



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

PETITION NO. 4 OF 2020

BETWEEN

RICHARD MALEBE.....PETITIONER

VERSUS

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

THE CHIEF MAGISTRATE'S COURT

(ANTI-CORRUPTION COURT)(NAIROBI).....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. In his petition dated 13th February 2020, the petitioner, an Advocate of the High Court of Kenya, asks the court to determine the question whether he is being prosecuted in Anti-Corruption Case No. 20 of 2019 for rendering a professional service and no more. He states that he is duly admitted as an Advocate, has a valid practicing certificate, and is a certified public secretary (CPS) his registration number being CPS (K) 2423. His only involvement in the matters giving rise to the intended prosecution against him is as a certified public secretary and advocate in the registration in Kenya, in 2014, of a foreign company known as CMC Di Ravenna-Kenya Branch. He asks the court to grant the following orders:

1. A declaration be and is hereby issued that the DPP's institution of criminal proceedings against the Petitioner in Anti-Corruption Case no. 20 of 2019- Republic vs. Henry Kiplagat Rotich and others violates his constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void ab initio.

2. An order of certiorari be and is hereby issued to quash the entire charge sheet amended, consolidated and filed in court on 31st October, 2019 and proceedings against the Petitioner in Anti-Corruption Case no. 20/2019, –Republic vs. Henry Kiplagat Rotich and 27 others.

3. An order of prohibition be and is hereby issued prohibiting the respondents from proceeding with the prosecution of the Petitioner in Anti-Corruption Case no. 20/2019, –Republic vs. Henry Kiplagat Rotich and others.

4. The costs of this Petition be provided for.

2. The petitioner has lodged this petition against the 1st respondent, the Director of Public Prosecutions (DPP) a public office established under Article 157 of the Constitution of Kenya and governed by the Office of the Director of Public Prosecutions Act (Act No. 2 of 2013 Laws of Kenya). The 2nd respondent is a subordinate court established pursuant to Article 169 of the Constitution of Kenya and section 5 of the Magistrates' Courts Act, 2015. The 2nd respondent is seized of Anti-Corruption Case No. 20 of 2019 in which the petitioner alleges that the DPP intends to charge him, alongside others already charged before court, with various offences.

3. The 3rd respondent is the Attorney General (AG) of the Republic of Kenya, joined to the proceedings to represent the interests of the Directorate of Criminal Investigations (DCI) and the Chief Magistrates Court. He is also joined to the proceedings in his capacity as an

officer obligated to defend the national government in court in all civil proceedings and as defender of the public interest and the rule of law pursuant to Article 156 of the Constitution.

The Petitioner's Case

4. The facts forming the basis of the petition are set out in detail in the petition and in the affidavit in support. The petitioner also filed a supplementary affidavit in response to the affidavit filed by the DPP in opposition to the petition.

5. The petitioner states that sometime in 2014, in his role as an Advocate and a certified public secretary, he was instructed by KPMG-Kenya to provide legal and company secretarial services to one of KPMG's clients. KPMG wanted to register a company known as CMC Di Ravenna-Kenya Branch. Two employees of KPMG-Kenya, a Lydia Ndirangu and Toddy Thairu, forwarded to the petitioner, through e-mail, the registration documents prepared by Ochieng Ogotu Advocates in conjunction with KPMG for the registration of CMC Di Ravenna-Kenya.

6. The instructions issued to the petitioner were to confirm that the documents drawn by the said advocates were in order and met the threshold for registration. He was also requested to affix his company secretarial stamp on the company registration forms numbers 236, 237, 238, 239 and 250, a mandatory requirement under the repealed Companies Act (Cap. 486) for compliance of a foreign company seeking to establish a place of business in Kenya. The statutory forms did not require that the directors of CMC-Di Ravenna- Kenya Branch appear before him for attestation of any signatures. He stamped and executed the forms in the ordinary course of his practice of his profession and returned them to KPMG for registration purposes. He states that neither at the time of registration of the company or at any time thereafter did he meet or in any way interact with the directors of CMC Di Ravenna-Kenya Branch.

7. The petitioner asserts that from the forms lodged for registration at the Companies Registry, he is not a director, shareholder or official of CMC Di Ravenna-Kenya Branch. He executed the forms as a company secretary as well as the person authorised under section 366 (1) (d) of the repealed Companies Act to accept, on behalf of the company, service of process and any notices required to be served on the company in Kenya. This was not an isolated engagement of the petitioner by KPMG as there were other instances where KPMG used his professional services in similar transactions. The use of his professional services as Advocate and Company Secretary by KPMG had resulted in the execution of a formal written alliance agreement.

8. The petitioner states that on 14th February 2019, he was summoned by the DCI for interrogations with regard to his involvement with a Kenyan foreign company- CMC Di Ravenna-Kenya Branch. He recorded a statement on 15th February 2019 clearly stating his involvement in the registration of the company as an Advocate and Certified Company Secretary where his role, on instructions from KPMG, entailed signing of the necessary registration forms. He also stated that he had no contact whatsoever with the company directors or representatives and had never been involved in the operations of the company. He also submitted his work laptop that contained his e-mail correspondence with KPMG on this transaction and other similar transactions to the DCI. The petitioner states that he did not receive any communication thereafter from the DCI or the DPP.

9. Sometime in July 2019, the DPP called a press conference and informed the public that there had been investigations relating to the Aror and Kimwarer Dam projects, in which billions of public funds were stolen, and that certain named individuals would be prosecuted on offences related to corruption. The petitioner was not among the persons who were charged in court in July, 2019. He therefore understood that the DCI and DPP had found no culpability on his part to warrant his being charged.

10. On 25th October 2019, however, he received information that there was an application for consolidation of cases relating to the Aror and Kimwarer dam scandals and that his name was in the draft amended charge sheet. Through his advocates, he wrote to the DPP on the same date asking him to review the decision to prosecute him. He also attached all documentary evidence relating to the facts of his professional involvement in the formation of CMD Di Ravenna – Kenya. He did not receive a response, nor has he ever received one to date, despite several reminders.

11. The petitioner sets out in his petition the charges that the DPP intends to lodge against him and his co-accused. He asserts that it is clear from the charge sheet that the intended charges against him relate to the activities of CMC Di Ravenna -Italy, CMC Di Ravenna-Itinera JV and CMC Di Ravenna Itinera JV- Kenya Branch which companies allegedly colluded to defraud the country of millions of dollars or Euros and or fraudulently acquired public property. He further asserts that from the evidence submitted to the DPP by the DCI vide the letter dated 25th October 2019, the petitioner was not involved in the incorporation or compliance under Part X of the Companies Act of the said entities or in any other way engaged in their affairs or business activities in Kenya. He further asserts that the evidence contained in the witness statements by KPMG representatives confirms that he had no direct contact with the directors or shareholders of CMC Di Ravenna- Kenya Branch, and that he was the professional KPMG-Kenya regularly used for registration of companies as required by the Advocates Act and the repealed Companies Act.

12. The petitioner therefore asks the court to intervene and halt his plea taking and prosecution on the grounds that the prosecution is an abuse of the court process and is premised on an improper exercise of the DPP's discretion conferred under Article 157 of the Constitution.

13. In his affidavit sworn in support of the petition, the petitioner reiterates the contents of his petition with regard to his qualifications and the instructions he received from KPMG with regard to the registration of CMC Di Ravenna-Kenya Branch. He had acted in accordance with the instructions and had thereafter returned the forms to KPMG for registration purposes. None of the forms required the directors of CMC Di Ravenna- Kenya Branch to appear before him, so he never met nor interacted in any way with them. KPMG-Kenya had lodged the forms for registration at the Companies Registry and the company was eventually incorporated. This was not the only time he had been engaged in this manner by KPMG-Kenya, giving by way of illustration his engagement in the registration of a company known as Agritec Kenya Limited. The use of his services by KPMG-Kenya had resulted in a formal written Alliance Agreement (annexure RM2).

14. The petitioner reiterates the factual background set out in his petition with regard to the summons by the DCI and his recording a

statement with the DCI. He had assumed the issue was over with regard to him until he learnt on 25th October 2019 of the intention by the DPP to amend the charge sheet to include him as one of the accused persons in the criminal prosecution in ACC No 20 of 2019. His Advocates, Munyao-Kayugira & Co., Advocates had written a letter dated 25th October 2019 (annexure RM 3) asking the DPP to review the decision to prosecute him. He had annexed to the letter documents relating to his engagement in the formation of the company. He had also indicated in the said letter that he was open to a lifestyle audit as he had always led an honest life devoid of corruption.

15. On 7th November 2019, he had received a text message from an Advocate informing him that his name was included in the list of accused persons in ACC No. 20 of 2019, and that warrants of arrest had been issued against him for failing to attend court. He was shocked as he had not been summoned to attend court for plea taking. He had rushed to court but found that the court had dispensed with the matter.

16. The petitioner avers that he had immediately spoken to the Investigating officer, IP Gilbert Kitalia, who asked him to present himself to the DCI offices for processing. He was admitted to police bail of Kenya Shillings Five Hundred Thousand (KES 500,000) as evidenced in a copy of the police bail receipt (RM 4). The warrants against him issued in the lower court had been lifted on 13th November 2019.

17. During the attendance in court when the warrants of arrest against him were lifted, Counsel appearing for the DPP indicated that the DPP had not received the petitioner's request for review of the decision to charge him. The petitioner had sent a reminder to the DPP (RM6) and when the case came up for plea taking on 27th November 2019, plea was deferred as Counsel for the DPP indicated that they needed time to consider his request for review of the decision to prosecute him.

18. The petitioner avers that the Law Society of Kenya had also, on 20th December 2019, written a letter to the DPP (RM 7) asking him to review the decision to prosecute the petitioner as it was evident that he was engaged in a professional capacity by KPMG-Kenya in the registration of CMC Di Ravenna-Kenya Branch. The DPP had thereafter indicated, on 14th January, 2020, that he had not seen the letter seeking review. The petitioner's Advocates had informed him that they had sent a reminder to the DPP on 22nd January 2020 (RM 8) but had received neither an acknowledgement nor a response.

19. The petitioner sets out the charges intended to be brought against him as being the following:

i). Count I: Conspiracy to defraud contrary to section 317 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that:

HENRY KIPLAGAT ROTICH, KAMAU THUGGE, SUSAN JEMTAI KOECH, DAVID KIPCHUMBA KIMOSOP, KENNEDY NYAKUNDI NYACHIRO, JACKSON NJAU KINYANJUI, TITUS MURIITHI, PAOLO PORCELLI, CMC DI RAVENNA-ITALY, CMC DI RAVENNA-ITINERA JV, CMC DI RAVENNA ITINERA JV KENYA BRANCH, ROBERT MACRI, ADRIANO DONADON, GIANNI PORTA, ROBERTO PROMUTICO, CACUCCILO MARCELLO, FISCHINI DARIO, MASSIMO MATTEUCI, BANDANI CLAUDIO, BENAZZI GRAZIO, SANTADREA MICHELA, CALANDRINI MAURO, MARCO BULGARELLI, LORENZO COTTIGNOLI and RICHARD MALEBE between 17th December, 2014 and 31st January 2019 conspired to defraud the Government of Kenya US \$501,829,769.43 by entering into the construction and development of Aror multi-purpose dam and Kimwarer multi-purpose dam, a project they knew was not approved and in respect of which they failed to comply with section 3 as read with section 78 of the Public Private Partnerships Act No. 15 of 2013 and as a consequence of which they improperly secured a commercial loan under the guise of a Government to Government agreement thus making the Government of Kenya liable as a financier and borrower.

ii). Count XV: Fraudulent acquisition of public property contrary to Section 45 (1) (A) as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003. The particulars of this charge are that:-

PAOLO PORCELLI, CMC DI RAVENNA-ITALY, CMC DI RAVENNA-ITINERA JV, CMC DI RAVENNA ITINERA JV KENYA BRANCH, ROBERT MACRI, ADRIANO DONADON, GIANNI PORTA, ROBERTO PROMUTICO, CACUCCILO MARCELLO, FISCHINI DARIO, MASSIMO MATTEUCI, BANDANI CLAUDIO, BENAZZI GRAZIO, SANTADREA MICHELA, CALANDRINI MAURO, MARCO BULGARELLI, LORENZO COTTIGNOLI and RICHARD MALEBE between 27th September, 2018 and 31st January, 2019 jointly with others not before court fraudulently acquired public property to wit EUR 29,790,552.73 as advance payment for the construction and development of the Kimwarer multi-purpose dam project through Intesa San Paolo Spa Bank, Account name CMC Di Ravenna-Itinera JV A/c No. IT95 0030 6903 3901 0000 0002 173 vide a utilization request Ref: NT/RMD/MOF/KIM/20/90/78/01 dated 6/11/2018 from the National Treasury of the Republic of Kenya knowing or having reason to believe that they were not entitled to the payment.

iii). Count XXXIII: Fraudulent acquisition of public property to wit EUR 36,824,018.43 contrary to Section 45 (A) as read with section 48 of the Anti- Corruption and Economic Crimes Act, 2003. The particulars of the offence are that:

PAOLO PORCELLI, CMC DI RAVENNA-ITALY, CMC DI RAVENNA-ITINERA JV, CMC DI RAVENNA ITINERA JV KENYA BRANCH, ROBERT MACRI, ADRIANO DONADON, GIANNI PORTA, ROBERTO PROMUTICO, CACUCCILO MARCELLO, FISCHINI DARIO, MASSIMO MATTEUCI, BANDANI CLAUDIO, BENAZZI GRAZIO, SANTADREA MICHELA, CALANDRINI MAURO, MARCO BULGARELLI, LORENZO COTTIGNOLI and RICHARD MALEBE on diverse dates between 7th December 2017 and 31st January 2019 jointly with others not before the court fraudulently acquired public property to wit EUR 36,824,018.43 as advance payment for the construction of the Aror Multi-purpose dam project through Intesa San Paolo Spa Bank, Account name CMC Di Ravenna-Itinera JV Ac no. IT95 0030 6903 3901 0000 0002 173 vide a utilization request Ref: MOF/ERD/20/94/78/01 (63) dated 22/12/2017 from the National Treasury of the Republic of Kenya knowing or having reason to believe that they were not entitled to the payment.

