Emphasis added)

50. I have said enough to show that although extradition proceedings have elements of international law, they are not *sui generis* proceedings but are criminal proceedings. Having said so, who has the mandate to conduct them in Kenya?

51. Under the **Repealed Constitution**, **Section 26(3)** provided that;

The Attorney general shall have power in any case in which he considers it desirable so to do-

(a) to 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 by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

52. Further, alongside being the Principal Legal Adviser of the Government **(Section 26(2)** of the **Repealed Constitution),** the Attorney General had power to institute and undertake all criminal proceedings, save for those before a Court-martial.

53. Under the **Constitution 2010,** the Office of the Director of Public Prosecution has been created by **Article 157.** The powers of the DPP are provided thus:

157(6) ***The Director of Public prosecutions shall exercise State powers of prosecution and may-***

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgement is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

54. Outrightly therefore, all the prosecution powers that were previously bestowed upon the Attorney General were taken away and given to the DPP and it is the DPP who is charged with the conduct of any and all criminal proceedings. In that context, I have read the Ruling of the Magistrate's Court and I agree with the Honourable Magistrate when he stated thus;

"I have looked at the provisions of Cap. 77 and in particular section 7(1) and (3). The said

section confers jurisdiction to issue authority to proceed to the Attorney General. The court is also alive to the provisions of Article 157 of the Constitution. Article 157 of the Constitution establishes the office of the Director of Public Prosecutions as an independent office which was previously under the office of the Attorney General. In the previous Constitution, the Attorney general was in charge of all criminal proceedings. Under the sixth schedule of the Constitution, section 7 all cases in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and extensions necessary to bring it in conformity with the Constitution.

It therefore meant that the Director of Public Prosecutions started performing some of the roles that the Attorney General had performed earlier. The roles specifically involved exercising state powers in instituting and undertaking criminal proceedings against any person before any court other than a court martial."

55. To this holding, it was argued that the Magistrate's Court erred by equating extradition proceedings to criminal proceedings so as to fall within the ambit of the DPP. Conversely it was argued by the DPP that by signing the authority to proceed, he was in no way exercising a delegated authority but a power given to him by the Constitution. In that regard, I have already determined that indeed extradition proceedings are criminal in nature and I must state that again the Honourable Magistrate correctly rendered himself when he wrote;

"It should be noted that the Attorney General did not delegate the power to issue the authority to proceed but it was taken away from him by the Constitution and given to the Director of Public Prosecutions who was merely exercising it in this case.

The Constitution of Kenya being the supreme law should be read to conform and construed with the alterations, adaptations, qualifications and extensions as may be necessary.

This is one case where I find that the adaptation and alterations are necessary to conform with the Constitution on the functions of the office of the Director of Public Prosecutions. Section 57(3) of the Director of Public Prosecutions Office Act gives the acts done by the Director of public Prosecutions."

56. I wholly adopt the above findings and would only add that the dawn of the **Constitution 2010** came with fundamental changes. That Constitution has been hailed as a transformative charter that completely altered the social setting of the Government and its institution. The Supreme Court of Kenya in **Re Senate, Advisory Opinion No.2 of 2013** observed as follows in this regard:

[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy…

57. Further, constitutional change is a revolution and as such, it comes with the shedding of old rules. Such a change in a constitutional manner is in the form of realignment of duties and obligations within the government structure. New institutions are created that take over powers and obligations from existing institutions. Some existing institutions and state organs are split, while others are abolished all together. This revolutionary nature of our Constitution was well noted by the Chief Justice in his concurring opinion in the ***Re Senate***, Advisory Opinion when he stated thus;

"[160] The Constitution of 2010 was a bold attempt to restructure the Kenyan State. <u>It</u>

was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens.

The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order…" (Emphasis added)

58. In addition to what I have therefore stated above, by dint of **Article 165(3)(d)** of the **Constitution**, this Court is under a constitutional duty to protect the mandate and integrity of all constitutional institutions, offices and state organs. This role, by extension, falls on all courts as pronounced by the Supreme Court above. However the High Court has been placed at the heart of this duty as the entry point in constitutional issues. That is why the Supreme Court observed as follows in **Peter Oduor Ngoge vs Francis Ole Kaparo & 5 others [2012] eKLR**:

"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

59. I must therefore firmly find that the office of the Attorney General must now realize that while extradition proceedings were under its belt under the **Repealed Constitution**, the ground shifted with the **Constitution 2010**. The Office of the Director of Public Prosecution is now an Independent office distinct from the Attorney General's office and this Court has a duty to protect all institutions and offices created by the Constitution from infringement on their mandate including that of the DPP. However, while the DPP will has the mandate to institute and authorize extradition proceedings, the two offices must work together. The international element in extradition proceedings means that Countries may continue to send requests through the Attorney General and the Attorney General is under a duty to respect the Constitution by forwarding such requests for action by the DPP as he has in fact been doing. That is the spirit of co-operation and harmony that runs through the Constitution.

