



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 295 OF 2018

HONOURABLE PHILOMENA MBETE MWILU.....PETITIONER

VERSUS

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

THE DIRECTOR OF CRIMINAL INVESTIGATION.....2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT

(ANTI-CORRUPTION COURT) (NAIROBI).....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

STANLEY MULUVI KIIMA.....INTERESTED PARTY

RULING

Introduction

1. The petitioner, Philomena Mbete Mwilu, has been charged with several offences in Anti-Corruption Case No 38 of 2016- R vs Philomena Mbete Mwilu and another. She has filed the present petition in which she alleges that the investigations by the Director of Criminal Investigations (2nd respondent) and the institution of the criminal proceedings by the Director of Public Prosecutions (1st respondent) violates her constitutional rights and is an abuse of court process.

2. When the matter came up before us for hearing on 6th December 2018, issues arose in respect of representation of the petitioner and the 1st respondent. We thus have before us two notices of motion. The first is dated 17th December 2018 and is contesting the appearance of **Mr. Khawar Mehood Qureshi, QC** as Counsel for the 1st respondent. The second application dated 20th December 2018 is filed by the 1st respondent and seeks disqualification of Senior Counsel **Mr. James Orengo** and **Mr. Okongo Omogeni** from further acting for the petitioner. Directions were given that the two applications be disposed of simultaneously, and this ruling therefore relates to both applications.

The Petitioner's application

3. In a letter dated 3rd December 2018, the 1st respondent requests the Attorney General (4th respondent) to issue a Special Licence to **Mr. Qureshi, QC** to appear and participate in these proceedings on his behalf. The 1st respondent justifies the request as follows:

“From the above, we note that the Kenyan bar has coalesced (sic) around the Deputy CJ and in fear of repacations (sic) in case she is not removed the Kenyan bar cannot be seen to be dispassionate.

It is clear that this is a case of great Public importance as it involves the highest Court in the Country. In order to show transparency and independence in dealing with the case, secondly to build jurisprudence and to interpret the Constitution, and also to avoid conflict between the ODP and the Judiciary, we think it is prudent to engage a Private Foreign Counsel to deal

with the matter”.

4. The 4th respondent acceded to that request and on 6th December 2018, Mr. Qureshi was introduced to us as part of the legal team representing the 1st respondent. However, this was opposed by the petitioner who challenged the manner of his recruitment, appointment and appearance. We directed that the challenge be by way of a formal application in order to give clarity to the grounds upon which the challenge was raised and give all parties a fair chance to respond.

5. The Petitioner’s application encapsulates that challenge and seeks the following prayers:-

1. The recruitment process and appointment of Professor Qureshi QC to act in this matter on behalf of and for the 1st Respondent be and is hereby declared irregular, unconstitutional null and void.

2. Gazette notice number 12613 is special issue Vol.CXX-No.148 of 5th December 2018 issued at the instance of the 1st Respondent and the 4th Respondent’s letter dated 5th December 2018, Ref: AG/CONF/6/A/5 Vol. II appointing Professor Khawar Qureshi QC to act in this matter on behalf of and for the 1st Respondent be and are hereby declared irregular, illegal, null and void.

3. Professor Khawar Qureshi QC be and is hereby declared unqualified to appear and act in this matter as an Advocate for the 1st Respondent.

4. The costs of this Application be provided for.

6. In a Practising Certificate said to be valid from 1st April 2018 until 30th April, 2019, Mr. Qureshi QC is declared by The General Council of The Bar of England and Wales to be a self-employed Barrister. The said Council also certifies Mr. Qureshi as a Barrister of good standing who is entitled to practice at the Bar of England and Wales and is currently in practice. That Certificate states that Mr. Qureshi is not the subject of any disciplinary proceedings and has no record of bankruptcy. It also reveals that Mr. Qureshi was called to the Bar by the Honourable Society of Middle Temple in October 1990 and was appointed a Queen’s Counsel in 2006.

7. The 1st respondent vide Gazette Notice No. 12613 dated 4th December 2018 appoints Mr. Qureshi as a Special Prosecutor in **CMC Anticorruption Case No. 38 of 2018-Republic vs. Philomena Mbete Mwilu and Another-** and in this petition and all matters incidental thereto. The Gazette Notice though dated 4th December 2018 is published in the Kenya Gazette issue of 5th December 2018. Thereafter by a letter dated 5th December 2018, the 4th respondent writes to Mr. Qureshi, through the Office of the 1st respondent, admitting him to practice as an Advocate in Kenya. In the said letter the 4th respondent also admits him to attend with the 1st respondent in conduct of this petition and Chief Magistrates Criminal Case No.38 of 2018- Republic vs. Philomena Mbete Mwilu and another and other incidental matters that may arise therefrom. The 4th respondent invokes the provisions of section 11 of The Advocates Act, Chapter 16 Laws of Kenya.

8. The petitioner pitches for the declaration that Mr. Qureshi’s appointment is irregular, unconstitutional and a nullity on various grounds which can be condensed into two principal arguments. First, that the recruitment process has breached principles applicable to public procurement under Article 227 of the Constitution and **The Public Procurement and Asset Disposal Act (Act No. 33 of 2015)** and regulations made thereunder. To this grievance can be added an assertion that the procurement affronts the provisions of Article 157(11) of The Constitution.

9. The second main argument is that the appointment of Mr Qureshi is not done in conformity with the provisions of The Advocates Act in respect to the admission of a foreign Advocate. Further, that in any event his appointment in respect to the present petition could not have been properly anchored under section 85 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya). The petitioner’s application is supported by the interested party.

10. We shall start with the challenge to the process of recruitment of Mr. Qureshi. **The Office of The Director of Public Prosecutions Act (Act No.2 of 2013)** is intended to give effect to Articles 157 and 158 of The Constitution and for connected purposes. Section 30 of The Act grants power to the 1st respondent to appoint a private legal practitioner as a public prosecutor in the following way:-

“(1) The Director may from time to time, and as need may arises, engage the services of a qualified private legal practitioner to assist in the discharge of his mandate.

(2) In engaging the services of a private legal practitioner under subsection (1), the Director shall comply with the relevant public procurement law and regulations.

11. Similarly section 31 provides as follows in respect to the powers of the 1st respondent to appoint a private legal practitioner to represent him in other proceedings:-

“In proceedings to which the Office is a party or in respect of which the Office otherwise has any function under this Act, the Director may appear in person or be represented by—

(a) any other officer subordinate to him; or

(b) a private legal practitioner engaged in accordance with section 30”.

12. Mr. Qureshi is a private legal practitioner and his engagement to act for the 1st respondent in these proceedings would have to be in comport with public procurement law. This is the express expectation of section 30(2) of The Act. However, even without this explicit prerequisite, the provisions of section 4 of **The Public Procurement and Asset Disposal Act**, would require the office of the 1st respondent which is a state organ established under the Constitution, to comply with the provisions of the Act with respect to procurement planning, processing, inventory and asset management, disposal of assets and contract management.

13. This conforms with the Constitutional imperative set out in Article 227 (1) that when a public entity contracts for goods or services then it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

14. The petitioner argues that the appointment of Mr. Qureshi was procured in violation of Article 10 of the Constitution. This Article requires that the 1st respondent complies with the rule of law, public participation, exercise of good governance, integrity, transparency and accountability. She further argues that the process of procurement was opaque and did not comply with principles of Article 227 of the Constitution and the Public Procurement and Asset Disposal Act. However, the 1st and 4th respondents counter that this court, in these proceedings, is not the appropriate forum to challenge the process of procurement of the services of Mr. Qureshi.

15. Part XV of the Public Procurement and Asset Disposal Act itself provides an elaborate procedure for the administrative review of a procurement process, the forum for which is the Public Procurement Administrative Review Board. Section 175 (1) of the Act allows a party aggrieved by a decision of the Review Board to seek judicial review in the High Court within 14 days of the decision of the Board.

16. There is thus a clear procedure provided by statute for challenging the decision of the 1st respondent in this case. We are guided in this regard by the sentiments of the Court of Appeal in **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR**, in which it held:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions”.

17. We wish to add that even if the case of the petitioner is that the appointment of Mr. Qureshi raised constitutional questions, the proper way of raising them would be by way of a substantive constitutional petition in which the issues would be at the centre of the proceedings and not as an interlocutory challenge in proceedings such as this.

18. Being of that persuasion, all arguments of whatever guise made against the recruitment of Mr. Qureshi as affronting the law in respect to public procurement must fall by the way side.

19. We now turn to consider the question whether Mr. Qureshi is properly admitted to practice in Kenya as a foreign Advocate in accordance with section 11 of the Advocates Act. However, before we do so we deem it proper to briefly address certain concerns raised by the 4th respondent regarding our decision not to permit Mr. Qureshi to participate in the present applications.

20. It is common ground that Mr. Qureshi is a foreign advocate. A pillar of the petitioner’s application before the court is that his admission as an advocate to appear before us is unlawful. An argument is made that he is unqualified to appear and act as an Advocate in the first place. We took the view, and we believe rightly so, that it would be improper to allow Mr. Qureshi to address us before we make a finding as to whether he has been properly admitted as a foreign advocate to appear in Kenyan courts.

21. It is acknowledged by both sides that an interrogation as to whether Mr. Qureshi has been properly admitted to practice in Kenya starts with an analysis of the provisions of section 11 of the Advocates Act and whether Mr. Qureshi’s admission meets the criteria and process set out in the Act. Section 11 provides as follows:

“(1) The Attorney-General may, in his absolute discretion, admit to practise as an advocate, for the purpose of any specified suit or matter in or in regard to which the person so admitted has been instructed by the Attorney-General or an advocate, a practitioner who is entitled to appear before superior courts of a Commonwealth country, if such person has come or intends to come to Kenya for the purpose of appearing, acting or advising in that suit or matter and is not disqualified or suspended by virtue of this Act, and a person so admitted (hereinafter in this section referred to as a “foreign advocate”) shall not, for the purpose of that suit or matter, be deemed to be an unqualified person.

(2) No foreign advocate shall be entitled to practise until he has paid to the Registrar the prescribed admission fee.

(3) No foreign advocate shall be entitled to practise unless he is instructed by, and if appearing in court appears with, an advocate or any person mentioned in section 10, nor shall any foreign advocate be entitled to sign or file any pleadings in court.

(4) Every foreign advocate shall, during and for the purposes of his admission, be deemed to be an advocate for the purposes of Parts VIII, IX, X, and XI:

Provided that in respect of a foreign advocate references in Part XI, or in any rules made under this Act, to the Disciplinary Committee shall be construed as references to the Chief Justice and references to striking the name of an advocate off the Roll shall be construed as references to disqualifying a foreign advocate from practice in Kenya.

(5) Where a complaint under Part XI has been made in respect of a foreign advocate, the Chief Justice, in addition to the powers

conferred upon him by that Part as modified by subsection (4), shall have power, in his discretion at the instance of the complainant or of the Council of the Society, to suspend immediately such foreign advocate from practice in Kenya pending the dismissal of the complaint or the making of a final order in respect thereof”.

22. We do not understand the petitioner to be questioning the absolute discretion of the 4th respondent to admit Mr. Qureshi to practice as an Advocate in Kenya. Her argument, we believe, is that the appointment is subject to and must comply with all relevant laws and regulations pertaining to admissions of Advocates.

23. From the fairly simple and uninvolved language of section 11, the 4th respondent is granted absolute and, in our view, unfettered discretion, subject only to the law, to admit a foreign Advocate to practice in Kenya if :

(a) That person is entitled to appear before a Superior Court of a Commonwealth Country.

(b) The person is not disqualified or suspended by virtue of the Act.

(c) The foreign Advocate is instructed by, and if he appears in Court must appear with an advocate or an Officer from The Attorney General’s Office or Director of Public Prosecution, or any other person who has a right of audience in Kenyan courts.

24. However, a foreign Advocate will not be entitled to practice until he has paid the prescribed admission fee to the Registrar (in the current constitutional dispensation, The Chief Registrar of the Judiciary). To be noted as well is that unlike a local Advocate, a foreign advocate is not entitled to sign or file any pleadings in Court.

25. There is no prescribed format in the Act for admission of a foreign advocate. In the matter before Court, the 4th respondent appointed Mr. Qureshi by a letter dated 5th December 2018 but subject to the following conditions:

(i) The authority to practice was limited to the matters named therein, that is, Petition No. 295 of 2018, Criminal Case No. 38 of 2018 and other incidental matters that may arise from the foregoing;

(ii) The Foreign Advocate was required to pay such admission fee as would be prescribed by the Chief Registrar of the Judiciary;

(iii) Mr. Qureshi would be required to maintain a valid Practising Certificate for the duration of his retainer; and

(iv) Mr. Qureshi was to be subject to the disciplinary process as applies to a foreign advocate under the Act during the course of the limited practice in Kenya.

26. Noteworthy from this letter of admission from the 4th respondent is the requirement that Mr. Qureshi maintains a valid practicing certificate. It is not clear, however, from the letter of admission whether the practicing certificate referred to is a local practicing certificate or a valid practicing certificate from the jurisdiction where Mr. Qureshi is ordinarily admitted to practice. The 1st respondent submitted that the foreign Advocate is not required to take a local practicing certificate. The petitioner argues that a holistic reading of the law would lead to the conclusion that the requirement that a foreign advocate obtains a local practicing certificate is mandatory and not a matter of discretion.

27. A plain textual reading of the provisions of section 11 does not support the proposition that a local practicing certificate needs to be taken out by a foreign Advocate. Yet that may not be enough to dispose of the argument, and we think it is necessary to consider the spirit of the law in order to see whether it detracts from this conclusion. The starting point is to interrogate the rationale for requiring an Advocate who ordinarily practices in Kenya to obtain a practicing certificate.

28. Under Section 9 of The Advocates Act a person cannot qualify to practice as an Advocate in Kenya unless, *inter alia*, he or she holds a practicing certificate. A practicing certificate is issued by the Chief Registrar of the Judiciary upon application in terms of section 22 of The Advocates Act which provides:

“(1) Application for a practising certificate shall be made to the Registrar—

(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate;

(b) by producing evidence satisfactory to the Registrar that the applicant has paid to the Society the fee prescribed for a practising certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and

(c) by producing a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate.

(2) Subject to section 31, the Registrar, if satisfied that the name of the applicant is on the Roll and that he is not for the time being suspended from practice, shall within fourteen days of the receipt by him of the application issue to the applicant a practising certificate.

(3) The Registrar shall cause one copy of each declaration delivered to him under this section to be filed in a register kept for

that purpose, and any person may inspect the register during office hours without payment”.

29. Drawing from the statutory requirements, one of the reasons why a practicing certificate (which is valid for a year) is issued, is to disqualify any person who has been suspended from practice. The occasion for issuing the certificate is also the occasion for checking, among other things, that the applicant is an admitted Advocate and has paid the prescribed practicing fees to the Law Society of Kenya as well as to the Advocates Benevolent Association. In addition, a no objection approval from the Law Society is required.

30. It follows from the above provisions that a foreign Advocate need not be a Member of the Law Society of Kenya and the Advocates Benevolent Association as the Advocate does not ordinarily practice in Kenya. Subscription fees in respect thereof is not necessary for such Advocate. In addition, not being a Member of the Law Society, the written approval or a letter of no objection by the President of The Law Society of Kenya would not be required. Simply put, the Law Society of Kenya cannot approve or disapprove a person whom it does not supervise.

31. In the exercise of his discretion to admit a person to practice as an Advocate in Kenya, the 4th respondent is under a duty to satisfy himself that the person he admits is a practitioner entitled to appear before Superior Courts of the Commonwealth. A person suspended or expelled from appearing before a Superior Court of a Commonwealth country obviously does not qualify. Once the foreign Advocate satisfies the requirement of the relevant Commonwealth country which entitles him or her to practice before the Superior Courts of that country, then it is needless to ask that advocate to satisfy local requirements for issuance of a Kenyan practicing certificate.

32. Given what we have found to be the objective for the statutory requirement that local Advocates take out a practising certificate, it is our view that a foreign Advocate who has been admitted by the 4th respondent to practice as an Advocate in Kenya in consonance with the provisions of section 11 of The Advocates Act need not take out a local practicing certificate.

33. We will now proceed to examine whether the admission of Mr. Qureshi to practice before the Court in Kenya made by way of the letter of 5th December 2018 satisfies the provisions of section 11. Shown to this Court is a Certificate that Mr. Qureshi QC is a self-employed Barrister in England and Wales. He has a right of audience before every court in those two countries in relation to all proceedings regarding **‘Administration of Oaths, Immigration Work, Probate Activities and Reserved Instrument Activities.’** We take these to include an audience before the Superior Courts of those countries.

34. The certificate issued shows a validity period from 1st April 2018 to 30th April 2019.

35. We take judicial notice that England and Wales are members of the Commonwealth family. In addition, the Bar Council of England and Wales certifies him as an Advocate of good standing with a certificate whose validity is for three months from 4th December 2018 when it was issued. We therefore find that as at 5th December 2018 when the 4th respondent admitted Mr. Qureshi to practice as an Advocate in Kenya, he met the criteria for such admission and we find no flaw in the manner in which the 4th respondent exercised his discretion. In addition, in so far as Mr. Qureshi paid Kshs.400 on 5th December 2018 as admission fees, he meets the further condition imposed by section 11(2) of The Act. While it is accepted that he does not have a Kenyan practicing certificate, we have already taken the view that it is not required by statute.

36. Having found that Mr Qureshi was properly admitted to act as a foreign Advocate in Kenya, the next question is whether he was properly appointed to act on behalf of the 1st respondent in these proceedings.

37. His appointment was made through Gazette Notice No. 12613 which we hereunder reproduce:-

“Gazette Notice No. 12613

The Criminal Procedure Code (Cap 75)

APPOINTMENT

IN EXERCISE of the Powers conferred by Section 85(1) of the Criminal Procedure Code, the Director of Public Prosecution appoints-

KHAWAR QURESHI (PROF.)

to be a Special Public Prosecutor in the CMC Anti-Corruption Case No. 38 of 2018 (Republic vs. Philomena Mbete Mwilu and Another) and High Court Petition No. 295 of 2018 and all matters incidental thereto.

Dated the 4th December, 2018.

NOORDIN M. HAJI

Director of Public Prosecutions.”

38. By the Gazette Notice, the 1st respondent appoints Mr. Qureshi as a Special Public Prosecutor in the criminal case but also in this constitutional petition and all matters incidental thereto. He invokes the provisions of section 85(1) of The Criminal Procedure Code.

39. As pointed out earlier, the Gazette Notice is dated 4th December 2018. As at that date, Mr. Qureshi had not been admitted to practice in Kenya since his letter of admission is dated 5th December 2018. However, the issue of the gazette notice preceding the date of admission was not taken up by the petitioner, and since as emerges later in the ruling, nothing turns upon it, we shall say no more about it.

40. Section 85(1) of The Criminal Procedure Code states:

“(1) The Director of Public Prosecutions, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases”.

41. We take the view and so hold that the power donated to the 1st respondent under this provision is to appoint public prosecutors in respect to any specified case or classes of cases of a criminal nature. The proceeding before this court is a constitutional petition challenging, *inter alia*, the commencement and prosecution of Criminal proceedings against the Petitioner in **Criminal Case No. 38 of 2018 Republic vs. Philomena Mbete Mwilu and Another**. While there is a nexus between these proceedings and the criminal proceedings in that this is a petition that confronts the constitutionality of the criminal proceedings, this constitutional petition is not a criminal proceeding. The appointment of Mr. Qureshi to appear for the 1st respondent in the proceedings currently before us cannot therefore be properly done under section 85(1) of the Criminal Procedure Code.

42. That said, the 1st and 4th respondents have relied on sections 30 and 31 of the ODPP Act as providing the statutory anchor for the appointment of the foreign Advocate to appear for the 1st respondent herein. These sections provide as follows:

“30. (1) The Director may from time to time, and as need may arise, engage the services of a qualified private legal practitioner to assist in the discharge of his mandate.

(2) In engaging the services of a private legal practitioner under subsection (1), the Director shall comply with the relevant public procurement law and regulations. Section 31 which is of different effect allows the D.P.P to be represented by a Private Legal Practitioner engaged in accordance with Section 30 to appear on his behalf in any Proceedings in which his Office is a Party or in respect of which the Office otherwise has any function under the Statute.

31. In proceedings to which the Office is a party or in respect of which the Office otherwise has any function under this Act, the Director may appear in person or be represented by—

(a) any other officer subordinate to him; or

(b) a private legal practitioner engaged in accordance with section 30”.

43. The proceedings before us were commenced by the petitioner who joined the 1st respondent as a critical party. By dint of the provisions of section 31 of the ODPP Act, the 1st respondent has an undoubted power to engage a private legal practitioner to appear for him in the proceedings. Having been properly admitted to practice in Kenya, Mr. Qureshi became available for the said appointment. Unlike under section 85(1) of the Criminal Procedure Code under which his appointment requires gazette with respect to criminal prosecutions, his engagement to act in any other matter in which the 1st respondent is a party under section 31 of the ODPP Act does not require gazette. It is our finding therefore that Mr. Qureshi was properly appointed to appear in these proceedings.

44. There is yet another issue raised by the petitioner which warrants our consideration. It is submitted on her behalf that a person engaged under contract, such as Mr. Qureshi, cannot be trusted to uphold the independence expected of that office by the Constitution and statute. The Office of the Director of Public Prosecution is established by Article 157(1) of The Constitution. Sub Article 10 thereof has the following important provision in respect to the independence of the Office of the Director of Public Prosecutions:

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

45. The independence of the office of the DPP is underscored by section 6 of the ODPP Act in the following terms:

“Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law”.

46. We think that the petitioner’s concern with regard to the appointment is easily answered by the above provisions. Further, we draw from and adopt a passage from the decision of the Supreme Court of Appeal of South Africa in **Moussa vs. S (181/2014)[2015] ZASCA 61** (14 April 2015). In that matter, the National Prosecuting Authority of South Africa had engaged private counsel in terms of Section 38 of their National Prosecuting Act to conduct Prosecution on fraud charges. The Prosecutor’s appointment was challenged as being unconstitutional

on the basis that it impinged on the constitutional imperative that prosecutions must be conducted without fear, favour or prejudice. In holding that the appointment of the prosecutor was in accord with the law, the Court expressed the following view:

“[25] The picture that emerges from the statutory scheme, in line with the constitutional imperative of ensuring independence, impartiality and prosecutions without fear, favour or prejudice, is the establishment of a single national prosecuting authority with strict controls, directions and hierarchical supervision from the top downwards. It was not suggested that the policy and policy directives presently in place are not consonant with that model. Section 38 of the NPA Act, which is at the heart of the present litigation, ensure that the appointment of persons with suitable qualifications and experience to perform ‘services’ in specific cases occurs only after consultation at the highest level involving the Minister, the National Director and/or Directors or Deputy National Directors. Importantly, s 38(4) provide:

‘(4) For purposes of this section, “services” include the conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be.’ (my emphasis)

This must mean that when persons from ‘outside’ are engaged as prosecutors, they do so after consideration at the highest level and that the prosecutions that they are involved in are subject to the control and direction of the highest ranking officials within the NPA, who themselves have taken the oath of office prescribed by s 32. This translates into ensuring that the decision and basis of the prosecution are within the control of those officials. All of this is to ensure that constitutional imperatives are met”.

47. The 1st respondent asks a foreign counsel to represent him in this matter. In the constitutional and statutory scheme of things whenever the 1st respondent is permitted to delegate his power, there is an obligation placed on him/her to retain responsibility for his office. The Office of the 1st respondent is created and given specific mandate by the Constitution and the Act. The reality is that the 1st Respondent cannot work alone, on occasion he will delegate. Even when he does, the 1st respondent must not forget the high calling of his office in which independence must be an enduring feature. Article 157 (9) provides as follows:

The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

48. Further as a reminder of his constitutional obligation, section 22 of The ODPP Act directs that:

“(1) The Director may subject to such conditions as he or she may impose in writing, delegate any power and assign any duty conferred on him or her in terms of this Act or any other written law to a subordinate officer.

(2) Any power exercised or functions performed under this Act by a prosecution counsel or a member of staff of the Office shall be deemed to have been exercised or performed by the Director.

(3) A delegation or assignment under subsection (1) does not prevent the Director from exercising the power in question himself or herself.

(4) A delegation under this section—

(a) shall be subject to any conditions the Director may impose;

(b) shall not divest the Director of the responsibility concerning the exercise of the powers or the performance of the duty delegated; and

(c) may be withdrawn, and any decision made by the person so delegated to may be withdrawn or amended by the Director”.

49. We are therefore not persuaded that the appointment by the 1st respondent of a foreign private practitioner to represent him in proceedings of this nature is a surrender of the independence of his Office. When the private practitioner acts on the instructions and under the directions of the 1st respondent, the Counsel is the *alter ego* of the 1st respondent.

50. Having reviewed the manner of admission and appointment of Mr. Qureshi, we are satisfied that it meets the requirements of statute and we are unable to fault it.

51. But there is a final argument that all this notwithstanding, Mr. Qureshi cannot appear before us because he does not hold a work permit. In reaction to this, the Respondents have shown to court a Special Pass issued on 6th December 2018 to Mr. Qureshi to work with the 1st respondent as an Advocate/Public Prosecutor. Section 36 of The Kenya Citizenship and Immigration Act (Cap. No 12 of 2011) permits for the issuance of Permits and Passes prescribed under Section 40 of the Statute. The latter Section sets out the procedure for issue of Permits and Passes as follows:-

“(1) In this section—

“Committee” means the permits determination committee appointed by the Cabinet Secretary.

(2) An application for a permit shall be made to the Director in the prescribed manner.

(3) The Director shall issue a permit of the required class to a person who is not a prohibited immigrant or inadmissible person, who has—

(a) made an application in the prescribed manner before entry into Kenya; and

(b) satisfied the Committee that he has met the requirements relating to the particular class of permit.

(4) The Director shall issue or revoke a permit on recommendations of the Committee.

(5) The Committee shall have power to request for additional information and where necessary, summon the applicants, require production of production supporting documents.

(6) The Director shall, within fourteen days of receipt of recommendations of the Committee, cause to be issued a permit to an applicant who so applies and qualifies.

(7) Where the Director is of the opinion that the issue of permits to an applicant is not in the interest of the country or for any other sufficient reason, the Director may upon giving reasons, in writing, to both the applicant and the Committee—

(a) refer the matter back to the Committee for further consideration; or

(b) decline to issue the permit to the applicant.

(8) Where the application has been referred back to the Committee, the Committee shall, within fourteen days, make its findings to the Director and such findings shall be limited to the reasons given for the referral.

(9) Subject to the provisions of this Act, the Committee shall regulate its own procedures.

(10) Any person who is aggrieved by a decision made under this section may apply to the Cabinet Secretary for review in the prescribed manner.

(11) A notice of approval or rejection as the case may be, of an application under this section shall be issued to the respective applicant in the prescribed manner.

(12) Where the notification issued under subsection (11) is for the rejection of the application, an aggrieved applicant may apply for a review of the Cabinet Secretary's decision within a period of ninety days from the date of receipt of the notification and may appeal the decision of the Cabinet Secretary to the High Court”.

52. The Kenya Citizenship and Immigration Regulations, which are promulgated under the Act, set out the category of Passes that can be issued by an Immigration Officer. One such Pass is a Special Pass. Regulation 34 says as follows of a Special Pass:-

“(1) Any person who wishes to enter or remain in Kenya for—

(a) a limited period for the purpose of applying a review of a decision denying a permit;

(b) applying for a permit or pass;

(c) temporarily conducting any business, trade or profession; or

(d) any other purpose which an immigration officer considers suitable, may apply to an immigration officer, in Form 32 set out in the First Schedule, for a special pass or in the case of an application that is to be made at the point of entry, completion of an entry declaration form shall be deemed to be an application for a special pass.

(2) An immigration officer may, after considering an application made under paragraph (1), issue a special pass to the applicant in Form 35 set out in the First Schedule, for such period that does not exceeding six months as he may specify in the pass.

(3) A special pass shall, subject to the terms and conditions as may be specified in the pass, permit the holder to enter Kenya within the period specified therein and to remain in Kenya for such period, not exceeding six months from the date of issue and to re-enter Kenya at any time during the period of validity of the pass”.

53. The Immigration Officer has issued Mr. Qureshi a Special Pass to enable him work as an Advocate/Public Prosecutor. One of the things such a pass enables the holder to do temporarily includes conducting any business, trade or profession. The petitioner has not told us how the issuance of that special pass violates the Kenya Citizenship and Immigration Act, and we are not persuaded by her submissions that there is any basis to fault the issuance of the pass.

54. Having come to the conclusions set out in the preceding sections with respect to the various challenges to the appearance of Mr. Qureshi for the 1st respondent, we are constrained to find that the petitioner’s application dated 15th December 2018 is without merit.

The 1st respondent's application

55. We now turn to consider the 1st respondent's application brought by way of a Notice of Motion dated 20th December 2018. The 1st respondent, who is supported by the 4th respondent, seeks orders to disqualify Senior Counsel Mr. James Orengo and Mr. Okong'o Omogeni from representing the petitioner in this petition as well as in Chief Magistrate's Anti-Corruption Case No 38 of 2018 and all related matters.

56. The grounds upon which the motion is based are that the two Senior Counsel are members of the Senate Committee on Justice, Legal Affairs and Human Rights. On 5th December 2018, the Committee met a multi-agency team comprising the 1st, 2nd and 4th respondents, and the Director of the Asset Recovery agency. During that meeting, the 1st respondent was asked a number of questions relating to the engagement of Mr. Qureshi, QC to act on his behalf. The 1st respondent complains that the two Senior Counsel actively participated in the meeting by raising several questions with regard to Mr. Qureshi's engagement to act in the present petition. The 1st respondent terms this a clear case of conflict of interest given that when this petition came up for hearing on 6th December, 2018, a day after the Committee's session, Senior Counsel appeared for the petitioner and objected to Mr. Qureshi's involvement in the petition without disclosing their participation in the Senate Committee meeting.

57. The 1st respondent contends that the interest of justice, fair administration of justice and interest of the general public require that the two Senior Counsel be barred from appearing in this Petition, the matter pending before the Chief Magistrate's court and all matters incidental thereto.

58. The 1st respondent's application is supported by the affidavit of Lilian Ogwora, sworn on 20th December 2018, which contains depositions that are more or less similar to the grounds on the face of the motion. The affidavit contains two annexures, a letter dated 13th December 2018 requesting for a copy of the Hansard report of the Senate proceedings of the Committee of 5th December 2018 and a copy of the Hansard.

59. The petitioner opposes the application through grounds of opposition dated 2nd January 2019. She contends that the application is frivolous, vexatious and a gross abuse of the court process. She further argues that the application is devoid of any legal or factual basis; is based on falsehood; is unsupported by the facts claimed to be relied upon; is a reaction to her application and is an afterthought. The petitioner further contends that the application is calculated to prejudice, embarrass and delay the fair hearing of the petition on merit.

60. The petitioner maintains that the two Senior Counsel did not, during the Senate Committee meeting, raise questions regarding Mr. Qureshi's appointment, a fact borne out by the Hansard. She contends that a conflict of interest is a factual legal question based on substantiated facts, not perceptions. It is her case that according to Senate Standing Orders, conflict of interest would arise in a demonstrated existence of a pecuniary or proprietary interest. If there had been a genuine and valid concern of impropriety, it should have been raised before the Senate Committee as soon as the participation of the Senior Counsel in the Committee began.

61. In submissions in support of his application, the 1st respondent contends that the two Senior Counsel sat on the Senate Committee which was dealing with various issues including that of the appointment of Mr. Qureshi. He argues that when he appeared before the Committee and the issue relating to the said appointment came up, the two Senior Counsel did not excuse themselves from the proceedings.

62. Further, that though they had a duty to disclose their interest in the matter, they failed to do so. He contends that even when the matter came up before the court on 6th December 2018, the two did not disclose to the court that they had sat throughout the Senate Committee's proceedings where the issue of appointment of Mr. Qureshi was discussed. He refers the court to the proceedings of the Committee in the Hansard, to show that the two Senior Counsel contributed to the proceedings.

63. The petitioner submits in response that the two Senior Counsel have been on record for her since the petition was filed. Consequently, the claim of conflict of interest made against the two is supported by neither facts nor law. According to the petitioner, there is no evidence from the Hansard to show that the two Senior Counsel asked questions regarding the present petition. She further relies on the Advocates Practice Rules which provide how an advocate can be disqualified where there is unethical conduct.

64. It is also her contention, that there should be real mischief and prejudice if the Advocate is allowed to continue taking part in the litigation. The burden of proof, she submits, is on the 1st respondent, the applicant, to demonstrate the confidential information Counsel have and how that information is or may be relevant to the matter at hand. In her view, the 1st respondent had not met the burden he carries to establish that there is a conflict of interest in the two Senior Counsel continuing to appear for her in this petition and in the criminal case. She maintains therefore that the issue of conflict of interest had only been raised because the petitioner had challenged the appointment of Mr. Qureshi. The interested party supports the petitioner's position in resisting the 1st respondent's application.

65. Having considered the respective averments and submissions of the parties, we take the following view of the matter.

66. The 1st respondent argues that sitting in the Committee gave rise to conflict of interest and for that reason the two Senior Counsel should be disqualified and barred from appearing in this petition and all matters related to it. The petitioner has argued that the grounds relied on by the applicant are not factually correct and that there is no legal basis to support this application because there is no conflict of interest that would warrant grant of the orders sought in the application.

67. In our view, the crux of the 1st respondent's challenge to the appearance of the two Senior Counsel for the petitioner is captured in paragraph 5 of the grounds in support of the Motion, which states as follows:

‘5. That there is a clear conflict of interest by both Hon Senator James Orengo, SC and Hon. Mogeni Eric Okong'o, SC, by

them participating during Senate Committee on Justice Legal Affairs and Human Rights where the question of Khawar Mehmood Qureshi QC, representing DPP in the instant petition was raised, and appearing before this honourable court the following day after MAT appearance before Senate Committee, further both Honourable Senators actively participating in providing oversight to the Office of the Director of Public Prosecutions (ODPP).'

68. We have considered this ground against the submissions by the 1st respondent. While the ground set out in paragraph 5 of the application is somewhat narrow, the 1st respondent expounded on his apprehension that a conflict of interest would arise in future from the continued participation of the two Senior Counsel in the Senate Committee while simultaneously representing the petitioner in this petition and in the criminal proceedings. We are thus called upon to consider the issue of conflict of interest and whether such a conflict has been demonstrated in the present proceedings.

69. A conflict of interest means a situation where a person finds himself or herself confronted by two different interests so that serving one interest would be against the other interest. The definition of conflict of interest in **Black's Law Dictionary, 10th Edition**, that is applicable in this matter, is that **"conflict of interest is a real or seeming incompatibility between one's private interest and one's public or fiduciary duties."**

70. For there to be conflict of interest, therefore, the participation of the two Senior Counsel in the Senate Committee, and their role as counsel for the petitioner in this matter, or any other related matter, must be inconsistent or incompatible, bearing in mind the information they receive or that may come to their knowledge during the exercise of their oversight role over the 1st respondent and which may be prejudicial to the course of justice.

71. There is no dispute that Mr. Orengo and Mr. Omogeni (SC), are members of the Senate and sit in the Senate Committee of Justice Legal Affairs and Human Rights Committee. They were in that Committee on the material day when the 1st respondent appeared before the Committee as Senators and members of the Committee. Any matters that were discussed in the Senate Committee were discussed in their presence by virtue of their position as members of the Committee.

72. It is contended by the 1st respondent that the two misconducted themselves by failing to disclose that they had a personal interest in the matter under discussion. What we need to consider is whether their failure to make that disclosure by itself warrants us to make a finding that a conflict of interest arises from their representing the petitioner in the matters before court.

73. Paragraph 6 (1) (b) of the Code of Conduct for Members of Parliament (the Fourth Schedule to the Parliamentary Powers and Privileges Act (No 29 of 2017)) provides that:

"Members of the house shall :-

(b) before contributing to debates in the house or its committees, or communicating with State officers or other public servants, declare any relevant interest in the context of parliamentary debate or the matter under discussion."

74. Paragraph 6 (2) defines a relevant interest to be **"an interest that may be seen by a reasonable member of the public to influence the way a member discharges his or her parliamentary duties."** [Emphasis ours]. This would be in tandem with the duty of a member of the house in the conduct of his parliamentary duties to resolve any conflict between a private interest and public interest in favour of public interest as required under Paragraph 4 of the Code of Conduct for Members of Parliament.

75. Our understanding of the above provisions is that any misconduct in respect to the failure to make the disclosure before the committee is a misconduct in the discharge of a member's parliamentary duty. However, such misconduct if any, would not have a bearing on whether there is a conflict of interest in respect to the proceedings before us. What is critical is that the information that the two Senior Counsel obtained during the proceedings was such that it was relevant, and could cause their client to have an unfair advantage in respect to these proceedings.

76. We have considered the discussions of the day as captured in the Hansard, and what is clear from the proceedings of that day is that the issues that were discussed were general in nature and did not go into specifics that would be prejudicial to the hearing of this petition. We have not seen evidence of discussion relating to the petition before this court or the case before the Chief Magistrate's Court to give an impression that the merits of this petition or that case were indeed discussed.

77. In our view, a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party. In this case, the facts placed before us do not in any way satisfy us that the conduct of the two Senior Counsel would amount to a conflict of interest in so far as this petition or related matters are concerned. From the record of proceedings before the Committee, the information that was given to the Committee by the 1st respondent related to the appointment of Mr. Qureshi, QC. It did not touch on or have any bearing on the merits of this petition or any other matter involving the petitioner.

78. We therefore find the application by the 1st respondent to be without merit.

79. We now make the following orders:

(a) The application dated 17th December 2018 be and is hereby dismissed

(b) The application dated 20th December 2018 be and is hereby dismissed

80. Having come to the conclusion that both the applications are devoid of merit, with no order as to costs and direct that we now take directions with respect to the pending applications for joinder with a view to an expeditious hearing of the petition on its merits.

Dated, Signed and Delivered at Nairobi this 17th Day of January 2019

H.A.OMONDI

JUDGE

M.NGUGI

JUDGE

F.TUIYOTT

JUDGE

W.MUSYOKA

JUDGE

E.C.MWITA

JUDGE