20. According to the petitioner, the charge sheet, on the face of it, relates to the activities of CMC Di Ravenna - Italy, CMC Di Ravenna-

Itinera JV and CMC Di Ravenna Itinera JV-Kenya Branch. These are the companies allegedly contracted to construct the multi-purpose Arror and Kimwarer dams and are alleged to have conspired to defraud the country of millions of funds and had fraudulently acquired public property.

21. The petitioner avers the evidence on record indicates that he was not involved in the incorporation or compliance under Part X of the repealed Companies Act of these companies, nor was he in any other way engaged in the affairs or business activities of the said companies. He contends that in any event, the evidence by KPMG employees, who are witnesses for the DPP, confirms that he did not have any direct contact with the directors or shareholders of CMC Di Ravenna- Kenya Branch, the only company in respect of which he was requested to render professional services.

22. It is on this basis that he had requested the DPP to review and terminate the charges against him, but the DPP had failed to acknowledge and act on his request despite the overwhelming exculpatory evidence in his favour. He had therefore filed the present petition to ask the court to intervene and ensure that he is not subjected to plea taking and prosecution. He asserts that the prosecution is an abuse of court process and is premised on an improper exercise of the DPP's discretion conferred under Article 157(11) of the Constitution which requires that the discretion be exercised with due regard to the public interest, the interests of the administration of justice and the need to avoid abuse of the legal process. The petitioner contends that the failure by the DPP to respond to the numerous letters seeking review of the decision to charge him is an outright infringement of his right to fair administrative action guaranteed under Article 47 of the Constitution and the Fair Administrative Action Act, 2015. The decision to charge him is an administrative action in respect of which Article 47 guarantees action that is expeditious, efficient, lawful, reasonable and procedurally fair. It is also his case that he has a right to be given written reasons for the action if it is likely to infringe his rights.

23. The petitioner contends that the DPP is abusing his powers in criminalising the professional work undertaken for purposes extraneous to the criminal justice system. The decision to charge him for services rendered in his professional capacity goes against the **Basic Principles on the role of lawyers (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)**. He cites in particular Principles 16 and 18.

24. The petitioner avers that there is no iota of evidence linking him to the affairs and business activities of the companies that led to the charges before the trial court beyond his role as an advocate and certified company secretary in the compliance of CMC- Di Ravenna- Kenya Branch which were offered on a one-off basis. He is therefore entitled to and should be accorded the equal protection of the law under the Constitution.

25. The petitioner makes further averments with regard to the **Guidelines on the Role of Prosecutors (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)** and the **National Prosecution Policy 2015** to reiterate that from the evidence, he was not involved, at all with the companies alleged to have executed contracts and received funds in the alleged fraudulent acquisition of public property, and in the absence of such evidence, the case against him fails the evidential test and the charges against him amount to an abuse of process contrary to Article 157 (11). It is his assertion also that the public interest test would frown against the prosecution of an advocate/company secretary for activities conducted by the company four (4) years post incorporation in the absence of evidence of the Advocate's further involvement with the company.

26. The petitioner avers that the preferment of charges against him in the circumstances of this petition would set a dangerous precedent to his calling as a professional and officer of the Court. Such a precedent would affect the very root of constitutionalism and the rule of law that ought to be safeguarded by the Constitution and all persons responsible for implementation and execution of the Constitution. He contends that in the past, the office of the DPP has used the evidentiary test in circumstances which are almost similar to his. He cites a public press statement (RM10) issued by the DPP on 26th July 2019 relating to an inquiry into allegations of irregular awarding of a tender for upgrading of roads and embezzlement of public funds by officials of the County Government of Kiambu. In the Statement, the DPP indicated that he had reviewed a decision to charge one of the directors on the basis that she was a sleeping director and was not active in the affairs of the company.

27. In his affidavit sworn on 27th February 2020 in response to the affidavit sworn by PC Thomas Tanui in opposition to the petition, the petitioner challenges the competence of the DPP to swear an affidavit on his own behalf and on behalf of the 2nd respondent. He contends that the DPP has no jurisdiction to represent the Chief Magistrate's Court Anti-Corruption Court in proceedings of this nature. He also asks the court to strike paragraphs 3, 4, 5, 23, 70 and 83 of PC Tanui's affidavit as they are scandalous, reek of bad faith and malice, and they manifest the attitude of the DPP that has obscured an objective assessment of evidence and prevented the DPP from reaching a balanced, reasonable and lawful decision.

28. The petitioner asks the court to note that in the company details provided by the Registrar of Companies on 13th February 2019, he was listed as an 'Authorized Person' but not as a director of CMC- Di Ravenna-Kenya Branch. However, in the company details provided on 25th March 2019, after he had recorded his statement with the DCI, he was listed as both a director and Authorised Person of the said company.

29. He avers that this contradiction can only be resolved by looking at the primary source document, the foreign company compliance forms and in particular form 237 which lists the directors of the company, and his name is not in this form. He notes that the DPP has conveniently not supplied the complete Form 237 filed during the incorporation of CMC Di Ravenna-Kenya Branch in his replying affidavit, which the petitioner terms a suppression of crucial evidence that shows that he is not a director of the company.

30. The petitioner notes that from the exhibits annexed to PC Tanui's affidavit, the tender for the Arror and Kimwarer dam projects was awarded to CMC Di Ravenna- South Africa Branch and the contract agreement between CMC Di Ravenna-Itinera Joint Venture was executed by one Paolo Porcelli and others. He was not on record as having executed the said contract. He had also noted that the payment voucher was made to CMC Di Ravenna -Itinera JV. The bank account statement annexed to the DPP's affidavit relating to CMC Di Ravenna Itinera JV showed that the account was opened in 2017, and there is no evidence that he was involved in the incorporation, compliance or control of the said company. He relied in support on a copy of the CR12 form and certificate of incorporation of the said company (RM 9 (a)

and (b) which he had supplied to the DPP by his letter dated 25th October 2019.

31. The petitioner further avers that the purported account opening documents exhibited as TT009 (b) in the affidavit of PC Tanui in respect of CMC Di Ravenna- Kenya Branch do not show who opened the account. His name is not on the document, which he states appears to be an account opening aide for bank officials. The petitioner avers that he is not privy to any of the activities of the company beyond its compliance under Part X of the repealed Companies Act, and no evidence has been submitted in the form of minutes, records, resolutions or contracts to show his alleged involvement.

32. The petitioner denies that he has been supplied with the documents annexed to the affidavit filed by the DPP, noting that he is yet to plead to the charges against him. He contends that in an attempt to show culpability on his part, there is a clear attempt by the DPP to load the activities of CMC Di Ravenna -Itinera JV to CMC Di Ravenna-Kenya Branch. He asserts that the DPP has failed to prove his active involvement in the affairs of CMC Di Ravenna Kenya-Branch or any other company or that he received a single coin from the alleged payments.

33. It is the petitioner's averment that the DPP, while he has set out the test to be applied in making a decision to prosecute him has failed to point out the specific activities on his part and the evidence in support that would support the said decision. The petitioner states that he resigned from his position as the 'Authorised Person' for purposes of service of process for CMC Di Ravenna- Kenya Branch; that his engagement was with KPMG and he had never had any engagement with the directors of the company CMC Di Ravenna- Kenya Branch as KPMG dealt directly with the company prior to his appointment and even negotiated a retainer; that his engagement with KPMG was only for the incorporation of CMC Di Ravenna- Kenya Branch; that there was no retainer for an engagement as company secretary and authorized representative beyond 2014; and that in the absence of a retainer for the subsequent years and lack of evidence that he was involved in the affairs of the company, there accrues no criminal culpability.

34. The petitioner asserted that he was engaged as a professional in relation to incorporation of CMC Di Ravenna-Kenya Branch, which was the only issue that he was presenting to the court for determination. In his view, the DPP was turning a blind eye to his role as a professional instructed by KPMG even after he had furnished the DPP with all the necessary information and documents. He was therefore seeking the court's intervention to put a halt to what he termed an ill-conceived prosecution which is not supported by any evidence.

The Case of the DPP

35. The DPP opposed the petition and filed an affidavit sworn by PC Thomas Tanui on 25th February 2020 and a supplementary affidavit sworn by Chief Inspector Gilbert Kitalia on 27th February 2020.

36. PC Tanui, a detective attached to the DCI, Serious Crime Unit, swore a prolix affidavit on 25th February 2020 in reply to the petition on behalf of the DPP and the Chief Magistrate's Court. He avers that he is personally aware that the petitioner has lied repeatedly to investigators about his involvement in the affairs of the companies that are party to the corruption and plunder of public resources, and that he is also lying to the court in several paragraphs of his affidavit in support of the petition. PC Tanui avers that the petitioner is not being charged merely for being an Advocate of the High Court of Kenya or for rendering services in his professional capacity either as an Advocate or a certified public secretary. He asserts that the petitioner is attempting to lie to the court that he is not a director and or the local representative of the company known as CMC Di Ravenna – Kenya Branch.

37. According to PC Tanui, the petitioner has three capacities in CMC Di Ravenna – Kenya Branch. He is a director of the company, its country representative as well as its company secretary, and he is responsible for all actions taken by the company in such capacities. PC Tanui relies on a copy of a letter dated 22nd March 2019 ("TT 001") from the DCI to the Registrar of Companies requesting for a list of the directors and shareholders of CMC Di Ravenna – Kenya Branch. He avers that the Registrar had sent to the DCI copies of the CR12 form and a list of documents delivered for registration by a company incorporated outside Kenya (annexures "TT 002 and "TT 003") which show that the petitioner is one of the directors of, and the authorised person for, CMC Di Ravenna – Kenya Branch.

38. PC Tanui states that by his own admission, the petitioner is also the Company Secretary of CMC Di Ravenna – Kenya Branch, yet, as evidenced by annexure "TT 002", since the registration of the company on 14th October 2014 at 12:29 p.m. up to the year 2019, no financial statements of any kind had been filed or returned since incorporation. PC Tanui asserts that this state of affairs was presided over by the petitioner in his capacities as director, authorized person and Company Secretary.

39. PC Tanui further relies on a letter dated 13th February 2019 from the Registrar of Companies to the DCI ("TT 004") in which the Registrar once again confirmed that CMC Di Ravenna – Kenya Branch had not filed any financial reports since incorporation. The Registrar also confirmed that according to the company's records, the petitioner was one of the directors and shareholders of the company.