60. The upshot of my findings above is that the extradition proceedings instituted in the Magistrate's Court are valid as the authority to proceed was issued by the DPP who has the legal authority to issue such an authority. While the **Act** provides that the Attorney General is the one to issue the authority to proceed, the onus now falls on Parliament and the **Kenya Law Reform Commission** to amend the Act and bring it into conformity with the **Constitution**. Before that is done, the pragmatic approach is the one adopted by the Magistrate's Court when it read **Section 7(1)** of the **Act** with the adaptations envisaged in **Section 7 of the Sixth Schedule of the Constitution** so as to bring it into inconformity with the Constitution. I adopt the same approach for reasons that I have given.

a. ***The Constitutional issues raised***

61. The Applicants raised several issues that they considered constitutional and faulted the Magistrate's Court for failing to appreciate and refer them for determination by this Court.

62. Before delving into determination of those issues, it is important to briefly outline the

salient legal provisions as regards the Act.

Section 2 of the **Act** defines the Court thus; *"the court" means the Resident Magistrate's Court"."* This is important so as to clearly indicate the Court which has the jurisdiction to hear and determine extradition applications. In execution of that mandate, the Magistrate's Court also has power to hear and determine proceedings for committal under **Section 9** of the **Act**. Under the same Section, the court will determine whether evidence has been sufficiently adduced to warrant trial for the alleged offence. That is why **Section 9(5)** states as follows;

> ***9(5) Where the court has received an authority to proceed in respect of a fugitive arrested, and it is satisfied, after hearing any evidence tendered in support of the request for the surrender or on behalf of the fugitive, that the offence to which the authority to proceed relates is an extradition offence, and if further satisfied-***
>
> a. ***where the fugitive is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed in Kenya; or***
> b. **…**

63. In that regard, the evidence adduced will be evaluated by the court guided by the criteria provided by **Section 4** of the **Act** which defines extradition offences. In a nutshell, before a surrender order is made, a 'full trial' is undertaken under and as proscribed by the Act. This background is imperative in examining whether the alleged constitutional contraventions have indeed been perpetrated and what remedy, if any, is available to the Applicants.

i. ***<u>Unfair and discriminative proceedings</u>***

64. It was submitted that the extradition proceedings as filed were unfair and discriminative. That they contravened the Constitution on equality before the law by purporting to charge the Applicants while the following people namely: Richard Grace, Peter Grant, Peter Cites, Mike Durham, John Glover and D.I. Tunner were free. The Applicants also argued that the said people ought to be summoned to attend and give evidence as they were accomplices in the alleged offences.

I would say no more than to agree with the Magistrate's Court when it correctly interpreted its role under **Section 9(5)** of the **Act** and held that such people and their evidence, if they were to be called, was a matter outside its mandate and that each party ought to make out its case and call its witnesses as it wished. The Court held in that context;

> ***"Having noted the provisions of Section 9(5) of Cap 77 and Clauses 5(1) and (2) of the London Scheme of Extradition within the Commonwealth, the jurisdiction of the court as conferred by the statutes, this court is of the opinion that it can only amount to fair trial if each party is allowed to call witnesses and evidence it desires in so far as it relates to the proceedings before the court without any undue interference from this court. The request by the subjects is therefore rejected. The Director of Public Prosecutions will be at liberty to call its witnesses without any direction from the Court."***

65. I wholly agree and it is also my finding that a Court of law cannot present a case for a party, more so in our adversarial system of litigation. One of the tenets that guides our Courts is impartiality and no Court can decide for a party which witnesses to call or which evidence to adduce. As regards the submission that the named persons may be accomplices, that issue cannot be a ground for alleging discrimination under our Constitution. It is not foreign in law for one to be charged for an offence he/she committed *"with others not before the court"*. Criminal liability is personal even in instances of offences committed by people jointly.

