REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL PETITION 101 OF 2011

IN THE MATTER OF THE NOMINATION FOR APPOINTMENT OF THE DEPUTY PUBLIC PROSECUTOR

AND

IN THE MATTER OF THE SECTION 12 AND 22 OF THE PUBLIC OFFICERS ETHICS ACT CHAPTER 183 OF THE LAWS OF KENYA

AND

IN THE MATTER OF INTERPRETATION OF ARTICLE 10(2) & 73 (1) (a) & (b) 2 (a), (b), (c), (d) & (e) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN MATTER OF ARTICLE 157 (6) (a), (b) & (c) 10 & 11 and ARTICLE 158 (4) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLE 165 (d) (ii) OF THE CONSTITUTION AS READ WITH SECTION 20 AND 21 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006. (GICHERU RULES)

KENYA YOUTH PARLIAMENT

KENYA YOUTH LEAGUE

PATRICK NJUGUNA…….…….....…
PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....….....…….....1ST RESPONDENT

TOBIKO KERIAKO DIRECTOR OF PUBLIC PROSECUTION.....2ND

RESPONDENT

KENYA FOR PEACE WITH TRUTH AND JUSTICE

AFRICAN CENTRE FOR OPEN GOVERNANCE…….....…..INTERESTED PARTIES

JUDGMENT

Our 2010 Constitution in Article 157 created the office of the Director of Public Prosecutions, (DPP) which hitherto existed in the office of the Attorney General under a different name. That current office of Director of Public Prosecutions is an independent one, not requiring the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the functions of that office the holder shall not be under the direction or control of any person or authority. In an endeavour to appoint the first Director of Public Prosecutions Post the 27th August 2010 promulgated Constitution of Kenya, the Executive head of the Republic of Kenya, upon whom, in consultation with the country's Prime Minister, falls the duty and responsibility of appointing the Director of Public Prosecutions, caused to be advertised in the Kenya Gazette, a special issue thereof, on the 16th March 2011, in Gazette Notice No. 2649, a Request for Applications for Appointment to Office of Director of Public Prosecutions. In the said advertisement was created the Interview Panel and the qualifications of candidates were spelt out. All and sundry were informed in the said advertisement that the exercise was subject to public disclosure.

Some thirty (30) or so candidates applied to be the first holders of the office of the Director of Public Prosecutions, among them **KERIAKO TOBIKO**, the 2nd Respondent herein who eventually was the successful candidate out of the thirteen (13) shortlisted ones and of the three (3) recommended to the Executive from which to pick one for appointment. Upon the 2nd Respondent's nomination to the office of the Director of Public Prosecutions and more specifically on the 16th June, 2011 the Petitioners namely, **KENYA YOUTH PARLIAMENT, KENYA YOUTH LEAGUE AND PARTRICK NJUGUNA** filed a petition in court seeking, inter alia, restraining orders to prevent the 2nd Respondent's assuming office. That Petition was soon amended on 17th June, 2011. The amendment was necessitated by the appointment of the 2nd Respondent to the office of Director of Public Prosecutions on 16th June, 2011.

The Amended Petition was brought with reliance on various Articles of the Constitution to wit, Articles 2,3,10,23,73,129,131,157,158,165,259 and 260 as well as under the provisions of Sections 12 and 22 of the Public Officers Ethics Act Cap 183 of the Laws of Kenya. The Petitioners set out in their Amended Petition the functions of the Director of Public Prosecutions as set out in Article 157 of the Constitution and also set out the Provisions of Article 158 of the same Constitution as to the procedure of the removal from office of the Director of Public Prosecutions. They added that the Constitution pronounces its supremacy and it binds all persons, state organs and the President and any acts done in contravention of the Constitution are void. Every person is obligated to respect, uphold and defend the letter and spirit of the Constitution. The Petitioner's case is based on the above and the further grounds that the Constitution enshrines the Principles of good governance, integrity, transparency and accountability in the conduct of public affairs, the culture of constitutionalism, principles of democracy, public participation of the people, equity, inclusiveness, non discrimination and the protection of the marginalized and binds all persons to apply, enact, interpret and implement the Constitution with due regard to the values set out by the Constitution. They added that the High Court is conferred with jurisdiction to hear any question respecting to the interpretation of the Constitution. They asserted that there had been breaches of the Constitution and of the Public Officers Ethics Act in the appointment of the Director of Public Prosecutions and called upon the court to intervene.

The Petitioners seek an interpretation from the court as to whether the appointment of the 2nd Respondent to the office of the Director of Public Prosecutions in the light of allegations of corruption, incompetence, conflict of interest and lack of reform credentials would be inconsistent with the Constitution and the

Public Officers Ethics Act. They also seek declaratory orders that the appointment in light of the said allegations unless thoroughly investigated and cleared would fail the integrity test set out for leadership. The court was asked to give an interpretation as to what constitutes competence, integrity, honesty and suitability for Public Office. The above were sought on the basis that the Public views presented against the 2nd Respondent revealed issues touching on his competence, integrity, honesty and suitability for office citing complaints as raised by a former Deputy Public Prosecutor, Mr Philip Murgor, another by a former Chairman of the Constitution of Kenya Review Commission, (CKRC) Professor Yash Pal Ghai, another by a former Judge of the Court of Appeal, the late Moijo Ole Keiuwa, another by Prof. PLO Lumumba, the then Director of the Kenya Anti Corruption Commission and others from some members of the Constitution Implementation Oversight Committee and members of the public suggesting that the 2nd Respondent is beholden to certain political class and has influenced the dismissal of cases involving powerful personalities namely Hon. William Ruto and Tom Chomodley.

The Petitioners then sought in their petition a Constitutional Interpretation of the Provisions, and in the words of their petition they are:-

"1. Whether under Constitution the appointment and/or election of any State Officer as defined in Article 260 of the Constitution must meet and/or pass test of competence, integrity, honesty and suitability for office set out under Article 10(1) and (2) and Article 73(1) and (2) of the Constitution and if so what is the legal definition or benchmark to determine competence, integrity, honesty and suitability.

2. Whether the President in exercise of his powers of appointment under Article 157 (2) or the appointment of any state Officer described under Article 260 is subject to and bound (sic) the provisions of the directions and provisions of Article 73 as read with Article 10, Articles 2(1) (2) and (4), Articles 129 (1) as read with Articles 131 (2)(a) of the Constitution.

3. Under what circumstances does an appointment to state office (enumerated under Article 260 meet the test of integrity, suitability and competence set out in Article 73 of the Constitution and what meaning is to be ascribed to the requirement for such state officer or appointees/nominees must be persons of integrity, meet the suitability and competence test of leadership.

4. Alternatively an interpretation is sought as to what is the meaning, tenor and purport of the requirement that state officers or leaders whether elected or appointed should meet the test of integrity, meet the suitability and competence test of leadership: of what consequence are these requirements to such state appointments."

After setting out the above for constitutional interpretation the Petitioners sought the following prayers:-

"1. A <u>DECLARATION</u> that the approval for nomination and appointment of KERIAKO TOBIKO the 2nd Respondent herein to the position of Director of Public Prosecutions in light of the allegations touching on his competence, integrity and suitability as well as conflict of interest for that office is in breach of the Constitution in particular Article 10 (1) and (2) and Article 73 (1) and (2) of the Constitution.

2. A <u>DECLARATION</u> that the President in exercise of his power of appointment under Article 157 (2) of the Constitution or the appointment of any State officer described under Article 260, present or future is subject to and bound by the provisions and the directions and dictates of Article 73 (namely the leadership and integrity test, competence, suitability and honesty) as read with Article 10 Articles 2(1) and 2 and 4, Articles 129 (1) as read with Articles 131 (2) (a) of the Constitution.

3A. <u>A PERMANENT ORDER</u> does issue restraining the Respondents by themselves or through their Principal, agents or representatives or otherwise howsoever, from swearing in the 2nd Respondent and taking oath and affirmation of office to the position of Director of Public

Prosecutions until such time as he shall have undertaken or been subjected to full and complete investigations as to his competence, integrity and suitability and his name cleared against allegations for non suitability and competence for that office of Director of Public Prosecutions as recommended by the Constitution Implementation Oversight Committee and in compliance with the Constitution in particular Articles 10 and 73 of the Constitution of Kenya"

The affidavit in support of the Petition sworn by Patrick Njuguna on his behalf and on behalf of the other Petitioners restated all we have set out above in addition to carrying various supporting documents.

The 1st and 2nd Respondents opposed the petition. The 1st Respondent filed grounds of opposition that the 2nd Respondent having been nominated, gazetted and sworn in as the Director of Public Prosecutions, the procedure for his removal should be strictly in accordance with Article 158 of the Constitution and therefore the prayers sought by the Petitioners could not issue as they were overtaken by events. The petition was described as an abuse of the process of the court in attempting to turn the court into a vetting organ and in any event the court cannot usurp the functions of Parliament. This court was said to lack jurisdiction to remove the 2nd Respondent from office. The further grounds raised in opposition are that the provisions of the Constitution invoked by the Petitioners for interpretation were clear and unambiguous requiring no constitutional interpretation and no evidence was provided to prove the allegations or to show a breach of any constitutional or statutory provision.

The 2nd Respondent on his part swore a Replying Affidavit in opposition to the Petition stating that as at 20th June, 2011 when the Petition herein was filed, he had been appointed to the office of Director of Public Prosecutions and so he agreed with the Petitioners when they conceded in paragraphs 5 and 9 of their petition and paragraphs 6,7 and 10 of the Supporting Affidavit that under the Constitution, once appointed, the Director of Public Prosecutions holds office for a period of eight (8) years removable only pursuant to the provisions of Article 158 of the Constitution. He similarly saw, as overtaken by events, the Petitioners' challenge to his nomination, confirmation and Gazettment. He denied that there were any fundamental rights and freedoms requiring enforcement by the court. He conceded that this court has the jurisdiction to enquire into the procedures leading to his nomination, confirmation and appointment to office but lacks the jurisdiction to conduct its own forensic hearing examining in detail the merits and demerits of the 2nd Respondent's suitability to hold office. He added that the process resulting in his appointment was competitive, transparent and above board and all the allegations, complaints, insinuations and innuendos about him now in the Petition were also placed before the Constitution Implementation Oversight Committee and were considered after the 2nd Respondent gave a comprehensive response thereto. The 2nd Respondent saw the Amended petition as circumvention of the clear removal provisions of Article 158 of the Constitution. He saw nothing in the petition that called for constitutional interpretation and prayed for the dismissal with costs of the petition.

There were filed further Replies by the Petitioners. Written Submissions and reference to many authorities were also made.

Learned Counsel Mr Ndubi applied and was allowed to have his clients the **Kenyans for Peace with Truth and Justice (KPTJ)** and **African Centre for Open Governance (AFRICOG)** joined to the petition as Interested Parties.

We heard submissions from all Counsel. Learned Counsel Mr A.B. Shah appearing with Senior Counsel Mr Paul Muite and various others took a Preliminary Point to the Petition stating that since the 2nd Respondent had already assumed office that was a *fait accompli,* a position the Petitioners acknowledge in their petition. The only option left for the Petitioners was to pursue the provisions of Article 158 of the Constitution. Counsel further asked the court not to take over the functions of the Tribunal established under Article 158 of the Constitution. He asked us further to not allow the misuse of our jurisdiction saying that the validity of the Director of Public Prosecutions' appointment cannot be challenged as the assessment of his suitability was the province of those who interviewed him.

Learned Counsel Mr Bryant supporting Counsel A.B. Shah submitted that Article 1 (1) (2) and (3) of our

Constitution gave a clear separation of powers and therefore this court should not wade into areas not preserved for it by the Constitution. Counsel saw the petition as one seeking the removal from office of the Director of Public Prosecutions although it is framed as if it were interpretative of the Constitution.

Due to the Constitutional nature of the Petition, parties and the court agreed not to proceed on the summary mode via the Preliminary Objection but rather to deal with the Petition on its merits. Pursuant to that arrangement Learned Counsel for the Petitioners Mr A.T. Oluoch set out to not only counter the grounds advanced that the court has no jurisdiction since the Director of Public Prosecutions has already been appointed and that he can only be removed vide the mechanism set out in Article 158 of the Constitution, that the court must not breach the Principle of separation of power as well as challenge that the Petition is bad and incompetent for want of due procedure but further Counsel set out to establish the merit of the Petition and why the same should succeed. Counsel submitted that the Petition relates to the interpretation of the criteria as set out in Article 166(2)(c) as it is read with Article 73 and whether over and above the academic credentials therein set out, the occupant must possess moral obligations and whether part (c) of Article 166 (2) was severable from the rest of the Article. Counsel had no doubt that we have the requisite jurisdiction as conferred by Article 165 (1) and (3) of the Constitution. He added that the holder of the office of Director of Public Prosecutions required to possess more than academic qualifications to give legitimacy to the office stating that the personal integrity of the 2nd Respondent was questioned. Counsel submitted that the President ought not to have appointed the Director of Public Prosecutions until further investigations were carried out to answer those allegations. To Counsel, such appointment fell short of the requirements of Articles 73 and 166 (2) (c) and therefore the Director of Public Prosecutions did not meet the legibility criteria. It was the view of Mr Oluoch that an exercise of power save as is prescribed in the Constitution is illegitimate which is what had happened in respect of the Director of Public Prosecutions' appointment by the President and his nomination and confirmation by the other organs.

The Petitioners' Counsel further submitted that it is not possible to make a valid appointment without taking into account the trio criteria of academic, integrity and moral character and impartiality. That were the allegations against the Director of Public Prosecutions to be proved his appointment would be a nullity. That with the promulgation of the 2010 Constitution strict separation of powers does not exist in its traditional sense. Counsel added that Article 158(4) of the Constitution concerned itself with the removal of the Director of Public Prosecutions once procedurally in office but that the Petition concerned itself with matters arising before the appointment and so the court has jurisdiction to enquire into this appointment for it is an absurdity to live with a Director of Public Prosecutions who was invalidly appointed. Counsel invited us to find that the process of appointing the Director of Public Prosecutions was invalid and the same is a nullity and declare it so.

Mr Ndubi for the Interested Parties on his part submitted that it is now widely accepted that Executive decisions can be overturned by the courts. He described the 50% - 50% decision of the CIOC as not honest adding that Article 2(2) of the Constitution was side stepped in the appointment of the Director of Public Prosecutions. Counsel added that they were not concerned with the merits of the appointment as they conceded that that was a matter for the Executive, their concern was the procedural aspects of the appointment of the Director of Public Prosecutions starting with the Interview Panel. He asked us to look at the Constitution as a whole as there cannot be a segregation of any provision of the Constitution. Executive Power is to be exercised only as provided by the Constitution. Mr Ndubi told us that they were not calling for return of writs for cancellation for the revocation of the appointment of the Director of Public Prosecutions but rather that his appointment was invalid, a nullity amounting to nothing and so they sought a declaration that such appointment was a nullity. Learned Counsel added that the procedure of appointment to state office is more important than the qualifications and that is so as to confer legitimacy to the office. As long as this appointment was before allegations and suspicions were removed, such appointment remains shrouded in suspicion, was Counsel's further view.

Learned Senior Counsel Mr Paul Muite dealing with the merits of the Petition asked the court to see exactly what orders the Petitioners sought and whether or not those orders or any of them was capable of being granted. Counsel did not see any distinction between "injunction" and "restraining" as changed from the original Petition to the Amended one. Noting that the Petition was amended on 17th June, 2011

and filed on 20th June, 2011 by which time the 2nd Respondent had been appointed and sworn into office and yet the Petitioners did not pray for the revocation of that appointment, Counsel submitted that the court could not grant orders not sought. Counsel added that nothing called for interpretation and as no violations of the Constitution were shown to have been committed, then the court cannot act in vain. Counsel further submitted that the elaborate procedure for appointment of the Director of Public Prosecutions was adhered to and merely because a particular group would have reached a different conclusion is not a basis for alleging violations of the Constitution. He urged us to dismiss the Petition.

Learned State Counsel Ms. T.W. Gathagu for the 1st Respondent submitted that there was no breach of the Constitution and necessary procedures were followed. She saw the Petition as a disguised removal of the Director of Public Prosecutions in which case this court has no jurisdiction.

The above represents the totality of pleadings and submissions by the several Counsel appearing for their respective parties. We were referred to many authorities in support of or against the Petition and we have anxiously taken into consideration each point put forth and all the authorities. We are keenly aware that this Petition is of considerable Constitutional relevance and of interest to certain persons and we have borne all that in mind. The Constitution, the law and the facts of this Petition and material placed before us are all that we have relied on to arrive at our decision. We have undertaken necessary research to aid our finding.

Having analysed the pleadings and submissions we see the following as the issues that commend themselves to us for determination:-

1. Firstly whether or not we have jurisdiction to entertain this Petition and grant all or some of the prayers sought.

2. Secondly whether or not the appointment of the 2nd Respondent as the Director of Public Prosecutions as prescribed under Article 157 of the 2010 Constitution was complied with.

All other issues raised principally that the Director of Public Prosecutions did not satisfy the qualifications required for that post as set out in Article 166 (2) (c) which are high moral character, integrity and impartiality. That the Director of Public Prosecutions did not meet any of the qualifications set out in chapter six of the Constitution relate to those two.

On the first issue we can do no better than humbly quote ourselves in Petition No. 102 of 2011 in the case of **KENYA (FIDA-K) & Others –VS- THE ATTORNEY GENERAL & ANOTHER.**

Wherein we stated:

“In our view the jurisdiction of this court under Article 165 is completely different from that of a Tribunal under Article 168. It is clear that the Tribunal’s jurisdiction kicks in when there is an alleged misconduct on the part of a judge or when he is unable to perform the functions of his office arising from mental or physical incapacity or breach of Code of Conduct or bankruptcy or incompetency or gross misconduct or misbehavior. The powers of a Tribunal may be initiated only by Judicial Service Commission acting on its own motion or on the petition of any person. The powers of the Tribunal under Article 168 cannot be invoked directly by an aggrieved citizen save through the Judicial Service Commission. On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore what is at stake is the process used to nominate and appoint the five Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the Judicial Service Commission was in accordance with the law, fairness and justice. If the process of the appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this court has no jurisdiction to address the grievances raised by the Petitioners. In our own view even if the five appointees were sworn in, this court has jurisdiction to entertain and deal with the matter. The jurisdiction of this court is dependent on the process and constitutionality of

appointment. In this sense, if the Judicial Service Commission a State Organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly we find and hold that we are properly seized of this Petition as we have the requisite jurisdiction. We think the objection raised by the Respondents against the Petition as concerns our powers to determine the dispute is without merit."

Nothing has happened since 25th August 2011 when we delivered the above judgment to make us be of a different view. The similarities in Petition No. 102/11 and this one are striking albeit for minor differences. The process of the nomination confirmation and appointment of the 2nd Respondent is the central attack in the present Petition and we find that we are clothed with the requisite jurisdiction being as we are, the High Court which is the supreme upholder and protector of the Constitution and we have only one option, to obey each command of the Constitution. We appreciate and respect the doctrine of separation of powers but find that in this case it is not applicable. We would not be wandering into the no go zones of the Executive by venturing into the matter of the appointment of the Director of Public Prosecutions to interrogate the constitutionally prescribed process under Article 157 of the Constitution. In actual fact it is this court's sole mandate to provide checks and balances for the Executive and the court will not hesitate to interfere when called upon to enter and interpret the Constitution and supervise the exercise of constitutional mandates. We find that to do otherwise would be a dereliction of our constitutional mandate. We have jurisdiction and consequently we ignore as irrelevant all the authorities shown to us tending to state the contrary. We now proceed to deal with the other issues raised in the Petition.

The Petitioners invoke this court's jurisdiction on the strength of the Articles of the constitution and Public Officers Ethics Act enumerated at the beginning parts of this judgment. They also invoke Sections 20 and 21 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 the Courts inherent jurisdiction. Article 259 of the current Constitution has set out the guiding principles when interpreting the Constitution and applying its provisions and these principles include promoting its purposes, values and the promotion of good governance. Undoubtedly these are liberal values vesting in the Judiciary authority on behalf of the people of Kenya to promote the values enshrined in the Constitution whenever called upon to interpret its provisions or to right alleged constitutional violations.

The Petitioners in seeking this court's interpretation went beyond the mere provisions of the Constitution to require the court to interpret as to whether, inter alia, the nomination for appointment of Mr Keriako Tobiko to the office of the Director of Public Prosecutions in light of allegations of corruption, incompetence and conflict of interest as well as lack of reform credentials would be inconsistent with the Constitution and in particular Articles 73(1) & (2) of the Constitution as read with Sections 12 and 22 of the Public Officers Ethics Act. With respect, that is not the traditional meaning of Constitutional interpretation. What that seeks is an order by way of a declaration and that of course is not interpretative by any stretch of extension of the notion of interpretation. The provisions of Article 73 and all the other Articles of the Constitution invoked by the Petitioners are clear and unambiguous and the court was not shown any lack of clarity or ambiguity to call in the court's interpreting function.

In the case before court there exists, as provided by the Constitution in Article 157 an elaborate hierarchical procedures for the recruitment and vetting of the Director of Public Prosecutions prior to his appointment. A Selection or Interview Panel was put in place. It called for applications, shortlisted and interviewed candidates. It called for and received representations in various ways including memoranda. That must have been for the Panel's interrogation. This court was further shown that Professor Ghai's was one of the memorandum received. Learned Counsel Mr Ndubi submitted that such memorandum was not considered by the Panel but what Counsel did not show is evidence of lack of consideration of that memorandum by Prof. Ghai. From the Interview/Selection Panel successful candidates were handed over to next vetting organs, Parliament's Constitution Implementation Oversight Committee. We were shown the report of this committee. There were views supportive of and opposed to the 2nd Respondent. At this stage Professor Ghai appeared before the Parliamentary Committee and against the appointment of the Director of Public Prosecutions. The Committee nevertheless forwarded

the name of the 2nd Respondent to Parliament where its recommendation for further investigations concerning the 2nd Respondent was deleted by an amendment of a motion of the house. Upto this stage there is evidence of active participation by members of Public and Parliament in the process of appointment of the Director of Public Prosecutions. The issue was taken by Mr Ndubi for the Interested Parties as whether the 50 per cent approval by the Parliamentary Committee was an approval or rejection of the 2nd Respondent and he answered his own question by stating that 50 percent doubt is too much particularly because of the provisions of Articles 73, 66, 166 (2) (c) and 157 (3).

The court was not shown a step in the process of appointment that was side stepped and therefore the question to answer is whether in the circumstances of this case this court can or indeed anyone else substitute its own value judgment on the contested matters of fact for that of the organs undertaking the entire appointment process. We state here, with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts, and evidence, this court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and the letter of the constitution but the court would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure. The Court's intervention would of necessity be pursuant to a high threshold. With the material placed before us and without substituting our value judgment for those of the constitutionally mandated organs would this court be well placed to grant the declarations sought by the Petitioners? We would not think so. An event cannot be wrong because someone else would have done it differently. The test is whether or not it was done as prescribed by statute.

No doubt the amendment of the Petition filed on 16th June, 2011 was necessitated by the appointment and gazettment of the 2nd Respondent subsequent to the 16th June , 2011. No doubt the Petitioners realized that their petition had been overtaken by events, as it were. Nevertheless they did not amend their prayers appropriately to require the revocation or nullification of the Director of Public Prosecutions' appointment. They retained the prayer for restraining the Respondents by themselves or through agents or representative or their Principal from swearing the 2nd Respondent into office. We must pose here to observe that the Attorney General herein named as the 1st Respondent has no constitutional function in the appointment of the Director of Public Prosecutions. The amended petition had its paragraph 5 providing:-

"5. The office of the Director of Public Prosecutions is established under Article 157 (1) & (2) and who shall be nominated and with the approval of National Assembly be appointed by the President. Under Article 157 (5) the Director of Public Prosecutions shall hold office for a period of eight years and consequently once appointed the country would be stuck with such a Director of Public Prosecutions subject to the procedures for removal under Article 158 (9)"

It would appear that the Petitioners fully appreciated the effect of the appointment and gazettment of the 2nd Respondent but fell short of seeking orders to nullify or revoke that appointment. As we have stated elsewhere in this judgment we would not hesitate to exercise our jurisdiction, in an appropriate case, to interrogate a process and procedure and if found wanting to nullify any appointment following such a wanting process/procedure. We are acutely conscious of the dictates of Article 159(2) (d) obligating the court to administer justice without undue regard to procedural technicalities. We have carefully considered submissions by all parties and even obeying Article 159 (2) (d) we entertain no doubts in our minds that orders sought or not sought in a Petition cannot be described as procedural technicalities even on the basis of the most liberal and purposeful interpretation of the Constitution.

To summarize we restate:-

The Nomination Panel cannot be faulted in the manner it conducted the duties assigned to it. Then followed the Speaker of the National Assembly who said that he had received a letter from the President for the appointment of the 2nd Respondent. The 2nd Respondent's name was sent to the House Committee (CIOC) for deliberation. The CIOC put out an advertisement calling for public comments for a public hearing to consider any comments that might be received. Issues raised by members of public and

memoranda were put to the 2nd Respondent. The committee evaluated the 2nd Respondent's moral character, impartiality and integrity. They ranked the 2nd Respondent the best candidate after evaluation of all the complaints raised against him.

Pursuant to Article 159 the full House approved the nomination of the 2nd Respondent for appointment to the office of the Director of Public Prosecutions after deleting the recommendations for further investigations against the 2nd Respondent. The Agent cannot be superior to the Principal, the CIOC was the agent and the full House was the Principal. We do not see that any allegation was overlooked.

It was contended that the Nomination Panel did not encourage public participation in a meaningful and purposeful manner. Mr Ndubi raised the issue that Professor Yash Pal Ghai raised the issue of the 2nd Respondent's suitability and that the relevant organs did not interrogate the very serious allegations presented to them. We were presented with no such evidence. On the contrary we noted that the Professor's allegations were submitted to the Nomination Panel in a written memorandum. He appeared in person before CIOC. There was no evidence that allegations were not considered by all the relevant organs including the two Principals all of whom found that the 2nd Respondent met the constitutional requirements for the office of the Director of Public Prosecutions. It cannot be that the assessment by all those organs were wrong merely because the Petitioners and Professor Yash Pal Ghai think otherwise. The Constitution vests different functions to different organs and to ask this court to fault processes by those organs without presenting material to prove any wrong doing is to ask the court to usurp the functions of those organs. That we shall not do. Those organs undertook their mandate and exercised their discretion after seeing those that presented complaints in whatever form. We cannot re-open the process and consider issues which were conclusively determined. Greatness is about the humility to accept the views and decisions of others.

While undertaking our research for this judgment we became aware of the Supreme Court of Appeal of South Africa case of **DEMOCRATIC ALLIANCE –VS- THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & 3 OTHERS, (Case No. 263/11) (2011) ZA SCA 241** in which judgment was delivered on 1st December, 2011 after parties in the case before us had concluded their submissions and therefore that decision was not addressed by the parties and formally placed before us. This South African case concerned the process of appoint of the National Director of Public Prosecutions and the power of the President alone to make the appointment. We have on our own, nevertheless, read the decision and without the benefit of submissions from Counsel we make the following observations:-

1. On the evidence availed to that court, the President of South Africa was shown to have failed to consider material adverse to Mr Simelane whom he proceeded to appoint National Director of Pubic Prosecutions. The President had "firm views" on appointing Mr Simelane as National Director of Public Prosecutions – see page 41 of the decision.

2. There was no Parliamentary Vetting or Approval in the South African case unlike the Kenyan situation which had a further process of the Selection Panel.

3. There were findings by an Enquiry chaired by Dr. Frence Ginwala and after evidence and cross-examination very adverse on Mr Simelane's moral probity and fitness for office surfaced – see pages 42 and 43 paragraph 112.

4. The Public Service Commission had recommended disciplinary proceedings against Mr Simalane. The President and the minister ignored those recommendations.

That case was not similar to this one but the decision, though not binding on this court is of great persuasive value and reinforces the view we have expressed elsewhere in this judgment that in an appropriate case and depending on the particular circumstances and evidence in that particular case, this court has jurisdiction to declare an appointment violative of the constitution and therefore a nullity and to set aside such an appointment as was the case in the South African case.

We have not been shown the constitutional provisions which were violated requiring this court's intervention. None of the Articles quoted is unclear or capable of more than one meaning. The Petitioners eventually conceded only asserting that their petition was a challenge and/or attack on the procedure and process of appointment. They failed to show any defects in that procedure and process. There was no evidence that all the allegations, complaints and all other matters complained of as against the 2nd Respondent were not considered by all the organs responsible for the process of his appointment. Those organs arrived at decisions which this court cannot undertake a merit review of. The 2nd Respondent having been appointed after the prescribed due process was adhered to, even if someone else would have arrived at a different verdict, our finding is that anyone having a reason to have the Director of Public Prosecutions removed from office must comply with the requirements of Article 158(4).

While the delivery of this judgment was pending our attention was drawn to two articles by Professor Yash Pal Ghai touching on the proceedings before this court and published by the Star Newspaper. Senior Counsel Paul Muite wrote to the Deputy Registrar of this court on 13th April, 2012 complaining that the articles were an attempt to influence this court to decide the case in a particular direction and therefore contemptuous of this court. He requested that his letter be brought to the attention of this court. He had sought a mention of the matter presumably for parties to address the court on the issue. The letter was copied to the Advocates on record for the Petitioners and to the 1st Respondent. We declined the mention requested for as we did not deem it appropriate. Had those articles been after the delivery of our decision we would have ignored them. But they were before judgment and their tenor was obviously directive and intimitative of the court. We read and understood the articles. We can only say that under the 2010 Constitution, Judges like everyone else, are accountable to the people of Kenya through the Judicial Service Commission. That accountability includes criticizing Rulings/Judgments once delivered. That criticism, though, must be within acceptable legal norms and respecting other people's understanding of the law. To publish articles anticipatory of a judgment and/or attempting/seeking to influence the court to decide a case in a particular way is to cross the boundary and wade into the realm of contempt. No one, whatever their standing in society has the right to undermine the administration of justice and the authority of the law and of the courts by acting contemptuously of the court. We shall say no more but leave it to the conscience of the good professor.

This judgment was scheduled to be delivered on 24th January, 2012 hearing having been concluded on 22nd November, 2011. This judgment was not delivered within the sixty (60) days provided for. That delay in delivery was the complaint by Professor Ghai in his 2nd article published in the Star Newspaper on 10th April, 2012. This court is aware through one of us that Professor Yash Pal Ghai has lodged a complaint with the Judges and Magistrates Vetting Board against each of the members of this bench. Out of respect and dereference to the Vetting Board, we do not now wish to comment or publicly give reasons for the delay which we would otherwise have done but for the complaint to the Vetting Board. Suffice only to sincerely apologize to the parties for the delay and to state that the same was caused by matters beyond this court's control. There was no interference from any quarters, internal or external, as insinuated by Prof. Ghai.

For the avoidance of doubt the Petition Amended on 17th June 2011 and filed herein on 20th June, 2012 is found to be lacking in merit and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS **25TH** DAY OF **MAY, 2012**.

J.W. MWERA

JUDGE

M. WARSAME
JUDGE

P.M. MWILU
JUDGE