40. PC Tanui avers that investigations have confirmed that the directors and officers of the companies have been using and quoting the company known as CMC Di Ravenna – Kenya Branch interchangeably with CMC Di Ravenna, CMC Di Ravenna Italy, CMC Di Ravenna South Africa, CMC Di Ravenna Itenera, CMC Di Ravenna Itenera JV, CMC Di Ravenna Itenera JV – Kenya Branch, a practice that he avers depends on the convenience of their scheme and conspiracy to defraud. He illustrates this by citing the case in which imported and dutiable vehicles were seized by the DCI and KRA, resulting in a lawsuit in the name of CMC Di Ravenna Itinera JV as the *ex parte* applicant, and annexes the judgment in the said suit (annexure "TT 005"). According to PC Tanui, the DPP had averred in those proceedings, as in the present case, that investigations were triggered on the 18th of September 2018 when the DCI received a complaint that there were governance and operation challenges in the management of the Kimwarer and Arror dam projects that required urgent attention, and an inquiry file No.122/2018 was opened to investigate the procurement process, award and construction of the said dams.

41. PC Tanui further avers that the investigations had shown that there was a tender advertisement through a Request for Proposal for the two projects and that the company described as CMC Di Ravenna – South Africa Branch was awarded the contract to design and construct the said dam as evidenced in a copy of the Letter of Award or Acceptance (annexure "TT 006(a) and (b)"). From his own knowledge and from

the documentary evidence, though the contract was awarded to CMC Di Ravenna – South Africa Branch, the transactions transitioned to involve two other companies-CMC Di Ravenna- Itinera JV, a company registered in Italy, and the petitioner’s company, CMC Di Ravenna-Kenya Branch which was incorporated in Kenya on 6th September 2017, almost 3 years after the award of the contracts. He exhibits in support copies of contracts between Kerio Valley Development Authority (KVDA) and CMC Di Ravenna - Itinera JV (annexure “TT 007(a) and (b)”).

42. PC Tanui further avers that despite the contract being awarded to CMC Di Ravenna- South Africa, advance payments of USD 41,611,140.83 (approximately Kshs. 4,292,651,060.25) for Arror dam and USD 33,663,324.59 (approximately Kshs. 3,485,500,628.00) for Kimwarer dam were paid to CMC Di Ravenna- Itinera JV. He exhibits in support payment vouchers (annexures “TT 008 (a) and (b)” respectively) as proof of payment of the said monies.

43. PC Tanui asserts that the respondents are not interested in contravening nor have they contravened the petitioner’s right to practice law and to discharge his duties as an Advocate. They have also not contravened the **Basic Principles on Roles of Lawyers or Principles 16 and 18** thereof as alleged by the petitioner. It is his deposition that the petitioner has not been charged because he has been identified with his clients or his client’s causes as a result of discharging his functions. Rather, he has been charged because he has committed criminal offences and has actively conspired with the other accused persons to, among other things, defraud the government of Kenya of billions of shillings and fraudulently acquired public property, contrary to sections 317 of the Penal Code and section 45(1)(A) as read with section 48 of the Anti-corruption and Economic Crimes Act (ACEC) Act, 2003.

44. In further elaboration of the DPP’s case, PC Tanui states that investigations by the DCI established that on 19th December 2014, KVDA under the Ministry of Environment, Water and Natural Resources invited bidders to tender for several projects, among them the projects for construction of Arror and Kimwarer Dams valued at 319,620,697.07 Euros and 258,688,881.72 Euros respectively. After the procurement process, the two projects were awarded to CMC Di Ravenna (sic) which also registered CMC Di Ravenna – Kenya Branch to which it made substantive payments from the amounts released for the tendered projects. CMC Di Ravenna – Kenya Branch in turn paid out substantive amounts to various entities, both real and fictional, which assisted in the distribution and payments of kick-backs and pay-offs to the other accused persons and or their assigns.

45. PC Tanui exhibited copies of bank statements and bank opening documents for A/c No. 2032037804 (“TT 009 (a) and (b)”) in the name of CMC Di Ravenna- Kenya Branch which he avers shows the millions that were paid to and from the company which, according to PC Tanui, was controlled by the petitioner, who at all times knew or ought to have known of all transactions in question. He asserts that the petitioner, as a director, company secretary and representative of the company knew of all the activities the subject matter of the charges of conspiracy to defraud and actively participated in the commission of the crimes as charged. He cannot therefore claim that any of the actions and or omissions complained of could have been done without his knowledge and or involvement. Further, that no resolutions, meetings and or extracts and or records of such or the opening of accounts or the issuing of bank cheques or a myriad of other activities could have been carried out by the company without the petitioner’s knowledge and participation.

46. According to the DPP, a review of the investigations file by his office established that the petitioner and his co-accused planned and intended to steal over Kshs 80 billion through the Arror and Kimwarer multipurpose dam projects.

47. PC Tanui makes further averments with regard to a concept paper sent to the Cabinet for approval with respect to various projects, among them the Arror and Kimwarer multi-purpose dams. He deposes that the projects were concocted purely for the purpose of looting public funds but as they were not part of the National Water Master Plan, they could only be made possible with the cooperation and conspiracy of the accused persons working for a common unlawful purpose. It is his deposition that in 2008, the Cabinet, through a Cabinet Memo dated 1st December 2008, approved only one project per area. One of the projects approved from the Kerio Valley area to be implemented by the KVDA was the Arror multipurpose dam project.

48. PC Tanui asserts that it is an indisputable fact, which the DPP will prove before the trial court, that the Kimwarer multipurpose dam project was never approved. Despite this, the accused persons ventured into its construction and development and consequently unlawfully conspired and succeeded in making and receiving payments for it, contrary to law. The DPP asserts that the petitioner and his co-accused each played their role and ensured that the two projects were commenced and paid for despite the fact that the projects were neither prioritized in the national budget nor were there any or any approved budgetary provisions or procurement plans put in place by KVDA.

49. PC Tanui makes further detailed averments with regard to the tenders for the project, which apparently was commenced as a concessionary project and was clearly designed and prepared as a public – private partnership project under the Public – Private Partnership Act (PPPA) No. 18 of 2013. PC Tanui avers that the accused persons thereafter abandoned any further reference under the PPPA and proceeded to make a complete and illegal about-turn and tender the projects under the provisions of the Public Procurement and Disposal Act (PPDA) 2005 that converted the project contract into a commercial instead of a concessional contract.

50. PC Tanui states that the DPP will prove to the trial court that the accused, in a pre-planned, choreographed move failed, refused and or neglected to invite Expressions of Interest (EOI), the first step required by law and instead sought Requests for Proposal which in law is the second step after the EOI had been submitted and evaluated. He alleges that it is clear from the material evidence which the DPP has shared with the petitioner that he is guilty of the charges laid against him, and that he knew all along of and actively participated in executing the conspiracy in his position not only as a director of the company concerned, but also as the company secretary and representative of the company.

51. According to the DPP, one of the bidders for the dam tenders in question was a company known as CMC Di Ravenna of Italy which had submitted a joint venture bid with a South African Company known as AECOM. AECOM was, however, dropped by CMC Di Ravenna from the bid process irregularly and in contravention of the law, with the full knowledge of KVDA and the accused persons, and a new joint venture partner known as MWH brought on board. Yet again this MWH was also illegally and unlawfully forsaken and removed from the tender process and in complete disregard of the law, the Italian company Itinera SPA of Italy was brought on board. PC Tanui avers that despite these changes, the letter of acceptance for the tender was issued by KVDA in favour of CMC Di Ravenna Ltd, a company domiciled

in South Africa which is a separate and different legal entity from CMC Di Ravenna, Italy.

52. PC Tanui notes that all these entities and the entity reflected in the Letter of Acceptance are different and separate legal entities from the entity that entered into and executed the commercial agreement and who were identified in that document as CMC Di Ravenna-Itinera JV. Further, that though this entity was not registered or reflected in the agreement as a limited liability company, it was described in the descriptive part of the contract agreement as a joint venture consisting of two separate legal entities known as COOPERATIVA MURATORI E CEMENTISI – CMC Di Ravenna, Italy a company duly incorporated under the laws of Italy, with a registered office in Via Trieste, 76-48122, Ravenna, Italy and Itinera S.P.A a company duly incorporated under the laws of Italy, with a registered office in Tortona, Via Balustra 15, Tortona, Italy. PC Tanui states that payments under the facilities agreement, however, ended up being paid to none of the above companies but to CMC Di Ravenna – Kenya Branch, CMC Di Ravenna Itinera – JV Kenya Branch and or their agents Intensa San Paolo London Branch.

53. It is further averred on behalf of the DPP that investigations also revealed that CMC Di Ravenna – Kenya Branch was paid part of the funds defrauded in excess of Kshs. 100 million. In addition, though counterpart funds were set aside in excess of Kshs 600 million, no land was acquired for purposes of the construction and development of the two dams. He asserts that the Kenya Forest Service, through the Chief Conservator of Forests, had unequivocally communicated to KVDA its opposition to the intended acquisition of forest land for dam construction. Despite this, the petitioner and his fellow directors and co-accused continued to receive large amounts of monies and pay out the same in furtherance of their criminal intents.

54. PC Tanui asserts that the petitioner was a crucial and active part of the group of conspirators who planned and executed a well-contrived scheme by all the accused persons, some of whom held positions of trust in government. Others like the petitioner enabled and facilitated the conspirators to acquire wealth for the sake of it and committed the Kenyan tax payer to a colossal debt in the form of usurious interest on the loans as well as the principal amounts for projects that were unviable, over-priced and unsustainable. It is the DPP's case that without the petitioner, most of what was planned could not have been achieved, and the conduits for funds and payments could not have been possible to manage or facilitate.

55. PC Tanui also makes detailed averments with respect to the meaning of fair administrative action and the provisions of the **National Prosecution Policy, 2015** which are more appropriate as submissions as they are not matters of fact which PC Tanui can depose to in light of the provisions of order 19(3) of the Civil Procedure Code. He avers that once a decision to charge has been made in accordance with the law, any demand that the DPP must engage and maintain correspondence or arguments with accused persons will be wholly impractical, not possible to implement and will engage precious resources in never ending arguments with persons charged under the law and therefore detract from the actual prosecution of the case facing the accused persons.

56. PC Tanui avers that the petitioner knows all too well his role in CMC Di Ravenna – Kenya Branch which has been used to not only receive and disburse stolen funds, but also to register vehicles and assets that have been bought using funds defrauded from the government of Kenya. After the contract was awarded, advance payments of USD 41,611,140.83 (approx. Kshs. 4,292,651,060.25) for Aror dam and USD 33,663,324.59 (approx. Kshs. 3,485,500,628.00) for Kimwarer dam were paid to CMC Di Ravenna- Itinera JV. It is these funds, according to the DPP, that CMC DI Ravenna- Itinera JV is believed to have used to purchase the 28 motor vehicles through Toyota Kenya at Ksh. 77,133,000, as evidenced by copies of the records of purchase from Toyota Kenya (annexure “TT 010”). The vehicles were registered in the name of CMC Di Ravenna Kenya Branch, matters which, according to the DPP, the petitioner is well aware of and was involved in. Nine of the vehicles, according to PC Tanui, were recovered from the petitioner's company, CMC Di Ravenna – Kenya Branch.

57. It is his assertion that in light of the above facts and the facts contained in the disclosed bundle of evidence, the DPP decided to substitute the charge sheet to include all the directors and the company secretary of the companies, an act that was within his rights. In doing so, he did not in any way act maliciously, capriciously or in excess of his jurisdiction. PC Tanui makes depositions with respect to the duties, under the law, of a company secretary and asserts that a company secretary is a crucial cog in the good governance of a company. He asserts that the petitioner had a paramount role in the formation, direction, regulation and reporting of the company but that he not only turned a blind eye to the requirement of witnessing the directors affixing signatures but that by passing the blame to KPMG- Kenya, he participated in all the crimes levelled against him as a director and company secretary of the company.

58. PC Tanui asserts further that the petitioner, while knowing the onus and obligations placed upon directors and company secretaries by the law, abandoned standards of conduct set by his profession and opted to be used by his co-conspirators and co-accused persons and cooperated with them to enable the commission of all the crimes alleged in his capacity as a director and company secretary. It is his averment that the petitioner continues as both a Director and the company secretary of CMC Di Ravenna – Kenya Branch from 2014 to date despite his claim that he was only instructed by KPMG-Kenya to provide legal and company secretarial services.