Lastly, discrimination under **Article 27** of the **Constitution** can hardly be invoked in circumstances where criminal liability is attributable to an individual. Neither the Magistrate's

Court nor this Court can therefore properly at this stage of the extradition proceedings purport to determine the criminal liability of persons who are not before them as there is no evidence to enable the Court make such a determination.

In the circumstances, I am unable to find any basis for finding that there was any discrimination in the institution of the extradition proceedings.

ii. ***The right to fair hearing***

66. On fair hearing, it was argued that the reference to the subjects as '*fugitives*' connotes culpability and that their presumption of innocence has been irreversibly made.

67. In that regard, **Section 2** of the **Act** defines a fugitive thus:

> ***"Means any person who is or is suspected of being in or on his way to Kenya and whose surrender is requested under this Act on grounds that he is accused of or is unlawfully at large after conviction for an extradition offence committed within the jurisdiction of the requesting country."***

In my view, the two words: *suspected* and *accused*, as used above in the definition of a fugitive, in no way connote culpability and loss of the presumption of innocent that is irreversible. It is a trite legal principle that an *accused* person is presumed innocent until proved guilty. This is a universal legal principle that cannot be taken away even in extradition proceedings. The nature of extradition proceedings is to determine whether grounds for surrender of a person to the requesting country, where he/she will undergo a *trial proper* for the alleged offences, have been met. All through the extradition proceedings, the surrender and the trial before the requesting State Court, if the surrender is finally made, one's presumption of innocence remains intact.

68. Further, the **Black's Law Dictionary 9th Edition**, defines a fugitive as;

> **2.** ***A criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony.***

It suffices therefore to say that the Applicants are criminal suspects accused of commission of some offences and the term fugitive as used in the Act is a legal term. Parliament in enacting the said Act must have been conscious of its use and I have no reason to believe that Parliament never intended that the work should be derogatory and used so as to permeate one's presumption of innocence. Parliament was in fact categorical on what it meant by use of the work hence the definition it accorded it. If the Applicants feel that the word is derogatory, then the best approach would be to petition Parliament and seek an amendment to the Act and delete it. Until that is done, the word is a legal one. To say the least, the term has a universal meaning and application that is not limited to Kenya and its use cannot amount to grounds for lack of a fair hearing. I so find.

iii. ***The Legal system of Jersey***

70. Aspersions were cast on Jersey's legal system and it was argued that it does not conform to some legal principles such as separation of powers. The Applicants contended that under such a system, they were certain not to enjoy their right to fair hearing as enshrined in **Article 50** of the **Constitution.** They further argued that if there are real offences against them, the competent jurisdiction in which they should face trial should be Kenya and not Jersey. That in Kenya they are assured of a fair trial as opposed to Jersey.

71. Outrightly, it emerges that the Applicants are making their case against their extradition before this Court: the High Court. I have already stated that the Court with jurisdiction in extradition matters is the Magistrate's Court. The High Court's jurisdiction is limited under **Sections 10, 11** and **12** of the **Act** and while this Application is rightly before me as a

constitutional application, the argument by the Applicants flies on the face of the law because it has not yet been decided by the extradition Court that the Applicants will definitely be extradited. Their apprehensions which can be competently dealt with by the Magistrate's Court are therefore misplaced. As a Court established by **Article 169** of the **Constitution**, the Magistrate's Court is bound in exercise of its mandate to protect and defend the Constitution. The contrary has not been shown in this case as against that Court.

72. Having so said and despite the above fact, in the spirit and honour of our international obligations, Kenya will not enter into an agreement with a State and turn its back on it. The fundamental question is, does Kenya have an extradition agreement with the Island of Jersey? If the answer is yes, it befalls all State organs to have to honor that agreement. That is the rationale behind the principle of ***Pact sunt servanda*** as used in international law.

73. Secondly, before a State like Kenya ratifies any treaty or enters into any contractual agreement with another State, the state law office (Office of the Attorney General) and the ministry in charge of foreign affairs must do due diligence. Before Kenya agreed to enter into an extradition agreement with the Island of Jersey it is right to assume that it was satisfied that its legal system met all the rules of fairness and legality.

74. As a matter of fact, I dare say that it does not fall within the jurisdiction of a municipal Court to question and put to trial the legal system of another sovereign State. That power and matter falls within the confines of international law and International Courts and Tribunals. It is clear to me therefore that while the right forum to address the issue is the Magistrate's Court without representation from the State authorities of Jersey, this Court or any other Court in Kenya would not be acting fairly if it purports to determine how the legal system of Jersey works. I say so guardedly as the Magistrate's Court will ultimately make its own decision on the matter despite any comments made by me in this matter and I have stated why.

75. In addition to what I have stated above, I also note that the Magistrate's Court stated in its Ruling aforesaid;

> ***"It was not lost to the Court that Mr. Samuel Gichuru one of the subjects herein has on a number of occasions submitted himself to the jurisdiction of New Jersey legal System. He has had some rulings in his favour and has lost others. It would be late in the day for him to turn around and state he does not expect fair treatment before courts when he himself initiated proceedings. The said legal system cannot be termed as oppressive now that the state has sought extradition orders against him."***

76. I agree with the Magistrate's Court and the Applicants cannot have their cake and eat it. When they wanted favourable orders, they approached the Jersey Courts and now that the Island of Jersey requires them, they cannot claim that that system is bad. What is good for the goose must be good for the gander.

77. Lastly, on this issue, a perusal of the record before the Court reveals that Mr. Gichuru retained a Jersey advocate called Mr. Young who on 8th February 2013 attended on the Attorney General of Jersey to invite the Law Officers of Jersey to reconsider its position on sentence in the event that Mr. Gichuru was prepared to plead guilty in Jersey to the criminal charges he may face there. In essence there is a demonstration of the 1st Applicant engaging the Jersey law officers in some form of a *plea-bargaining*. I ask myself: why engage into a plea bargain with a system you have no faith in?

In the end and for the above reasons, I am unable to state that the jersey legal system is so weak that it cannot grant the Applicants a fair trial.

iv. ***Adverse prior publicity***

78. Right from the beginning of proceedings before the Magistrates' Court, it has been the Applicants' case that their extraction proceedings have drawn a lot of publicity and that they are apprehensive that they cannot get a fair trial. In my view, the fact that the Applicants are public figures (a fact conceded by the Applicants themselves) and the fact that the offences with which they are accused of are of the nature of economic crimes would necessarily throw this matter squarely in the eye of the general public. Luckily for the Applicants, Courts decide cases on the facts and evidence before them and not on the public opinion shaped by the publicity elicited by the matter.

79. The Magistrate's Court could not have put it any better when it stated thus;

> ***"On the issue of adverse publicity this court is in agreement with the ruling of the High Court in Civil Suit No. 1192 of 2005 William S. K. Ruto and another Vs Attorney General where it was held that "the applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press … media publicity per se does not constitute of itself a violation of a party's right to a fair hearing. It will therefore not warrant a referral to the High Court for a constitutional interpretation."***

I agree and would adopt the above statements as if it were mine and that is all there is to say on that matter.

v. ***<u>Extradition and liberty</u>***

80. The 1st Applicant referred to the ***Vasiljkovic (supra)*** case to urge that in extradition proceedings, because compliance with an extradition request obliges arrest, detention and removal from the extraditing nation (and ordinarily, lengthy detention in the Country to which the person is surrendered), an extradition decision places an obvious and immediate burden on the liberty of the surrendered person and, accordingly, extradition legislation typically enlivens those constitutional provisions which control the imposition of a loss of liberty on persons subject to it. That therefore this Court ought to adopt the same approach and find that extradition proceedings 'infringe' on the liberty of the subject.

81. I have read that decision and the portion of the decision relied on by the Applicants is not the finding of the Australian Court. What the Applicants presented to this Court as the observation of the Court is only but submissions of the parties which the Court crystallized as forming *"common ground"*. In paragraph 172 of that decision, the Court notes; "*Some aspects of the parties arguments on the first issue, described above, represent common ground."* It then lists several of those grounds and at paragraph 177, it stated; "*Extradition implies loss of liberty is one of them*." In fact in the ***Vasiljkovic*** case, the Court was categorical that the Australian law that allows one to be legally deprived his liberty was not unconstitutional and that is also the law in our realm as I know it.

82. In that context, Liberty like other human rights is not absolute. It can be limited under **Article 24** of our **Constitution** and criminal law is concerned with finding a basis for limiting one's liberty. Hence extradition proceedings, as long as they are conducted in accordance with the law, in no way infringe on a person's liberty and that is my finding on that issue.

vi. ***<u>Dual criminality and delay in instituting the extradition proceedings</u>.***

83. Having found that the Magistrates' Court is the court with jurisdiction to conduct extradition proceedings under the Act, this Court is not about to usurp that jurisdiction. The law as regards the dual criminality principle is well captured in **Section 4** of the **Act** thus:

> **4 (1)** ***For the purposes of this Act, an offence is an extradition offence if-***

a. ***It is an offence against the law of a requesting country which, however described in that law, falls within any of the descriptions contained in the schedule and is punishable under that law with imprisonment for a term of twelve months or any greater punishment;***

b. ***The act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Kenya if it took place within Kenya or, in the case of an extraterritorial offence, in corresponding circumstances outside Kenya.***

84. This is the law that the extradition court will apply and as the miscellaneous application before that Court is yet to be canvassed, I fail to see how it can be argued that the principle of dual criminality and the law has been wrongly applied.

Likewise, the submissions on the delay in bringing the charges against the Applicants and whether or not the extradition proceedings have been brought as an abuse to the Court process are all legitimate questions that fall within the mandate and power of the Magistrate's Court that hears and determines the extradition motion. The Magistrates' Court correctly appreciated this when it held that these issues have been raised too early in the day and will be dealt with, if and when duly raised. I will encourage the Applicants to argue their case before the right forum and such substantive issues that go to the determination of an application whether or not a Court should dismiss an application for surrender or go ahead and order surrender should not be made the subject of preliminary applications so as to defeat an extradition application by way of judicial fiat.

85. Before making my final orders, I would like to address the issue of costs in this matter. It is a general principle that costs will ordinarily follow the event. This principle was reiterated by the Supreme Court in the case ***Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai 7 4 others [2014] eKLR,*** where it held thus:

> ***"So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the Suit."***

86. However, since the dawn of the **Constitution 2010,** especially **Article 22(2)** that has expanded the arena of those persons with the *locus standi* to approach this Court to defend the Bill of Rights, there has been an apparent paradigm shift with regard to award of costs in public interest litigation matters and/or matters that involve interpretation of the Constitution. This is meant to ensure that people do not fear the burden of costs at the peril of not protecting the Constitution in public interest litigation. In the **Jasbir case (above)** the Supreme Court expounded thus;

> ***"[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. <u>The claims of the public interest will be a relevant factor, in the exercise of such discretion,</u> as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."***

87. I am duly guided and while this Application was majorly concerned with the alleged contravention of the Applicants' fundamental rights and freedoms under the Constitution, the matter has also contributed to public interest litigation (PIL). Through this matter, the Court has had the occasion to expound on the fundamental question of the powers of the DPP *vis-à-vis* the AG as relates to extradition proceedings; and the mandate of the extradition court among other

issues. Hence, it is my conviction that this is an apt matter where there should be no order as to costs.

Conclusion

87. I have, in my view, addressed all matters placed before me for determination. However, before making the final orders, I must state for the record that in the course of these proceedings, it came to my attention that that there were complaints that there was undue delay in the conclusion of this matter. The complaints came from quarters other than the Parties to the litigation itself. In that regard, any blame for the delay in the finalization of this matter since 2013 cannot be placed in the hands of this Court and the record can bear that statement out. I digressed.

88. In concluding, I must thank all the advocates who appeared for their courtesy, depth of research and conciseness of submissions. That I did not make reference to all their submissions and authorities cited, is in no measure an expression of their irrelevance but only to make the Judgment concise and pointed.

Orders

88. The upshot of the foregoing is that I hereby make the following orders;

i. ***The Originating Notice of Motion dated and filed on 15th February, 2013 is hereby dismissed.***

ii. ***The Conservatory Orders issued on 15th February, 2013 are hereby vacated.***

iii. ***The proceedings before the Magistrate's Court in Miscellaneous Application No.9 of 2011 are declared valid.***

iv. ***The Magistrate's Court Ruling in Miscellaneous Application No.9 of 2011 rendered on 5th February, 2013 is hereby affirmed.***

v. ***The Chief Magistrates' Court Miscellaneous Application No.9 of 2011 shall be expeditiously mentioned before the Honourable Chief Magistrate for directions with the aim of its hearing in a timeous manner.***

vi. ***There shall be no order as to costs.***

89. Orders accordingly

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18th DAY OF DECEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of;

Muriuki – Court clerk

Mr. Otadu for 1st Petitioner

Mr. Ngatia for 2nd Petitioner

Mr. Kaumba for 1st Respondent

Mr. Mule for 2nd and 3rd Respondent

Miss Lunyolo holding brief for Mr. Ruto for Interested Party

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE