



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 221 OF 2013

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONSRESPONDENT

AND

ROYAL MEDIA SERVICES LTDINTERESTED PARTY

EX-PARTE

COMMUNICATIONS COMMISSION OF KENYA

JUDGEMENT

The Communications Commission of Kenya (hereinafter simply referred to as the Applicant or Commission) is a body corporate established under Section 3 of the Kenya Information and Communications Act, 1998 ('the Act'). Its mandate includes the licensing and regulation of postal, information and communication services in accordance with the Act. The Director of Public Prosecutions (hereinafter referred to as the Respondent or DPP) is an office established by Article 157 (1) of the Constitution and one of its mandates is to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence recognized by the laws of Kenya. Royal Media Services Limited (hereinafter simply referred to as the Interested Party) is a limited liability company incorporated under the Companies Act, Cap 486 and conducts broadcasting business in Kenya.

According to the papers filed in Court by the Applicant, on 30th January, 2013 it obtained warrants in **Criminal Investigation Department Communication Commission of Kenya v Royal Media Services, Nairobi CMCC Miscellaneous Criminal Application Nos.152, 153, 154 and 155 of 2013** to seize broadcasting equipment used in making unauthorized broadcast transmissions at Migori, Enchoro Hill in Borabu, Narok, Menengai Hill in Nakuru, Nanyuki, Gatara in Muranga, Mukuyuni, Mwingi Karue Hill in Embu, Mamburui in Malindi and Vuria in Taita. The search and seizure warrants became the subject of **Royal Media Services Limited v Attorney General and another, Nairobi High Court Petition No. 59 of 2013** wherein Achode, J found that the seizure orders were lawfully issued.

On 15th February, 2013, the Director of Criminal Investigation Department wrote to the Respondent

recommending that the Interested Party and its directors be charged for the use of unauthorized frequencies on the following counts:

- i. Establishing and using radio apparatus without a licence from CCK contrary to Section 35 as read with Section 38(2) of the Kenya Communications Act No. 2 of 1998.
- ii. Using radio communication apparatus in contravention of a notice issued under Section 41 as read with Section 41(5) of the Communications Act.

After exchange of correspondences, the Respondent through a letter dated 27th May, 2013 wrote to the Director of Criminal Investigations and made decisions, which the Applicant has identified as follows:

- i. **I have carefully perused the file and analyzed the evidence on record and noted that the evidence gathered cannot establish a prosecutable case against the suspects.....**
- ii. **It is therefore clear that the approval that would have been required for erecting the masts would have been from KCAA, Ministry of State for Defence and NEMA but not that of CCK.**
- iii. **Further, the investigators failed to establish the use of the alleged frequencies for there is not a single independent witness other than the CCK officers that has recorded a statement to confirm that the alleged unauthorized frequencies were active.**
- iv. **In view of the above, the proposed counts cannot stand in law as against the suspects.**
- v. **My office is aware of the pending High Court Constitutional Petition No. 244 of 2011 in which CCK is a party.....**

It is imperative to note that pending the determination of the Petition, it would be idle to proceed and commence proceedings against the suspects against the backdrop of an express Court Order barring CCK from interfering with broadcasting services.

- vi. **I therefore direct that in view of the above, there is no sufficient evidence to support the charges proposed and to institute the intended proceedings would be tantamount to subverting the rule of law and would by extension undermine the authority of the High Court.**
- vii. **Do therefore proceed and have the file closed with no further police action.**

The Applicant's case is that the Respondent's decision not to prosecute the Interested Party is *ultra vires*. In particular, the Applicant contends that the decision of the Respondent directing the Director of the Criminal Investigations to **"proceed and close the (investigation) file without further police action"** is *ultra vires* the powers conferred on the Respondent by **Article 157 of the Constitution** and the **Office of the Director of Public Prosecutions Act No. 2 of 2013** and the **National Police Service Act No. 11A of 2011**. Further, the Applicant contends that the aforesaid decision by the Respondent is *ultra vires* the relevant provisions relating to the directions that may be given to the Inspector General of Police under **Article 245 of the Constitution**, the **Office of the Director of Public Prosecutions Act No. 2 of 2013** and the **National Police Service Act No. 11A of 2011**. The Applicant argues that in acting as above stated, the Respondent exercised a power that the office does not possess in law.

Secondly, the Applicant asserts that the decision of the Respondent is a breach of its legitimate expectation for the reasons found in Paragraph 31 of the verifying affidavit sworn by the Applicant's Managing Director, Mr. Francis Wangusi:

"31. That further to the foregoing, I am advised by the Commission's Advocates and which advice I verily believe to be sound in law that the decisions of the Office of Director of Public Prosecutions are a breach of legitimate expectation for the following reasons:

- i. **The Commission was established by the Kenya Communications Act, 1998 ("the Principal Act") with the initial mandate to:**

"licence and regulate telecommunication, radio communication and postal services."

(ii) The mandate of the Commission was thereafter expanded by the *Kenya Communications (Amendment) Act No. 1 of 2009* (“the 2009 Act”) to:

“facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce.”

(iii) Under Section 5(1) of the 2009 Act, the object and purpose for which the Commission is established was expanded to be to:

“licence and regulate postal, information and communication services in accordance with the provisions of this Act.”

(iv) Frequency spectrum is a scarce public resource allocated to nations in accordance with complex international agreements and is, in each country, managed by a central authority, which in the case of Kenya is the Commission, in order to ensure utilization in a co-ordinated manner so that frequency users do not interfere with each other.

(v) The Commission therefore assigns frequencies to applicants including broadcasters, strategic national institutions such as the Kenya Defence Forces, the Kenya Civil Aviation Authority, the Kenya Police, the Kenya Wildlife Service, among others, based on a national frequency plan which it develops and maintains. The said plan is informed by amongst others, Geneva, 1984.

(vi) As a result, the Commission is empowered by the Legislature to regulate radio communications under the *Principal Act, the 2009 Act together with the Kenya Information and Communications (Radio communications and Frequency Spectrum) Regulations, 2010* (“the Regulations”).

(vii) The Commission having undertaken its regulatory role and in conjunction with the Criminal Investigation Department and established the existence of violations by the Interested Party or any other parties, the Commission has a legitimate expectation that the Office of the Director of Public Prosecutions would act in a complementary manner to uphold the regulatory function of the Commission.

(viii) The Commission having undertaken its regulatory role in conjunction with the Director of Criminal Investigations Department, and having established the existence of statutory violations by the Interested party, the Commission has a legitimate expectation that the Office of the Director of Public Prosecutions would act in a complementary manner in undertaking its prosecutorial role to its logical conclusion in order to give the legislative effect to the regulatory function of the Commission.

(ix) By making the decision(s) that it did, the Office of the Director of Public Prosecutions fundamentally breached the Applicant’s legitimate expectation that acting as the regulator, the Office of the Director of Public Prosecutions would support and play a complementary role in implementing the provisions of the Kenya Information and Communications Act and upholding the Rule of Law.

(x) The actions of the Office of the Director of Public of Public Prosecutions do not foster public confidence in the office it being part of the law enforcement mechanism of the Criminal Justice System.

(xi) By making the decision that it did, the Office of the Director of Public Prosecutions had caused a breakdown in the chain of law enforcement against the Interested Party and as such breached the legitimate expectation of the Applicant that the law would apply to the Interested Party as it would to any offending person.

Thirdly, the Applicant asserts that the decision of the Respondent that **“[i]t is imperative to note that pending the determination of the Petition, it would be idle to proceed and commence proceedings against the suspects against the backdrop of an express Court Order barring CCK from interfering with broadcasting services”** is based on fundamental errors of law as the orders in **HC Petition No. 244 of 2011, MEDIA OWNERS ASSOCIATION V THE COMMUNICATIONS COMMISSION OF KENYA & 2 OTHERS** (hereinafter simply referred to as Petition No. 244 of 2011) do not relate to the use of illegal or unlicensed frequencies by the Interested Party.

Further, the Applicant argues that the Respondent erred in law by stating that Petition No. 244 of 2011 **“challenges the very constitutional authority of the Commission to act as the regulator and in particular its powers to licence broadcasters under Article 34 of the Constitution”** and **“to institute the intended proceedings would be tantamount to subverting the rule of law and would by extension undermine the constitutional authority of the High Court”**

The Applicant argues that the foregoing statements made by the Respondents are based on fundamental errors of law, in that they are made:

- i. While ignoring the fact that the Orders subsisting in Petition No. 244 of 2011 do not relate to the use of illegal or unlicensed frequencies by the Interested Party;
- ii. Without appreciating that no Order/Decision in Petition No. 244 of 2011 has made any finding as to the unconstitutionality or otherwise of the Applicant;
- iii. Under the wrong assumption that the Orders prayed for in Petition No. 244 of 2011 will be granted as a matter of course;
- iv. Without appreciating that the Orders in Petition No. 244 of 2011 cannot be construed to be a *carte blanche* to the Interested Party to engage in criminal activity under the guise of the said Orders.

The Applicant submits that the decision of the Respondent that **“it is therefore clear that the approval that would have been required for erecting the masts would have been from KCAA, Ministry of State for Defense and NEMA but not that of CCK”** was made under the influence of a fundamental error of law as the decision was made in ignorance of the provisions of the Kenya Information and Communications Act and the Regulations made thereunder relating to radio apparatus and the use of the same rather than the physical masts on which the said apparatus are mounted.

The Applicant also contends that the Respondent’s decision that the evidence gathered did not meet the requisite prosecutorial threshold to mount a prosecution against the Interested Party was made under an error of law of the applicable threshold required by a prosecutor to lay a prosecution against an offender.

Fourthly, the Applicant contends that the decision of the Respondent not to prosecute the Interested Party is against public interest and public policy. The Applicant avers that it assigns frequencies to applicants including broadcasters, strategic national institutions such as the Kenya Defence Forces, the Kenya Civil Aviation Authority, the Kenya Police, and the Kenya Wildlife Service, among others, based on a national frequency plan which it develops and maintains. According to the Applicant, frequency regulation, by its very nature, is critical to the security of the nation and the safety of its population. It therefore assigns frequencies to users subject to terms and conditions contained in their respective frequency licences. Among the terms is that a user is required to make submissions to the Applicant on the geographical coordinates it proposes to transmit from in order for a suitable transmission position to be established and authorization for erection of a transmission station at the site be granted by the Applicant.

It is the Applicant’s case that sometimes in 2006 it started receiving several complaints from broadcasters and strategic national institutions, including the Kenya Civil Aviation Authority, concerning interference with the frequencies assigned to them. As a result of the complaints and in routine discharge of its duties, the Applicant carried out several surveillance/inspection exercises to establish the cause of the interferences. As a result, it established that several broadcasters were causing harmful interference with frequencies lawfully assigned to aeronautical services and to other broadcasters. The Applicant also discovered that the Interested Party had also been making transmissions on some frequencies from several locations without due assignment, authorization or licensing by the Applicant and this was in

contravention of the law.

Consequently, the Applicant wrote to the Interested Party on several occasions, notifying it of the unauthorized use of the various frequencies and demanded that it ceases to make use of the various frequencies but the Interested Party failed to cease making such transmissions. The Applicant subsequently took action with a view to protecting the security of the country and the safety of its people. The Applicant therefore contends that the decision of the Respondent negates the aforesaid protection of public interest and has the practical effect of compromising the security of the nation and the safety of the people. The Applicant contends that the Respondent failed to protect the public policy consideration requiring that the Interested Party should face the force of law. The Applicant submits that it is in the public interest that all investigative arms of government, together with the Respondent, work in harmony and in collaboration to ensure that there is no breakdown in the process of law enforcement against offenders.

Fifthly, the Applicant asserts that the decision of the Respondent is, on the whole, irrational, unreasonable and will lead to an absurd result as the practical effect of the decision is to immunize the Interested Party from the application of the Kenya Information and Communications Act. The Applicant contends that the practical effect of the decision of the Respondent is to suspend the operation of provisions of the Kenya Information and Communications Act as against the Interested Party and as such take it out of the purview of the applicable law. The Applicant argues that the decision has placed it in a position where it may be bound to return equipment that has been used in the commission of a criminal offence back to the offender and the said equipment is likely to be used again in the commission of the same criminal offence. It is the Applicant's case that this would be an absurd result not contemplated by the law.

Finally, the Applicant asserts that the Respondent arrived at the impugned decision by taking irrelevant considerations into account. The Applicant argues that in basing his decision on the Orders in **Petition No. 244 of 2011** the Respondent took irrelevant considerations into account as the Interested Party is not a party to those proceedings and the frequencies and radio apparatus, the subject matter of the present proceedings, have nothing to do with the matters arising in that Petition which solely relates to migration to a new broadcasting network.

After obtaining the leave of this Court to commence these judicial review proceedings, the Applicant through the Notice of Motion application dated 3rd July, 2013 prays for orders as follows:

“(a) An Order of Certiorari to remove into the High Court and quash the decisions(s) of the Office of the Director of Public Prosecutions contained in the letter dated 27th May 2013 addressed to the Director of Criminal Investigations Department in relation to the intended prosecution of Royal Media Services Limited.

(b) An Order of Mandamus directed at the Office of the Director of Public Prosecutions compelling the said office to institute and maintain to their logical conclusion, such criminal proceedings against Royal Media Services Limited whether in terms of the recommendation by the Office of the Director of Criminal Investigations Department dated 15th February, 2013 or in terms of any such recommendations for criminal prosecution as may be or may have been made by the Inspector General of Police or the Applicant as the regulator contemplated under the Kenya Information and Communications Act, Cap 411A, Laws of Kenya.

(c) Costs of and incidental to these Judicial Review proceedings.”

The Respondent opposed the application through a replying affidavit sworn by Terry Kahoro a prosecution counsel in the office of the Respondent. In the said affidavit, the Respondent details the letters exchanged with the Applicant and the Director of Criminal Investigations before the impugned decision was made.

The Respondent's case is that it is the only body mandated by the Constitution and the law to decide

whether complaints disclose any criminal offences requiring prosecution. The Respondent asserts that its decision was purely based on the law, the evidence available and was made with regard to public interest considerations and the need to prevent the abuse of legal process. It is the Respondent's case that the decision whether or not to prosecute is the preserve of his office and he is not bound by the recommendations to prosecute made by investigative agencies or any enforcement body or authority such as the Applicant. The Respondent contends that the decision not to prosecute did not amount to a breach of any legitimate expectation since in law it is not contemplated that all investigations must result in the commencement of criminal proceedings. He contends that the position of the Applicant is that of a regulator and not a prosecutor thus the determination as to what case merits prosecution is not within the province of the Applicant or the Director of Criminal Investigations but it is the sole responsibility of the Respondent who exercises independent and professional judgement in the making of prosecutorial decisions. It is argued that although the Respondent complements actions of regulatory and investigative authorities in enforcing the law, nonetheless, it is the constitutional duty of the Respondent to make prosecutorial decisions without influence or dictation by any of those bodies. The Respondent asserts that upon review of the evidence and the law it emerged that the evidence was insufficient to sustain the intended or any other criminal charges against the Interested Party.

The Respondent contends that although the order issued in the **Petition No. 244 of 2011** was considered, the said order was not the sole basis upon which the decision not to charge was reached. The Respondent contends that reference was made to the said order in recognition of the fact that as the custodian of public interest, charged with the duty of preventing the abuse of legal process and having regard to interests of the administration of justice, it would have been professionally wrong for the Respondent to act as if such an order of stay never existed even though the matter was still pending final determination. The Respondent submits that the gist of **Petition No. 244 of 2011** is that the Applicant is not the constitutional body contemplated under Article 34(3) of the Constitution and therefore not competent to act as the regulator. The Respondent therefore argues that reference to the order in question was therefore a proper or relevant consideration.

The Respondent asserts that the decision not to charge the Interested Party did not offer it a carte blanche to commit criminal acts as contended by the Applicant. The Respondent submits that the contention by the Applicant that the decision not to prosecute the Interested Party compromises national security or safety is not based on any material evidence and is therefore suspicious, misleading and purely calculated to exert pressure on the Respondent to review his decision. The Respondent avers that the decision was rational, reasonable and lawful thus not amenable to judicial review since no irrelevant matters were taken into account. The Respondent urges the Court to find that the application has no merit, is an abuse of the Court process and brought in bad faith. The Respondent therefore prays that the application be dismissed with costs.

The Interested Party opposed the application through a replying affidavit sworn on 20th September, 2013 by Samuel Kamau Macharia, the Chairman of its Board of Directors. The Interested Party contends that this application is one in a series of cases in which the Applicant, on the one hand, and the Interested Party and other broadcasters, on the other hand, have been having regarding the application of the Constitution to the broadcasting business. The Interested Party holds the view that the Applicant as constituted is not a regulator independent of control of the government, political and commercial interests in a democratic state like Kenya as envisaged by Article 34 of the Constitution.

The Interested Party contends that the Applicant's aim is to destabilize its broadcasting business despite orders issued in **Petition No. 244 of 2011** on 14th November, 2011 restraining it (the Applicant) from interfering with its broadcasting freedom. The Interested Party listed six cases between it and other broadcasters, on the one hand, and the Applicant, on the other hand, to demonstrate the acrimonious relationship between it and the Applicant. It is the Interested Party's case that the Applicant has been acting oppressively towards it. The Interested Party asserts that the Applicant's alleged enforcement actions were taken in disobedience of the orders of the Court issued in **Petition No. 244 of 2011**.

The Interested Party submits that this application is fatally defective in that the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and

is not available in the relationship between one public authority and another.

The Interested Party avers that under Article 157(4) of the Constitution, the Respondent has discretion to either institute or not institute criminal proceedings against any person and consequently the order of mandamus is not available to the Applicant. Further, the Interested Party submits that the Respondent is an independent office and cannot be directed in the execution of his duties.

The Interested Party asserts that the object of the Applicant is to secure a review of the judgments of this Court in **High Court Petition No. 346 of 2012, High Court Petition No. 59 of 2013 and High Court Criminal Miscellaneous Application No. 43 of 2013** even though this Court has no power to review the decisions of superior courts. The Interested Party also argues that the Applicant is not the independent regulator envisaged by Article 34(5) of the Constitution since Parliament is yet to enact legislation establishing such a body.

Having outlined at length the pleadings of the parties, I do not find it necessary to reproduce their submissions in respect to those pleadings. The submissions will be referred to in the process of making the decision.

Before proceeding to consider what I believe to be the core issues in this matter, I wish to consider an issue raised by the Interested Party on the availability of judicial review remedies to the Applicant. The Interested Party contends that the remedy of judicial review is not available to public bodies. The Interested Party's case is that a public body cannot make a claim for judicial review orders against another public body. This is a fallacious argument. The basic function of judicial review is to ensure that those who submit themselves to public bodies are treated fairly by the said public bodies. If a public body submits itself to another public body, that public body ought to be treated fairly. The remedy of judicial review is therefore available to private and public bodies against public authorities to which they have been subjected to.

The Respondent and the Interested Party submitted that the Respondent is an independent office not subject to the direction and control of anybody else. They also submitted that in deciding whether to prosecute or not to prosecute, the Respondent is exercising discretion and the Respondent cannot therefore be directed on how to exercise the discretion. In support of their arguments they cited the decision of G.V. Odunga, J in **Nairobi High Court Misc. Civil Application No. 249 of 2012, REPUBLIC v THE DIRECTOR OF PUBLIC PROSECUTION EX-PARTE VICTORY WELDING WORKS LIMITED AND ANOTHER** in which he stated that:

“Article 157 (6)(a) of the Constitution provides that the Director of Public Prosecutionsshall exercise 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. It is therefore clear that the decision whether or not to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed by the DPP is purely discretionary. Where therefore in the opinion of the DPP no offence is disclosed, the DPP cannot be compelled to institute and undertake criminal proceedings since a decision whether or not to prosecute is arrived at after assessing the merits of the case based on the evidence presented to the DPP.”

I have perused the cited judgment and I do not get the impression that my brother, G. V. Odunga, J is of the view that the Director of Public Prosecutions is beyond the reach of this court whenever he exercises the discretion bestowed upon his office by the Constitution. At paragraph 10 of the same judgment, after analyzing several decisions, the learned Judge concluded that:

“It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to the control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.”

Another decision cited in support of the Respondent and Interested Party's proposition is the decision of Mumbi Ngugi, J in **JOHN SWAKA V THE DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS [2013] eKLR** where at paragraphs 49 & 50 of her judgement the learned Judge stated that:

“49. The powers of the Director of Public Prosecution are set out in Article 157 of the Constitution. Article 157 (10) provides as follows:

‘The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.’

50. As this Court observed in Francis Anyango Juma v Director of Public Prosecutions and Another Petition No. 160 of 2012, the intention behind the constitutional provision is to enable the DPP to carry out his constitutional mandate without interference from any person or organ. The Court observed at paragraph 28 of its judgment as follows:

‘Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's right under the Constitution or violation of the Constitution itself.’

The above cited decision, in my understanding, is that the Court can intervene where the Respondent exercises his mandate unconstitutionally. My opinion is that the DPP has discretion in deciding whether to prosecute or not to prosecute an alleged offender. However, that discretion must be exercised legally and reasonably. Where the Respondent exercises his powers for extraneous purposes, the Court can, and does have the authority, to intervene.

The correct principles applicable in review of the exercise of prosecutorial powers were those established in the persuasive decision of the Privy Council in **MOHIT v THE DIRECTOR OF PUBLIC PROSECUTIONS OF MAURITIUS (MAURITIUS) [2006] UKPC 20** (25 April 2006) where it was recognized that the orders of judicial review are available to an applicant where the Director of Public Prosecutions decides not to prosecute. It was, however, observed that:

“Recognition of a right to challenge the DPP's decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP's decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner.”

Where the Court therefore finds that the DPP has exercised his discretion not to prosecute wrongly, the Court can only remit the matter back to the DPP for reconsideration in view of the findings of the Court. The powers of the DPP are found in the Constitution and statute and they should be exercised within the constitutional and statutory provisions. In view of the source of the powers of the DPP, this Court has the authority to ensure those powers are exercised constitutionally and lawfully.

The Privy Council in **MOHIT**, supra, cited the decision of the Supreme Court of Fiji in **MATALULU v DPP [2003] 4LRC 712** in which grounds for review of the exercise of the prosecutorial powers were enumerated. The Supreme Court of Fiji is quoted to have stated that:

“It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-

making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. In excess of the DPP's constitutional or statutory grants of power—such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).
2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion—if the DPP were to act upon a political instruction the decision could be amenable to review.
3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
5. Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.”

In the Kenyan context, the DPP must exercise his powers with “regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”—Article 157 (11) of the Constitution. The powers of the Respondent are amplified by Section 5 of the Office of the Director of Public Prosecutions Act, 2013 which provides that:

“5. (1) Pursuant to Article 157 of the Constitution the Director shall—

(a) have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;

(b) exercise State powers of prosecution and may—

(i) 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;

(ii) 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

(iii) subject to Article 157 (7) and (8), discontinue at any stage before judgment is

delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions;

(c) formulate and keep under review public prosecution policy;

(d) perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the Constitution and this Act.

(2) The Director shall exercise State powers of prosecution and may—

(a) notwithstanding the provision⁴ of any other law in force for the time being, perform all that is necessary to be done for the purpose of performing the functions of the Director; and

(b) direct that investigations be conducted by an investigative agency named in the direction.

(3) Without prejudice to other provisions of this Act or any other law in force, the Director may assign an officer subordinate to him to assist or guide in the investigation of a crime and every investigative Agency shall give effect to that direction.

(4) The Director shall—

(a) promote appropriate standards of practice by public prosecutors, assistant prosecutors, and any other person exercising prosecutorial authority under this Act;

(b) implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime;

(c) cooperate with the National Police Service, investigative agencies, the courts, the legal profession and other Government agencies or institutions so as to ensure the fairness and effectiveness of public prosecutions;

(d) set the qualification for the appointment of prosecutors;

(e) review a decision to prosecute, or not to prosecute, any criminal offence;

(f) advise the State on all matters relating to the administration of criminal justice; and

(g) do all such other things as are necessary or incidental to the performance of its functions under the Constitution, this Act or any other written law.”

Although the Court has powers to review the Respondent’s decision that power must be exercised sparingly-see the decision of the Privy Council in **SHARMA v BROWN-ANTOINE AND OTHERS [2006] UKPC 57**. In the Kenyan context there is a strong reason why the courts should, only in very extreme cases, intervene with the decision of the Director of Public Prosecutions not to prosecute. The reason is that a complainant aggrieved by the decision of the DPP has the remedy of commencing private prosecution and that prosecution can only be taken over by the DPP with the permission of the complainant–**Article 157(6)(b) of the Constitution**. A person dissatisfied with the decision of the DPP not to prosecute is therefore not left without a remedy. However, the Court cannot altogether abdicate its supervisory powers over the exercise of the prosecutorial mandate by the Respondent. Where an applicant demonstrates that judicial review is the best remedy for checking abuse of prosecutorial powers by the Respondent, I do not see why the Court should not grant appropriate orders to such an applicant.

Having stated my understanding of the law applicable to review of the DPP’s prosecutorial powers, I now

move to consider the Applicant's complaints about the exercise or non-exercise of prosecutorial powers by the Respondent.

The test applicable in deciding whether to prosecute or not to prosecute was laid down in the English case of **R v DPP Exp. MANNING [2001] QB 330** as follows:

“21. General responsibility for the institution and conduct of prosecutions in England and Wales is entrusted to the Director, subject to the superintendence of the Attorney General, and the responsible staff of the Crown Prosecution Service, although the power to institute a private prosecution is preserved. Section 10 of the Prosecution of Offences Act 1985 requires the Director to issue a code for Crown Prosecutor giving guidance on general principles to be applied by them in determining, in any case, whether proceedings for an offence should be instituted. The Code applicable in this case laid down two tests before a decision to prosecute would be made. The first test was described as “the evidential test’ which had to be satisfied before the second ‘public interest’ test became applicable. The code provided:

“5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a “realistic prospect of conviction” against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.

- 5. A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.**
- 5. When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used or is reliable**

22. An explanatory Memorandum emphasised that the evidential test was a “realistic prospect of conviction.” This had to be satisfied. If it was not satisfied there should be no prosecution, no matter how great the public interest might seem in having the matter aired in court. It was not the role of the CPS simply to give cases a public hearing, regardless of the strength of the evidence. There had to be an objective assessment of that evidence. The CPS should not look for the same standard of proof that a jury or bench of magistrates before it could convict, which would set too high a standard and tend to usurp the role of the court. The test based on “more likely than not” meant just that.”

This is the same standard set by the Kenyan National Prosecution Policy, 2007 which provides at Clause 3.0 that in making a decision to prosecute, a prosecutor is required to satisfy himself or herself that the evidential test and the public interest test have been satisfied. The policy requires that the prosecutor must arrive at an independent opinion and should not be influenced by the opinion of the complainant or the investigating officer.

The Applicant submits that in deciding not to prosecute, the Applicant used the test used by judicial officers in arriving at a decision to convict and this amounts to an error of law. The Respondent gave several reasons as to why he arrived at the decision not to prosecute the Interested Party. The Applicant's view is that each of these reasons is an independent decision. I do not agree with the Applicant that each of the reasons given by the Respondent is an independent decision. The only decision contained in the Respondent's letter was that there was no sufficient evidence to mount a prosecution against the Interested Party for the reasons cited.

The question would then be whether the reasons given by the Respondent are sustainable. The duty to prosecute or not to prosecute lies with the Respondent. Kenyans through the Constitution and Parliament specifically assigned that power to the Respondent. The Respondent, it is assumed, is equipped with the skills and tools of analyzing a case and deciding whether the same has a realistic prospect of conviction. Although some of the reasons given by the Respondent may give the impression that he took irrelevant

matters into consideration, an overall review of his decision does not show that he acted outside his statutory powers. For example, the Applicant is right in contending that the Respondent erred by stating that a prosecution could not commence because of the existence of **Petition No. 244 of 2011**. This amounted to taking extraneous matters into consideration since the existence of the said Petition did not in any way suspend the operation of the law governing broadcasting services. The same Petition did not also bar the Applicant from executing its statutory obligations.

This Court cannot however, fault the Respondent's statement that **“there is not a single independent witness other than the CCK officers that has recorded a statement to confirm that the alleged unauthorized frequencies were active.”** In stating so, the Respondent was acting within the discretion bestowed upon his office by the law. The decision not to prosecute because of this particular reason cannot be interfered with by this Court for to do so would amount to usurping the Respondent's discretion.

All in all, I find that the Respondent acted within his constitutional and statutory mandate in arriving at the decision not to prosecute the Interested Party. The Applicant's application therefore fails and the same is dismissed. Considering that the Applicant and the Respondent are public bodies, I will make no orders as to costs. The parties including the Interested Party will meet their own costs.

The Interested Party asked for the release of the exhibits that were seized during the investigations. That is a matter to be dealt with by the investigating officer and I will make no order on the said exhibits.

Dated, signed and delivered at Nairobi this 21st day of February , 2014

W. K. KORIR,

JUDGE OF THE HIGH COURT