59. No. 236797 Chief Inspector Kitalia, also an investigating officer with the DCC, Serious Crimes Unit, swore a supplementary affidavit in opposition to the petition. The purpose of CIP Kitalia's affidavit was to place before the court certain documents which should have been attached to PC Tanui's affidavit but had been erroneously left out. CIP Kitalia exhibited in his affidavit copies of motor vehicle records from NTSA (“TT 011 (a to q)”) which he averred confirmed that the vehicles referred to in PC Tanui's affidavit were all registered in favor of CMC Di Ravenna – Kenya Branch. It was his averment that the vehicles were funded by the monies received from CMC Di Ravenna – Kenya Branch, exhibiting in support copies of bank statements (annexure “TT 012 (a) & (b)”) for account No. 2032037804 operated by CMC Di Ravenna - Kenya Branch which he averred showed the payment of the last tranche of Kshs. 6,033,900/- out of the total of Kshs. 83,142,927.80 due to Toyota Kenya for all the vehicles, including those listed in annexure “TT 011 (a to q)”.

60. CIP Kitalia also exhibited copies of bank statements (“TT 013 (a & b)”) for account No.2038590513 operated by CMC Di Ravenna Itinera JV – Kenya Branch showing payment to Toyota Kenya Limited of Kshs. 77,133,000/-. Also placed before the court was a summary of the payment schedule (“TT 014”) that the DCI had obtained from Toyota Kenya Limited showing all the vehicles bought from Toyota Kenya Limited and allegedly paid for by the petitioner's company CMC Di Ravenna – Kenya Branch and also CMC DI Ravenna Itinera JV – Kenya Branch which CIP Kitalia avers proved the link between the two companies and the role of the petitioner as a director and representative. CIP Kitalia averred that both companies share the same pool of directors, funding and premises and are used interchangeably together with other listed entities at the whims of the conspirators that the DPP had charged in court.

The Case for the AG

61. The AG filed grounds of opposition on his own behalf and on behalf of the 2nd respondent, the Chief Magistrate's Anti-Corruption Court. He argues that the petition is misconceived and incompetent and discloses no reasonable cause of action as against the 2nd and 3rd respondent. He terms the petition an abuse of court process, noting that it is in respect of criminal prosecutions and neither his office nor the national government is a party, and the petitioner is therefore non-suited as against his office. He further contends that the petitioner has not met the test set in **Anarita Karimi Njeru v Republic (No. 1 [1979]KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance [2014]eKLR** with respect to the obligation on a party alleging violation of rights. The petitioner has not been able to establish how the 2nd and 3rd respondents have violated his rights, nor is there an allegation of bias or incompetence on the part of the court. The AG asserts that it is in the public interest that the proceedings before the trial court should be allowed to proceed to their logical conclusion in accordance with the law.

The Submissions

62. The parties filed written submissions which were highlighted by their respective Counsel. The AG did not file submissions but Mr. Robi made brief oral submissions on his behalf.

The Petitioner's Submissions

63. The petitioner filed submissions dated 27th February 2020 as well as a list of authorities of the same date. The petitioner submits that he bases his petition on Article 22(1) of the Constitution which gives everyone the right to institute proceedings alleging violation of a right or fundamental freedom in the Bill of Rights. He alleges that there is imminent infringement of his constitutional right to equal protection under the law guaranteed under Article 27(1) and his right to a fair trial protected under Articles 25 (2) and 50. He further submits that the court has jurisdiction, under Article 23(1) and Article 165, to hear an application for redress of a violation of rights and to grant appropriate relief, including a declaration of rights, an injunction or an order of judicial review.

64. The petitioner submits that the issue in contention is whether the DPP, in exercising State powers of prosecution under Article 157 of the Constitution in instituting criminal proceedings against him in respect of offences alleged to have been committed by the petitioner set out in the charge sheet awaiting plea taking in **Anti-Corruption Case No. 20 of 2019 – Republic vs. Henry Kiplagat Rotich and others** violates the petitioner's constitutional rights and is an abuse of the legal process.

65. The petitioner submits that section 366(1)(d) of the repealed Companies Act under which he signed Form No. 236 in respect of CMC Di Ravenna – Kenya Branch provided that foreign companies which after the appointed date establish a place of business within Kenya shall, within thirty days of the establishment of the place of business, deliver to the registrar for registration the names and postal addresses of some one or more persons resident in Kenya authorized to accept on behalf of the company service of process and any notices required to be served on the company. This is the role that he was to play with respect to the company. Form 236 lodged in respect of the company stated that CMC Di Ravenna – Kenya Branch is a company incorporated in Italy with a place of business within Kenya at L. R. No. 209/8257, 8th Floor, ABC Towers, Waiyaki Way, P.O. Box 40612-00200 Nairobi which, is the address of the KPMC audit firm.

66. It is his submission that as a matter of law in Kenya, lawyers' firms and lawyers in their personal names are authorized to accept service on behalf of companies who are their clients. This, he asserts, does not make them culpable for the alleged criminal transgressions of those entities or persons for whom they are authorized to accept service of process. It is also his assertion that other than his role in facilitating the registration of CMC Di Ravenna – Kenya Branch as set out in his petition, he did not render any services nor did he receive any service of process or notices on behalf of the company.

67. The petitioner reiterates that he is not a director, certified public secretary or person resident in Kenya authorized to accept on behalf of the company service of process and any notices required to be served on CMC Di Ravenna Itinera JV – Kenya Branch, a company that was issued with a certificate of compliance dated 6th September 2017. He had only rendered professional services as an advocate and a certified public secretary, as well as a person authorized to accept service of process and notices at the request of KPMG for CMC Di Ravenna – Kenya Branch in 2014.

68. He draws attention to the fact that CMC Di, Ravenna – Kenya Branch is not listed as an accused in the proposed charge sheet. He terms it a miscarriage of justice and abuse of the process of the court for the DPP to charge him in matters involving companies of which he is not a director, shareholder, certified public secretary or person authorized to receive process and notices. The petitioner further notes that the DPP has not enjoined KPMG and Ochieng Ogotu & Company Advocates who had also rendered professional services to CMC Di Ravenna – Kenya Branch.

69. The petitioner submits that the professional work he discharged in respect of the company is provided for under section 34 of the Advocates Act Chapter 16 of the Laws of Kenya, the Certified Public Secretaries of Kenya Act Chapter 534 and the repealed Companies Act. He notes that the **Basic Principles on the Role of Lawyers** (supra) recognize the risks that Advocates are exposed to that are beyond their control while handling clients' work. He cites in particular Principles 16 and 18 which provide that governments shall ensure that lawyers shall not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, and that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

70. It is the petitioner's case that the foundation of the alleged offences against him emanate from his work as an advocate and certified company secretary. He asserts that this is confirmed by the statement, in particular, of Lydiah Njeri Ndirangu, an employee of KPMG. She had stated in her statement to the DCI that KPMG had settled on the petitioner as the company that was being registered did not have its own lawyer and company secretary, and he was the one that KPMG usually used. The petitioner submits that there is not an iota of evidence linking him to the affairs and business activities of the companies that led to the charges before the court. In his view, the charges intended

to be preferred against him are based on multiple errors of analysis of facts and an error of understanding of the scheme of section 366(1)(d) of the repealed Companies Act.

71. The petitioner further submits that the two charges preferred against him are predicated on CMC – Di Ravenna Itinera JV– Kenya Branch, the entity that received the monies as evidenced by the payment vouchers exhibited by the DPP in the affidavit of PC Tanui. On the face of it, according to the petitioner, these charges are directed at CMC – Di Ravenna – Italy, CMC Di Ravenna– Itinera JV, and CMC Di Ravenna Itinera JV– Kenya Branch and the directors and shareholders of these companies. He submits that he is neither a shareholder nor a director of these companies. Had the DPP diligently and professionally tested the evidentiary basis underlying the decision to charge the petitioner by cross-checking and verifying the documents of registration signed by the petitioner which had been submitted to his office and the letter from the Registrar of Companies dated 13th February 2019 to the DCI in which the petitioner’s name does not appear among the directors and shareholders of CMC – Di Ravenna – Kenya Branch, he would not have preferred the said charges.

72. The petitioner submits that in the letter from the Registrar of Companies dated 13th February 2019, the petitioner’s name is placed last and beneath it are the words, in brackets, ‘*Authorized Person*’. He submits that the letter is secondary evidence, having been extracted from the primary document, form 237, the ‘*List and Particulars of the Directors*’ of the company. The petitioner submits that the Registrar of Companies made an error in including his name under the names of directors. In his view, a discerning eye, which the DPP is under an obligation to deploy at all times, would see that apart from the name of the petitioner in the letter of 13th February 2019 bearing the qualification ‘*Authorized person*’, the description ‘*director*’ does not appear against his name. He submits that the DPP did not scrutinize the primary records once the petitioner raised the issue in his letter of 25th October 2019. The DPP had also, in the replying affidavit sworn by PC Tanui, deliberately left out the second page of Form 237, the primary source of the letter dated 13th February 2019 and 25th March 2019. This second page would have shown that the petitioner is not a director of CMC – Di Ravenna – Kenya Branch.

73. The petitioner poses several questions with regard to the charges intended to be brought against him. He asks whether he is being charged as a director or as the company secretary at incorporation of CMC – Di Ravenna – Kenya Branch, or whether it is for being an authorized person to receive service on behalf of the company. Should this be the case, he asks why CMC – Di Ravenna – Kenya Branch, the company which he was involved, as a company secretary, at registration and as the person authorized to accept service on behalf of, is not in the charge sheet, and instead a company known as CMC – Di Ravenna Itinera JV – Kenya Branch is included in the charge sheet. He reiterates that he was not involved in the registration of CMC – Di Ravenna Itinera JV – Kenya Branch with a certificate of compliance dated 6th September 2017. He is also not a director or certified public secretary of the company, nor is he a director or official of the two other legal entities in the proposed charge sheet – CMC Di Ravenna Italy and CMC DI Ravenna Itinera JV.

74. The petitioner submits that if CMC Di Ravenna – Kenya Branch was paid part of the funds allegedly defrauded from the government, the DPP has not demonstrated that the company secretary for the period of 2014 when the petitioner was retained was a signatory to the resolution opening the bank accounts into which the funds were paid. He has also not shown that the petitioner was a signatory to the bank account or that any of the money reached the petitioner. The petitioner observes that the money in contention was, according to the DPP’s own evidence, disbursed in 2018, over 4 years since the petitioner carried out his professional duties at the behest of KPMG. He reiterates that he was not at any time a director of CMI Di Ravenna – Kenya as revealed by the documents lodged with the Registrar of Companies pursuant to section 366 (1)(d) of the Companies Act. He terms it unfair for the DPP to create a non-existent directorship of the petitioner in CMC Di Ravenna- Kenya Branch and use it as a basis to saddle the petitioner with a criminal prosecution. To do so is an abuse of the DPP’s prosecution powers under Article 157, and is a violation of the petitioner’s rights under Articles 25(c), 27(1) (2), 28, 29 (a)(d), 50.

75. The petitioner seeks reliance on a Press Statement dated 26th July 2019 in the DPP’s website. The DPP had indicated in the Statement his decision not to prosecute a sleeping director whom the DPP stated was not active in the affairs of the company in a prosecution related to the misuse of funds in the County Government of Kiambu. He argues that the DPP should similarly not have completely ignored his elaborate explanation that he was not a director of any of the companies involved in the Arror and Kimwarer multipurpose dams and that he was only involved in the registration of CMC Di Ravenna – Kenya Branch at the request of KPMG. His submission was that if a sleeping director’s explanation in the Kiambu County matter was deemed a reasonable explanation to exclude prosecution, his explanation that he was not involved in the affairs of CMC Di Ravenna – Kenya Branch should also have been sufficient for the DPP to remove him from the amended charge sheet.

76. The petitioner cites the decision in **Republic v Director of Public Prosecutions & 2 others ex parte Edwin Harold Dayan Dande & 3 others [2018] eKLR** to submit that the DPP is turning a blind eye to the explanations that he has given, yet the DPP has not tendered any evidence to show that the petitioner was involved in any way beyond incorporation of CMC Di Ravenna-Kenya Branch.

77. According to the petitioner, in form 238 required under section 366(1) (d) on registration of a foreign company in Kenya under the repealed Companies Act, he is listed as the person resident in Kenya authorized to accept service of process on behalf of CMC DI Ravenna-Kenya Branch. He submits that the DPP is mistaken in equating this position with that of a “*local representative*” of the company. He asserts that he has never been “a director” or “*the local representative*” of the company. Save for the instructions by KPMG to act, in his capacity as a certified public secretary, for the purpose of registration of CMC Di Ravenna- Kenya Branch in 2014, he was not thereafter retained by KPMG to continue rendering company secretarial services after 2014, despite the fact that his name remained in the company’s records as its company secretary. He submits that the trail of emails between KPMG Kenya and KPMG South Africa, the promoters of CMC Di Ravenna-Kenya Branch at the time of registration, shows that one Porcelli is indicated as the legal representative of CMC Di Ravenna-Kenya Branch. The petitioner had been paid a retainer by KPMG for the registration of the company and thereafter his involvement with the company ended.

78. The petitioner submits that nothing turns on his having been listed under section 366(1)(d) of the Companies Act as a person resident in Kenya authorized to accept service of process and any notices required to be served on the company. He submits that it would be unfair and unjust if this role, which he likens to that of a post office address or a dropping zone, were to be deemed as making one culpable for the actions of the company. Further, that a retainer made in 2014 is not *ipso facto* sufficient to make him culpable.

79. The petitioner terms as misleading averments on behalf of the DPP that “directors” and “officers” of the companies concerned have been

using the company known as CMC Di Ravenna-Kenya Branch interchangeably with CMC Di Ravenna, CMC Di Ravenna Italy, CMC Di Ravenna South Africa, CMC Di Ravenna Itenera, CMC Di Ravenna Itenera JV, CMC Di Ravenna JV-Kenya Branch according to the convenience of their scheme and conspiracy. He submits that the DPP has not shown the role that the petitioner has played in the alleged scheme, nor has he shown that the petitioner has been identified by any witness as having undertaken any act with regard to the conspiracy.

80. The petitioner observes that in the decision in **Republic v Kenya Revenue Authority ex parte CMC Di Ravenna (Kenya) [2019] eKLR** annexed to the affidavit of PC Tanui, reference is made at paragraph 39 of the judgment to a company known as “*CMC Di Ravenna-Kenya Branch which was incorporated in Kenya on 6th September 2017, almost 3 years after the award of the contract.*” The petitioner submits that he was not involved in the incorporation of CMC Di Ravenna-Kenya Branch on 6th September 2017. He also submits that the DPP was compounding his subversion of the truth by referring, at paragraph 15 of PC Tanui’s affidavit, to “*the Petitioners company in this suit – CMC Di Ravenna-Kenya Branch which was incorporated in Kenya on 6th September 2017 almost 3 years after the award of the Contract.*” The petitioner submits that the documents presented to the court clearly show that he was only retained by KPMG to act as company secretary in 2014 to register CMC Di Ravenna-Kenya Branch. He was not involved in the incorporation on 6th September 2017 of CMC Di Ravenna-Kenya Branch.

81. The petitioner further submits that it is hubris for the DPP to project CMC Di Ravenna-Kenya Branch as the petitioner’s company. He submits that it is self-evident that the role he played in the registration of the company was purely that of an agent of KPMG for KPMG’s client. It is his contention that it is elementary company law that a company is owned by the shareholders, and the DPP has not shown that the company was the petitioner’s company. He relies in support on **Re The Great Wheal Polgooth Limited, 49 LT 1 (1883-1884)** in which the court held:

“...so far as his duties of solicitor to the company were concerned, the solicitor was not a promoter or officer of the company, or as such within sect. 165; that there was no evidence that the solicitor had ever acted as a promoter of the company, or in any other capacity than that of solicitor; that there was nothing in this case to arouse in him any suspicion of fraud; and that as solicitor he had not been guilty of any misfeasance...”

82. The petitioner alleges breach of the DPP’s constitutional duty at Article 47 of the Constitution by his failure to render his administrative action to respond to the petitioner’s letters dated 25th October 2019, 13th November 2019 and 22nd January 2020 in which the petitioner had clearly demonstrated why it would not be correct for the DPP to proceed with the intended charges against him in view of the explanations that the petitioner had presented to the DPP that are exculpatory on the allegations that may have informed the decision to prefer charges against him. He cited the provisions of section 4 of the Office of the Director of Public Prosecutions Act that requires that in exercising his mandate, the DPP should do so in accordance with the Constitution and the principles set out in the said section.

83. The petitioner also argues that he has been denied the right to fair hearing guaranteed under Article 25 (2) and 50 of the Constitution. This is on the basis that his prosecution is premised on a clear failure by the DPP to re-check the public records at the Registrar of Companies to confirm whether or not the petitioner is a director of any of the companies implicated in the criminal act. According to the petitioner, he cannot be assured of a fair trial as he will not be able to prepare his defence when he is being assigned a status he does not hold in a company in whose registration he was involved in at the request of another professional firm, and which company is not even a party to the criminal charges proposed against him. He contends that the charges against him lack a proper factual basis or foundation, and he cannot therefore prepare and articulate a defence in light of the imprecise particulars of the offence and lack of particularity of his involvement in the affairs of the companies that he is charged alongside.

84. The petitioner submits that while the DPP does exercise state powers of prosecution under Article 157 and may institute and undertake criminal proceedings against any person before any court, he also has an obligation under Article 157(11) to exercise his powers with due regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. The petitioner further cites the provisions of the National Prosecution Policy which spells out the principles that should guide a decision to prosecute. He submits that the evidential test set out in the policy must be satisfied before the public interest test is considered. In his view, on a proper consideration of the evidential test with respect to his role in the registration of CMC Di Ravenna – Kenya Branch, it is not possible for there to be any admissible and sufficient evidence to mount a prosecution against him. In his view, the DPP is clearly labouring under a grave misconception by treating him as a director of the company.

85. The petitioner relies on the Court of Appeal decision in **Prof Njuguna S Ndung’u vs The Ethics And Anti-Corruption Commission & 3 Others [2018] eKLR** (Hereafter the ‘*Njuguna S. Ndungu* case’) for the proposition that where the charges against a party are largely dependent on documentary evidence and most of the facts are not in controversy, the High Court is called upon to find out whether or not the acts or omissions allegedly committed by the petitioner *prima facie* constitute the alleged criminal offence. He further cites the case of **Diamond Hasham Lalji & another vs. Attorney General & 4 others [2018] eKLR** (the **Diamond Hasham Lalji** case) in which the Court of Appeal considered the question of challenge to the DPP’s prosecutorial powers and concluded that such powers are not absolute but are limited by Article 157(11) which requires that the DPP takes certain factors into consideration in making the decision to prosecute.

86. Reliance is also placed on the case of **R v The Makadara Chief Magistrate & 2 Others ex parte Wilberforce Nyamboga Mariaria** in which the court held that where exculpatory evidence is presented to the police in the course of investigation but they deliberately decide to ignore it, it can only be concluded that they are driven by collateral considerations other than genuine vindication of the criminal judicial process, and their actions would be an abuse of discretion and power. The petitioner submits that this is the position in this case, where the DPP has evidence of the scope of the petitioner’s involvement in the incorporation of CMC Di Ravenna-Kenya Branch. His submission is that the involvement reveals nothing more than a lawful professional engagement.

87. The petitioner further cites the case of **Wilfred Masinde Wanyonyi v Director of Public Prosecutions & Another [2015] eKLR** in which the court held that where the DPP has breached his discretion under Article 157(11), then the High Court must invoke its powers under Article 165(3)(d)(ii) to tell him that he has acted contrary to the powers conferred on him by the Constitution. The case of **Githunguri vs. Republic [1986] KLR** in which the High Court underscored the inherent powers of the High Court to ensure that the prosecution does not abuse the court process was also cited to support the submission that the prosecution against him is untenable and without foundation *ab*

initio in view of the exculpatory material he has submitted to the DPP. He refers the court to the words of **R Jackson** in a presentation titled **“The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys, April 1, 1940** in which the author highlights the dangers of unbridled exercise of prosecutorial powers.

88. While conceding that the court should exercise some deference to the exercise of the DPP’s prosecutorial powers, the petitioner submits that the court will interfere with the exercise of that power sparingly and in exceptional and the clearest of cases. In his view, in light of the material before the court, his case is one of the exceptional and clear case in which the court should interfere. The petitioner further submits that the DPP is bound by the provisions of the Constitution in Article 2 (2) of the Constitution not to claim or exercise state authority bestowed on him by Article 157(11) except in accordance with the Constitution; is bound by the national values and principles of governance set out in Article 10, as well as the provisions of Articles 19, 20, 21, 27, 28 and 29 of the Constitution.

89. Finally, the petitioner submits that the court is empowered by Article 23 of the Constitution to grant appropriate relief. In his view, in this case, the appropriate relief is one that brings to an end the criminal prosecution against him for the role he played in his professional capacity in the incorporation of CMD Di Ravenna – Kenya Branch.

90. In his oral submissions on behalf of the petitioner, Learned Counsel, Mr. Ongoya asked the court, in considering the petition, to consider one single factual question. This was whether, apart from the petitioner’s execution of instructions from KPMG to provide professional company secretarial services in the incorporation of a company called CMC Di Ravenna Kenya Branch in 2014, there was any conduct attributable to the petitioner that is the *prima facie* evidence forming the proposed charges against him.

91. The court was requested to note that there are four critical persons in the charge sheet, accused numbers 9, 10, 11, and 27. Mr. Ongoya submitted that accused 9 is a company called CMC Di Ravenna Italy, and that evidence will show that this is a company incorporated in Italy with no connection to the petitioner at all as he never incorporated it. Accused 11 is a company called CMC Di Ravenna Itinera JV Kenya Branch, a company incorporated in 2017 as averred by the petitioner in his supplementary affidavit. The petitioner did not participate in its incorporation at all. Accused 10 is CMC di Ravenna Itinera JV, a company with no connection to the petitioner, who never participated in its incorporation, and there is no allegation that he did. Mr. Ongoya submitted that CMC di Ravenna-Kenya Branch, a company incorporated in 2014, is not an accused person at all in any of the counts, yet this was the company with which the prosecutorial and investigative arms are drawing a connection with the petitioner.

92. Mr. Ongoya contended that a person making a decision to prosecute has an obligation, within the meaning of Article 157, to be keen on the evidence. If he is reckless with the facts, the interest of the administration of justice within the meaning of Article 157(11) will be prejudiced. His submission was that the prosecution has an obligation to explain to the court whether, had it known that the petitioner had no connection to the three companies, accused 9, 10 and 11 which are said to have played some role in the Kimwarer and Aror dams scandal, they would still have included him in the charge sheet.

93. Mr. Ongoya referred the court to the information before the court relating to the scope of the petitioner’s involvement in the incorporation of CMC Di Ravenna- Kenya Branch in 2014. This material consisted of email correspondence between CMC Di Ravenna South Africa Branch and KPMG, and email correspondence between KPMG and the petitioner, as well as the statement of Lydia Njeri Ndirangu of KPMG. His submission was that this material shows the role of KPMG and the petitioner; that it is KPMG which gave instructions to the petitioner, and that he had no contact with CMC Di Ravenna Italy.

94. According to Mr. Ongoya, there was prosecutorial impropriety in the decision to charge the petitioner. He observed that the investigation sought to establish the role of the petitioner in CMC Di Ravenna-Kenya Branch. While the DPP had annexed a list of the directors and secretaries of the company in annexure TTO3, he had left out the second page which shows the list of directors, conduct which the petitioner termed prosecutorial impropriety. Mr. Ongoya further noted that while the DPP had annexed the bank account opening forms in respect of the company, he had not annexed the forms that show who the officials who signed the forms are, and where a party hides material, that is also impropriety.

95. Mr. Ongoya further referred to the letter from the DCI to the Registrar of Companies seeking information about the directors of some companies. He observed that the response from the Registrar dated 13th February 2019 includes a list of people, the last of whom is the petitioner, who is indicated as ‘authorised person’. Counsel referred to section 366 (i)(d) of the repealed Companies Act to submit that the petitioner was, effectively, like the dropping zone for correspondence. It was his submission further that all the other people in the letter have the description ‘Director’, while the second column against the petitioner’s name is blank.

96. Mr. Ongoya submitted that the letter dated 13th February 2019 was written by the Registrar of Companies just before the petitioner recorded his statement with the investigator on 14th February 2019. According to Mr. Ongoya, after the petitioner recorded his statement, a new document emerged, dated 25th March 2019, in which the petitioner is now described as a Director. Mr. Ongoya submitted that while the fight against corruption must be supported, people who have respect for Article 157(11) of the Constitution should not behave in a manner that conceals material from the court.

97. Mr. Ongoya noted that the DPP had not addressed the question he had posed regarding the factual basis for the prosecution. While conceding that the petitioner had participated in the incorporation of CMC di Ravenna Kenya Branch, his question was what else, beyond the act of stamping documents, *prima facie*, links him to the criminal acts. Mr. Ongoya submitted that the petitioner was not just asking the court to consider this question: the DPP has previously restrained himself from prosecuting persons he termed sleeping directors, as evidenced in the DPP’s press release exhibited in the petitioner’s documents. He urged the court to allow the petition.

Submissions by the DPP

98. Mr. Taib and Mr. Muteti presented the case of the DPP and highlighted the submissions dated 27th February 2020 and a list of authorities filed on 28th February 2020.

99. In the written submissions, the DPP argues that he exercises state powers of prosecution vested in his office under Article 157 of the Constitution. He therefore has power to institute proceedings against the petitioner. He also submits that his office has published the National Prosecution Policy that provides guidelines on the test to be applied before a decision to prosecute is taken. Key among the considerations is whether the evidence placed before the DPP discloses a prosecutable case and whether it is in the public interest to commence a prosecution.

100. Where acts of a criminal nature are brought to his knowledge, he has the responsibility to ensure that the allegations are thoroughly investigated and appropriate action taken. He is not, in doing so, subject to the direction and control of any person, body or authority, including the petitioner, whom the DPP submits has lobbied and agitated for the dropping of any charges preferred against him. The DPP states that upon receipt and analysis of information from DCI, he directed the DCI to commence and or expand investigations against the petitioner, a directive that was based on an objective assessment of the material and was not actuated by malice, ill will or spite.

101. The DPP submits further that being an independent institution established under the Constitution, his office can only be interfered with or his actions interrogated by the court where there is a manifest contravention of the Constitution or a breach of fundamental rights. Since there are no such manifestations in this case, the court should not usurp his constitutional mandate, substitute its own assessment of evidence, or decide what charges are to be preferred and against whom.

102. The DPP submits that in any event, the court's power to prohibit prosecution should be exercised sparingly and only in the clearest of cases. His position is that prosecutorial decisions should be left to the DPP to determine on the basis of evidence and public interest, and the court should remain the neutral arbiter and restrain itself from making orders that would unnecessarily fetter the DPP's constitutional mandate. In his view, it is the petitioner who should establish that the DPP acted *ultra vires* or irrationally, and the DPP does not have to prove that he has acted rationally or within his power. The DPP submits that the petitioner has failed to establish a case that merits the review of the decision to prosecute him.

103. According to the DPP, the bulwark of the petitioner's case is that he was merely an innocent conveyor of documents and that he acted in his role as an Advocate of the High Court of Kenya, had nothing to do with the alleged crimes and that he should not be punished merely for doing his work as an Advocate or as a Company Secretary. The DPP submits, however, that he has laid bare the information that the petitioner concealed from the court, despite full disclosure of more than 15,000 pages of documentary evidence having been availed to the petitioner.

104. According to the DPP, the petitioner not only acted for the company concerned (in the offences charged) but he also did as he was instructed, assumed the mantle of both the Company Secretary and a Director of the said company, and participated fully in the commission of the crimes alleged, including receiving into the company's accounts the funds defrauded from the government of Kenya. The DPP maintains that the petitioner was an active participant in the conspiracy and was a conduit for the siphoning of the funds stolen and played a crucial role in the execution of the crimes he has been charged with.

105. In response to the petitioner's contention that his right to a fair trial has been violated, the DPP argues that the guarantees of fair trial envisaged under Article 50 and the procedural safeguards in the Criminal Procedure Code and the Evidence Act are sufficient to ensure that the petitioner is accorded a fair trial. There is therefore no basis for this court to intervene or issue the orders sought in the petition. The DPP asserts that no immunity is granted to Advocates, and such limited immunity as there may be is granted in certain circumstances and does not extend to acts that are criminal and are committed outside the scope of one's official duties. Further, it is the DPP's position that the mere institution of a criminal charge against an Advocate is not, in itself, a threat to the practice of law by the petitioner. In the DPP's view, the petitioner's claim of immunity and the overall tenor of his case is not founded on the Constitution or any statute.

106. The DPP further submits that Kenya has committed itself, under Article 2 (5) and (6) of the Constitution, to Article 11 of the **United Nations Convention Against Corruption** which directly addresses the question of combatting corruption and economic crime and places upon each State the duty to eradicate corruption and strengthen integrity among members of the judiciary and, by extension, Advocates of the High Court who are officers of the court. The DPP submits that he would be failing in his duty if he were to accord Advocates against whom issues touching on integrity have been raised preferential treatment. Reference is made to Article 7 of the Universal Declaration of Human Rights and Articles 3 and 19 of the African Charter on Human and Peoples Rights which the DPP submits emphasizes equality of all persons before the law.

107. The DPP contends that the petitioner's acts in this case were so far outside the purview of his role as an Advocate acting innocently for a client that he cannot claim to be covered under any sort of immunity. That the obligations placed on the petitioner in law as a Director, Company Secretary and representative of CMC Di Ravenna – Kenya Branch cannot be side-stepped, and therefore the steps taken by the DPP in this matter should not be viewed as a personal attack on the petitioner as an individual or as an Advocate, nor are they intended to in any way punish the petitioner for practicing law.

108. The DPP submits that his decision to charge the petitioner in accordance with Articles 35 (sic) and 157 (11) of the Constitution was informed by the facts revealed by the investigations, and was not arrived at arbitrarily or in breach of the law. Further, the decision was formally communicated to the petitioner through an application to amend the charge sheet to include the petitioner and also to consolidate the cases in the trial court, which was known and available to the petitioner. The DPP argues that the trial court, where the application was heard and granted, was the proper forum for the petitioner to object to the orders sought by the DPP. As he did not raise any objection in that forum or apply for review or appeal against the decision of the trial court, this petition is *res judicata*, and the court is now *functus officio*. The DPP asks the court to find that the petition is an abuse of the court process and strike it out as incompetent, *ab-initio*.

109. The DPP identifies three issues as arising for determination in this matter. The first is whether the petition is an abuse of the court process as the subject matter thereof has been formally pleaded before the trial court and determined without any objection, application for review or appeal by the petitioner. The second issue is whether the DPP has acted in contravention of Article 157(11) of the Constitution. The third and final issue is whether there has been a violation of the petitioner's constitutional rights in the initiation of the charges against him.

110. According to the DPP, since this is a constitutional petition in which the petitioner alleges violation of his constitutional rights, he is under an obligation to demonstrate violation of these rights. That the law is that a person who seeks redress under the Constitution must state his or her claim with precision and demonstrate which provisions of the Constitution have been violated or infringed, and the manner of the alleged violations. The DPP relies in support on the decisions in **Anarita Karimi Njeru v Attorney General (1979) KLR 154**, **Meme v Republic [2004] eKLR** and **Trusted Society of Human Rights Alliance v AG. & 2 others [2012] eKLR** for this submissions.

111. The DPP submits that the petitioner has alleged violation of several Articles of the Constitution, but in his petition, he has mentions only Articles 10(1), Article 27(1), Article 47, Articles 50(1) and (2)(a, b, c, j & k) and Article 157(11). The DPP notes that the petitioner has not explained how the other Articles cited in his petition have been violated, or the manner of their violation. It is also the DPP's submission that the petitioner has not demonstrated how Article 10(1) on the national values and principles of governance has been violated.

112. With regard to Article 27(1) which guarantees to everyone the right to equality and freedom from discrimination, the DPP submits that his office has treated the petitioner equally before the law and has charged him along with his fellow Directors. He has not discriminated against the petitioner and no evidence has been adduced by the petitioner with regard to the alleged discrimination. The DPP submits that he has shown that the foundation and basis of the offences facing the petitioner are not his work as an Advocate and Certified Public Secretary but as a criminal who engaged in the execution of the offences charged. The DPP contends that the petitioner has supplied no evidence of any discrimination against him and has failed to state his claim with any precision or demonstrated how Article 27 has been violated. The DPP makes similar submissions with respect to the petitioner's failure to demonstrate the violation of the right to dignity guaranteed under Article 28.

113. The DPP denies violation of the petitioner's right to fair administrative action guaranteed under Article 47. He submits that the administrative action relevant to the charging of the petitioner is linked inextricably to the processes embedded in the acts of investigation, the taking of statements of the accused person and the opportunity given to an accused person to ventilate his side of the narrative and to assist in the decision making process. The DPP submits that the petitioner has not provided any evidence of breach of his rights to fair administrative action in the process leading up to his being charged. According to the DPP, the petitioner did not lead any evidence to show why he did not oppose the application to amend the charge sheet to include him, apply for review of or appeal from the decision, which were the administrative and legal steps that provided for the petitioner's rights. He asserts that there were no breaches of those rights and if there were, no evidence of the said breaches has been provided.

114. The DPP notes that the petitioner has placed before the court correspondence for the period after he was charged and after the application to have the charges sheet amended to include him. This, in the DPP's view, is not in any way linked to the process of the decision to charge him and are actions after the event. His submission was that to expect the DPP to engage in correspondence and the unavoidable arguments with accused persons would have no bearing on any rights and would place an unbearable burden on the resources of the DPP with no corresponding benefit in terms of the safeguard of the rights of persons.

115. The DPP also denies violation of the petitioner's rights under Article 50. It is his case that all the petitioner's rights under the Article have been upheld: the petitioner has been charged before a court of law and is subjected to a fair public hearing. He is presumed innocent until the contrary is proved, and has been informed of all the charges with sufficient details to answer them in accordance with the law on the drafting of charges. The DPP further asserts that the petitioner has been informed in advance of the evidence the prosecution intends to rely upon, and he has been provided with full disclosure thereof, such disclosure involving in excess of 44 folders and 15,000 copies of documentary evidence. The petitioner would also have his chance to challenge the said evidence, to cross examine all witnesses, and to participate in the trial fully.

116. With regard to the petitioner's contention that the DPP has contravened Article 157(11) and of his prosecution being based on ulterior motives, malice, abuse of process, unreasonableness and irrationality in making the decision to prosecute him, the DPP submits that no evidence in support of this allegation has been placed before the court. He denies the contention that there is no factual or legal foundation for the charges against the petitioner and submits that it is in the public interest that the DPP's constitutional mandate of commencing criminal prosecutions ought not to be unduly hampered by intervention of the court. He submits that when the basis of the challenge to the DPP's decision is on the legal and factual foundation of charges preferred, debate revolves around the scope and depth of scrutiny to be undertaken by the court. In his view, the petitioner not only wants the court to interrogate the process in which the charges were brought against him but also the merit of the decision to mount the prosecution.

117. The DPP submits that the court's power to prohibit prosecution should be exercised very sparingly and in the clearest of cases. The court must remain the neutral arbiter and refrain from making orders that amount to an unnecessary fetter on the DPP in the discharge of his constitutional mandate. He submits that the court should not assess the merits of the DPP's decision, reliance for this submission being placed on **Matalulu & Another v DPP [2003] 4 LRC 712**. The DPP further submits that local jurisprudence also adopts this non-intrusive approach, his submission being that courts take the position that they must grant a measure of deference to the DPP's exercise of prosecutorial discretion. The DPP cites in this regard the case of **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** and **Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**.

118. The DPP submits that even though there is an emerging view that a substantive review of the exercise of the DPP's decision must necessarily involve an assessment of the merit of the decision in the context of the threshold set for the DPP by the Constitution, it is not yet the position of the law in Kenya. The DPP relies on the decision in **Republic v Director of Public Prosecution & another ex parte Patrick Ogola Onyango & 8 others [2016] eKLR** which proposes the rationale for a more involved review of the decision of the DPP. He also cites the case of **Director of Public Prosecutions vs. Humphrey [1976] 2 ALL ER 497** in which the need for the court to keep out of the prosecution arena is emphasized. Also cited is the Botswana case of **State vs. Matere [1993] BLR 465**.

119. The DPP observes that the approach advocated by the Court of Appeal in **Njuguna S. Ndungu and Diamond Hasham Lalji** is to be applied only when the court is faced with a clear and obvious case of breach of constitutional rights of an accused person. His submission is that the position taken by courts in Kenya is that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. It is also his submission that the courts in Kenya are in agreement that there are circumstances where the type of scrutiny set out in the majority decision of **Njuguna S. Ndungu** is called for.

120. The DPP emphasizes that these circumstances are that there should be clear and credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, in which case a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled. The DPP submits that this is not the position in the present case.

121. The DPP submits further that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. In his view, to allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini trials. It is his submission that the prosecution meets the evidential and public interest tests set in the National Prosecution Policy, 2015, which is in consonance with the constitutional imperative of Article 157(11).

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

123. In the present case, according to the DPP, he has complied with the law on the framing of charges and has provided all the information that he is required to provide under the law. In his view, the objections raised by the petitioner have no basis. The DPP cites the provisions of section 134 of the Criminal Procedure Code with regard to the framing of charges to submit that the petitioner has not demonstrated that the charges as drafted failed to contain a statement of the specific offence(s) with which the petitioner is charged, or that it does not contain such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Reliance is placed on the decision in **Sigilani vs Republic (2004) 2 KLR 480** for the submission that the petitioner has failed to demonstrate that he has been charged with an offence that is not known in law, or that the offence was not disclosed, or that it was not stated in a clear and unambiguous manner.

124. Mr. Taib pointed out in his oral submissions that the documents that were before the trial court were in excess of 15,000 pages and it was not within the scope of this court to consider their scope and import. His submission was that the omission of some documents in this case is not due to procedural impropriety but is due to the impracticality and the need to provide only the relevant documents.

125. Mr. Taib contended that the petitioner had misrepresented his case and had lied to the court. He had also failed to disclose material and important documents as a result of which he had obtained temporary orders. Further, that he had failed to produce the letter written by the police to the Registrar of Companies seeking information on the identity of directors of CMC Di Ravenna-Kenya Branch. The response from the Registrar showed that the petitioner was indicated in form CR12 in respect of CMC Di Ravenna-Kenya Branch as one of the Director of the company. It was the DPP's submission that the petitioner had lied to the court that he is not a Director of the company and the authorized person. Mr. Taib's submission was that there are company secretaries who take legal responsibility as directors and are responsible for criminal activities by their companies.

126. Mr. Taib referred the court to the bank statements annexed to the affidavit of PC Tanui which showed payments from CMC di Ravenna Itinera JV Kenya Branch to CMC Di Ravenna-Kenya Branch. He observed that there was, on 8th October 2018, an outward transfer, the beneficiary being CMC Di Ravenna-Kenya Branch. This entry was repeated in the following three entries and on the following pages, and according to the DPP, it showed that the money stolen from Treasury was forwarded to CMC Di Ravenna -Kenya Branch.

127. Mr. Taib observed that the parties in this matter had been reduced to arguing before this court alternative sets of facts, matters which should be argued before the trial court. He urged the court to refuse to be reduced to a replica mini trial, for several reasons. First, because the court should not open the floodgates by telling accused persons that they can have a mini trial before the High Court as this would be a waste of resources for all parties, and for the court. Secondly, that there is a whole line of decisions that shows that courts frown on interference with the prosecutorial discretion of the DPP, and the court will not attempt to replace his decisions on the basis that the court would have arrived at a different decision. Mr. Taib noted that it is only recently that there has arisen a more liberal approach to weighing the constitutional safeguards against the discretion of the DPP, citing the decision in **Diamond Hashem Lalji vs DPP**. Mr. Taib submitted that courts should not interfere unless it is shown that the DPP has acted unlawfully or unjustifiably, and if the petitioner was able to prove that the DPP was not exercising his discretion independently, none of which had been proved in this case.

128. Mr. Taib submitted that while the petitioner had argued that CMC Di Ravenna-Kenya Branch has nothing to do with CMC Di Ravenna Italy, the DPP's documents showed that the heading of CMC Di Ravenna Kenya Branch was a company incorporated outside Kenya, and that it was a company incorporated in Italy, but registered in Kenya. He maintained that the petitioner is directly linked to the company incorporated in Italy; he was part of this company, and it is not true that CMC Di Ravenna Kenya Branch was incorporated independently and has nothing to do with CMC Di Ravenna Italy.

129. It was also his submission that the DPP's documents, specifically the list and particulars of the directors and secretary of a company incorporated outside Kenya, shows how the web of conspiracy was span. He argued that the documents were presented by Ochieng Ogutu & Co advocates, while the petitioner was alleging that he was the company secretary. The petitioner and his firm, Richard Wekesa & Co. Advocates, were indicated as the persons authorized to accept service on behalf of a company incorporated outside Kenya.

130. In further submissions on behalf of the DPP, Learned Counsel, Mr. Muteti, addressed the court on the import of the decision of the Court of Appeal in **Njuguna S. Ndungu**, which he submitted is bad law. He further submitted that the DPP runs an evidential and public interest test before making a decision to prosecute. Mr. Muteti submitted that the public interest consideration in this case is clear, but the court does not have the evidence that the DPP will present to the trial court. In Mr. Muteti's view, in order to stop a prosecution, the court must be satisfied that the evidence is so deficient that it cannot meet the *prima facie* threshold that the DPP applies in making the decision to prosecute. He urged the court to depart from the **Njuguna S. Ndungu** decision, contending that it is the duty of the court to intervene where the DPP has abused his power, which was not the case in this instance.

Submissions for the AG

131. Mr. Robi, Learned Counsel for the AG, submitted that this petition is against the DPP entirely. Further, that since the petition arises from a criminal prosecution to which the AG is not a party, it should be dismissed as against the AG.

132. Mr. Robi submitted further that this being a petition in which the petitioner alleges violation of rights, he should be able to prove the violations, which he has not done. Mr. Robi supported the submissions by Mr. Taib and Mr. Muteti and urged the court to dismiss the petition.

Analysis and Determination

133. I have considered the extensive pleadings and submissions of the parties and I take the view that the issues raised in this petition are fairly straightforward. There are, first, the preliminary and procedural issues relating to who should or should not be joined in the proceedings, and who should file pleadings on behalf of whom, and substantive issues that go to the root of the petition. I will begin by disposing of the preliminary or procedural issues, which should not detain us for long.

Preliminary Issues

134. The AG argues that his office should not have been joined to the proceedings as the petition is directed at the office of the DPP. The petitioner retorts that the AG is a necessary party to represent the Chief Magistrate's Court. Under Article 156(4)(b) of the Constitution, the office of the Attorney General has the mandate to represent the national government, of which the judiciary, and therefore the 2nd respondent in this matter, is a part. It is incorrect therefore to argue that the AG is improperly joined to these proceedings.

135. The second procedural issue relates to the filing by the DPP of an affidavit, ostensibly on his own behalf and on behalf of the Chief Magistrate's Court. The petitioner is correct, in my view, in his contention that the DPP has no mandate to do this. In light of my finding that it is the office of the AG that has the constitutional mandate to represent the national government in civil proceedings, the DPP was acting outside his powers in purporting to file a reply on his own behalf and on behalf of the trial court. Since he did not, however, make any averments on behalf of the trial court, there is no prejudice caused to the petitioner.

136. A third argument made by the DPP is that this petition is *res judicata* and the court *functus officio*. The DPP submits that the petition is *res judicata* as the petitioner had an opportunity to raise the issues he now raises before the trial court when an application was made to amend the charge sheet to include him as one of the accused persons.

137. The law on *res judicata* is that the plea is applicable only where there is a former judgment by a court of competent jurisdiction that was directly speaking to the matter in the subsequent suit, and was between the same parties. Section 7 of the Civil Procedure Act sets out the conditions on which the plea can be invoked as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

138. With all due respect to the DPP, a court seized of a criminal matter, dealing with an application for amendment of a charge sheet under the Criminal Procedure Code, cannot be deemed to have been the proper forum for hearing and determination of the question whether the DPP has acted in violation of his constitutional mandate, or has violated constitutional rights of the petitioner. The jurisdiction to hear and determine such questions is vested, under Article 22 and 165 of the Constitution, in the High Court.

139. The DPP has also submitted that this Court is *functus officio*. This doctrine prevents the re-opening of a matter before a court that had heard and rendered the final decision on the matter, and is intended to bring a matter to finality-- see **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**. This court has not addressed itself at any point to the issues raised in this petition, so the doctrine is not applicable.

Substantive Issues

140. The key issue that arises in this petition is whether the DPP, in making his decision to charge the petitioner with other accused persons in Nairobi Anti-Corruption Case No. 20 of 2019, is in breach of his constitutional obligation under Article 157(11) of the Constitution. A corollary issue is whether he has by such breach violated the petitioner's constitutional rights. In dealing with this overarching question, I am required to consider if and under what circumstances the court may intervene and prohibit the exercise of the DPP'S constitutional powers of prosecution. I will thereafter consider whether the facts and circumstances of this case lend themselves to such intervention.

141. The question of the circumstances under which the court can interfere with the exercise of the DPP's powers of prosecution has been considered in many decisions in this country. Indeed, from the submissions made for the petitioner and the DPP, there is some consensus between the parties that the court does have the jurisdiction, in certain circumstances, to inquire into the exercise of the DPP's prosecutorial discretion, and on what these circumstances are.

142. The question is what the scope and depth of the scrutiny to which the court should enter in considering a challenge to the DPP's decision to prosecute should be. The petitioner urges the court to be guided by the decision of the Court of Appeal in the **Njuguna S. Ndungu** case and enter into a consideration of the merits of the case and a scrutiny of the proposed evidence in the context of the relevant law. The DPP's position is that the court should exercise restraint and should not be drawn into a mini-trial of the case pending before the

trial court. He beseeches the court to remain the neutral arbiter and refrain from making orders that amount to an unnecessary fetter on the DPP's discharge of his constitutional mandate. The DPP cites the decision in **Matalulu & Another v DPP [2003] 4 LRC 712** in which the court held:

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

143. The DPP further cites several decisions in which courts have urged a non-intrusive approach on the basis that courts must grant a measure of deference to the DPP's exercise of prosecutorial discretion. Among the decisions cited are **Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others** (supra) and **Republic v Commissioner of Police and Another ex parte Michael Monari & Another** (supra) in which the court stated that:

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

144. However, as the DPP observed, there is emerging jurisprudence that judicial review of the DPP's decision to prosecute should not be confined only to process. On the contrary, a substantive review of the exercise of the DPP's decision must necessarily involve an assessment of the merit of the decision in the context of the threshold set for the DPP by the Constitution.

145. In his decision in **Republic v Director of Public Prosecution & another ex parte Patrick Ogola Onyango & 8 others** Onguto J stated as follows:

“116. The courts’ twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.

117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of Thuita Mwangi & 2 Others vs. The Ethics and Anti–Corruption Commission Petition No. 153 of 2013 [2014]eKLR and also Republic vs. Commissioner of Police & Another Ex p Michael Monari & Another [2012] eKLR where Warsame J (as he then was) stated as follows:

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

146. After considering the decisions in which courts have taken a more liberal approach to the review of the decisions of the DPP, Onguto J went on to state as follows:

“118. On the other hand, the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution: see the cases of Republic vs Director of Public Prosecutions Ex p Qian Guon Jun & Another [2013]eKLR, Republic vs. Attorney General Ex p Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Githunguri vs. Republic (Supra) and Republic vs. The Judicial Commission into the Goldenberg Affair and 2 Others Ex p Saitoti HC Misc. Application No. 102 of 2006.

119. In Republic vs. Attorney General Ex p Kipngeno Arap Ngeny (Supra), the court observed as follows:

“It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution.” (emphasis mine)

120. The same rather oxymoronic tide appears to obtain outside our jurisdiction. In Australia, in the case of William vs. Spautz [1992] 66 NSWLR 585 the High Court was of the view that proceedings lacking in any proper foundation amount to abuse of process and ought to be stayed. Yet in England, the House of Lords was emphatic in the case of Director of Public Prosecutions vs. Humphrey [1976] 2 ALL ER 497 at 511 that:

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

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

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

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

147. The conclusion reached in the above case is echoed in the majority decision of the Court of Appeal in **Njuguna S. Ndungu** in which the Court stated:

“[23] I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.

The jurisprudence shows that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly. In Diamond's case (supra), the court said in part at para. 42:

“The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

148. In **Diamond Hasham Lalji** which the Court of Appeal cited in **Njuguna S. Ndung'u**, it was held that:

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

149. It cannot be disputed therefore that the position of our law is that in certain, albeit limited, circumstances, the court may properly inquire into the propriety of the exercise of the discretion of the DPP to prosecute. Such an inquiry, as the cases above illustrate, must be undertaken in the clearest of cases. The question then, is whether the present case falls into that bracket. It would do so, as emerges from the cases set out above, if the facts and circumstances demonstrate a violation of the constitutional rights of the petitioner, or an improper exercise of the DPP's prosecutorial discretion conferred under the Constitution.

Violation of the Rights of the Petitioner

150. The petitioner alleges violation of his constitutional rights under various Articles of the Constitution. He argues that the DPP has violated or threatened to violate his rights under Article 27, 28, 47 and 25 and 50 of the Constitution. He has also mentioned various other Articles of the Constitution such as Articles 19, 20, 21, 22 and 23 of the Constitution which the DPP submits he has not demonstrated violation of. These latter Articles contain procedural aspects with respect to the duty to protect the fundamental rights guaranteed under the Constitution.

151. Article 25 and 50 relate to protection of the right to fair hearing. The petitioner submits that the right has been violated due to the fact that he is being charged in respect of a position that he does not hold in a company whose registration he was involved in. In my view, the provisions of Article 50(2), which guarantees the fair trial rights of an accused at the trial, can only come into play in the course of trial. There is no indication that the petitioner, should he be subjected to trial, will not be presumed innocent, or will be denied adequate time or facility to prepare his defence. Nor has he been denied the right to legal representation. I am not satisfied therefore that there has been a violation of the right to fair hearing.

152. The petitioner contends that his right to fair administrative action guaranteed under Article 47 has been violated. This Article guarantees to everyone the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The petitioner submits that though he sent a letter dated 25th October 2019 to the DPP and followed it up with several reminders, he has yet to receive a response thereto. The DPP's response is that he is not under an obligation to respond to correspondence from persons against whom he has exercised

his prosecutorial powers. He submits that were he to do so in respect of every communication made to him, he would be unable to discharge the functions of his office.

153. I note that on 14th February 2019, the petitioner had been summoned before the DCI and had recorded his statement in which he had given his version of the events leading to the registration of the foreign company in Kenya, CMC Di Ravenna-Kenya Branch. He had thus been given an opportunity to explain his involvement in the registration of the foreign company in question. To that extent, therefore, in my view, the DPP is correct in his submission that he cannot be required to engage in correspondence with persons against whom he intends to prefer charges, for that would greatly hamper his capacity to carry out his prosecutorial functions. I am not satisfied, therefore, that there has been a violation of the petitioner's rights under Article 47.

154. An argument has also been made that the petitioner has been denied the right to equality before the law. This is on the basis that other professionals involved in the registration of CMC Di Ravenna-Kenya Branch have not been charged with him. In my view, however, the decision to charge one person and not another cannot form a proper basis for alleging violation of constitutional rights under Article 27. Such a decision, I believe, is predicated on the evidence that the DPP has, and which meets the tests for mounting a prosecution mandated by the Constitution and the National Prosecution Policy.

Violation of Article 157(11)

155. The petitioner has alleged that the DPP is in violation of his constitutional mandate under Article 157(11) thereby improperly exercising his prosecutorial discretion. The petitioner submits that he had written to the DPP and sent him documents showing that the only role he played in the registration of the company, CMC Di Ravenna-Kenya Branch, was to sign compliance forms as a certified public secretary on the instructions of KPMG. He was also the authorized person under section 366(1)(d) for purposes of service of process. He was not, however, a director or legal representative of the company and was not involved in any way in its affairs.

156. I note that the intended prosecution of the petitioner arises from the alleged loss of billions of tax payers' funds in a corrupt scheme involving the proposed construction of two dams in the Kerio Valley, the Aror and Kinwarer multi-purpose dams. The DPP's case is that investigations established that the petitioner and his co-accused planned and intended to steal over Kshs 80 billion through these projects. The DPP illustrates the enormity of this loss by the averments by PC Tanui that this amount surpasses the Kshs 62 billion required to run the entire Kenyan health system, makes nonsense of the judiciary's annual budget of 19.5 billion, the DCI's 7.5 billion, and parliament's 40.5 billion.

157. The projects had been initiated on 19th December 2014 when KVDA, under the Ministry of Environment, Water and Natural Resources invited bidders to tender for several projects. The tender for the construction of Aror and Kinwarer Dams were valued at 319,620,697.07 Euros and 258,688,881.72 Euros respectively. Following the tender, the two projects were awarded to CMC Di Ravenna. CMC Di Ravenna then registered CMC Di Ravenna – Kenya Branch to which it made substantial payments from the amounts released for the tendered projects.

158. The DPP asserts that CMC Di Ravenna – Kenya Branch in turn paid out substantial amounts to various entities, both real and fictional, which assisted in the distribution and payments of kick-backs and pay-offs to the other accused persons and or their assigns. The DPP states that these payouts were controlled by the petitioner, and that the petitioner at all times knew or ought to have known of all transactions in question. Since, according to the DPP, the petitioner was a Director, Company Secretary and representative of the company, he knew all the activities the subject matter of the charges of conspiracy to defraud. He also actively participated in the commission of the crimes with which he is charged.

159. The DPP also states that though the contract was awarded to CMC Di Ravenna – South Africa Branch, the transactions transitioned to involve two other companies-CMC Di Ravenna- Itinera JV, a company registered in Italy, and the petitioner's company in this suit, CMC Di Ravenna- Kenya Branch which he avers '*was incorporated in Kenya on 6th September 2017, almost 3 years after the award of the contracts*'. The DPP alleges that the directors and officers of the companies have been using and quoting the company known as CMC Di Ravenna – Kenya Branch interchangeably with CMC Di Ravenna, CMC Di Ravenna Italy, CMC Di Ravenna South Africa, CMC Di Ravenna Itinera, CMC Di Ravenna Itinera JV, CMC Di Ravenna Itinera JV – Kenya Branch, depending on the convenience of their scheme and conspiracy to defraud. These allegations, if proved to be correct, are really serious and any person against whom there is *prima facie* evidence of involvement should be prosecuted.

160. There is no dispute that the DPP is under a constitutional obligation under Article 157(11), in exercising the powers of prosecution vested in his office, to:

...have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

161. The DPP has promulgated the **National Prosecution Policy** under which he has set two tests to which every intended prosecution is to be subjected. This is the evidentiary test, which requires that the evidence available is admissible and sufficient, and the public interest test, which requires that where evidence discloses a criminal act, a prosecution be conducted. The National Prosecution Policy requires that the evidentiary test is satisfied before the matter is subjected to the public interest test. The Policy provides as follows with respect to the evidentiary test:

“Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available” To make this determination, Public Prosecutors should therefore consider the following:

a) If the identity of the accused is clearly established through admissible evidence.

b) The strength of the rebuttal evidence.

c) Would the evidence be excluded on the basis of its inadmissibility, for instance under the hearsay and the bad character rules"

d) Reliability of the evidence considering; whether there would be concern about accuracy, credibility or motivation of the witnesses" What is the suspect's explanation"

Is the confession believable" How was evidence obtained.

i. Is there further evidence which would be required" The standard of evidence required under the Evidentiary Test is less than the Court's "beyond reasonable doubt" standard for conviction.

ii. In some cases the available evidence at the time may not be sufficient to determine the Evidential Test, that is, "realistic prospect of conviction". In such circumstances, Public Prosecutors should apply the "Threshold Test" in order to make the decision whether or not to charge.

iii. For example, relevant expert evidence or evidence required to determine bail risk may not be available within the limited time of arraignment of a suspect before court. Such are the instances that necessitate the application of the Threshold Test.

iv. A prosecutor shall consider the following conditions in applying the Threshold Test:

(i) The evidence available is insufficient to apply the Evidential Test.

(ii) There are reasonable grounds to believe that evidence will become available in good time.

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

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

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

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

162. The petitioner contends that the case against him has no factual foundation or basis, and that the evidentiary test has therefore not been satisfied. The DPP, not surprisingly, takes the contrary position, asserting that both tests required under the National Prosecution Policy have been met.

163. According to the DPP, the evidence that links the petitioner to the dams scandal is that he is a director, company secretary and local representative of CMC Di Ravenna-Kenya Branch. This is a foreign company, according to PC Tanui's affidavit evidence, incorporated in Italy that received a certificate of compliance on 6th September 2017. The DPP presents in evidence two letters from the office of the Registrar of Companies dated 13th February 2020 and 25th March 2020 which the DPP avers show that the petitioner is a director, company secretary and local representative of CMC Di Ravenna-Kenya Branch.

164. The petitioner's position is that he was only involved in the registration of CMC Di Ravenna-Kenya Branch. He was instructed to act as a certified public secretary for purposes only of registration or compliance of a foreign company in Kenya by KPMG audit firm. This was in 2014, and he did not have anything to do with that company thereafter.

165. I have considered the documents placed before me by the parties. I note from the letter dated 13th February 2019 that the Registrar of Companies indicated that the petitioner was the 'authorised person' in respect of CMC Di Ravenna-Kenya Branch. This position was provided for under section 366(1)(d) of the repealed Companies Act. The section provided as follows:

Foreign companies which, after the appointed day, establish a place of business within Kenya shall, within thirty days of the establishment of the place of business, deliver to the Registrar for registration-

...

(d) the names and postal addresses of some one or more persons resident in Kenya authorized to accept on behalf of the company service of process and any notices required to be served on the company;...

166. In the letter dated 25th March 2019, the Registrar of Companies indicates that the petitioner was a director and authorized person of the company. Form 237, the statutory form produced by the petitioner, however, indicates that he was the 'authorised person' of the company, a

position that was required under the law for purposes of receiving process. This is borne out by form 238 lodged pursuant to section 366(1)(d) of the repealed companies Act. The petitioner asserts that the DPP deliberately left out the second page of form 237, which shows that the petitioner is not a director of CMC Di Ravenna-Kenya Branch.

167. Having considered the documents placed before the court, I am constrained to agree with the petitioner that in the absence of any other evidence showing the petitioner's involvement in the matters forming the subject of the investigations and prosecution, the evidential basis for his prosecution is lacking.

168. I have set out above the provisions of the National Prosecution Policy on the tests to be applied by a prosecutor in making a decision whether or not to charge. The DPP has consistently referred to the company known as CMC Di Ravenna-Kenya Branch as the petitioner's company. The DPP has also accused the petitioner of lying, both to the DCI and to the court. However, aside from the repeated reference to the company as the 'petitioner's company' and the assertion that he is lying, the documentary evidence placed before the court shows that the petitioner's involvement with the company known as CMC Di Ravenna-Kenya Branch was at its registration. He had acted on the instructions of KPMG Kenya to sign and stamp the statutory forms for the registration of the company. In compliance with the requirements of section 366(1)(d) of the repealed Companies Act, he was the person indicated in Form 238 as the 'authorised person' to receive service of process and any notices required to be served on the company.

169. I agree with the DPP that Advocates, like all other professionals, do not have a special immunity if they commit, in the course of their professional duties, acts which are criminal in nature. There is a danger, however, that in circumstances such as are before me, a zealous prosecutor may cast his net too wide and catch even those, like the petitioner, who only performed the basic professional function of facilitating the local registration of one of the companies that allegedly was involved in the dams scandal. Had the petitioner indeed been disclosed in the statutory forms as a director and local representative of the said company, or had there been other evidence such as account opening forms which demonstrated that he was indeed a director or local representative of the companies involved, this court would have had no hesitation in saying that the DPP has a factual foundation, has a *prima facie* case, that should be left to the trial court.

170. However, in the circumstances of this case, and bearing in mind the **Basic Principles on the Role of Lawyers** relied on by the petitioner, I take the view that the DPP, in seeking to prosecute the petitioner, is identifying the petitioner with the acts allegedly committed by the company that he had, several years prior to the perpetration of the alleged offences, participated in the local registration of, and was indicated as the 'authorised person' for purposes of service of process.

171. There is the constant refrain by the DPP that CMC Di Ravenna-Kenya Branch is the petitioner's company, yet all the material before the court points to a contrary position. An objective observer would thus be forgiven for thinking that the DPP has taken his position either from misapprehension of the provisions of the repealed Companies Act, or for some other motive that does not accord with the constitutional imperative in Article 157(11).

172. In the case of **R vs The Makadara Chief Magistrate & 2 Others Ex Parte Wilberforce Nyamboga Mariaria**, the court stated as follows:

“However, where as it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons only known to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.”

173. In his decision in **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others [2014] eKLR**, Lenaola J (as he then was) stated as follows:

“Where a prosecution is based on a complete misapprehension of the facts and the applicable law and where a suspect is being lumped together with others for no credible reason, that is what is called abuse of the process of the Court. Where a man is being vexed for no clear unlawful action or inaction on his part, then the actions of the prosecutor are not in public interest and is against the interests of the administration justice. Where Article 157(11) of the Constitution has been breached, Article 165(3)(d)(ii) must be invoked and the DPP told that he has acted inconsistently with the authority conferred upon him by the Constitution.”

174. Taking all the above matters into consideration, I am constrained to find that the exercise of the DPP's prosecutorial discretion in relation to the petitioner does not accord with his mandate under Article 157(11) or the provisions of the National Prosecution Policy. I accordingly find that the petition is merited, and I hereby grant orders as prayed in the petition dated 13th February 2020 with no order as to costs.

Dated and Delivered at Nairobi this 12th day of May 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent and pursuant to a

notice issued on 8th May 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE