Director of Public Prosecutions v Mutua & another (Anti-Corruption and Economic Crimes Case E027 of 2024) [2025] KEMC 197 (KLR) (22 August 2025) (Ruling)

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REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E027 OF 2024

CN ONDIEKI, PM

AUGUST 22, 2025

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

AND

PAMELA NDUKU MUTUA ..... 1ST RESPONDENT

AMOS JUMA SIKUKU ..... 2ND RESPONDENT

RULING

Introduction

1. An application to discontinue proceedings, invariably, warrants a delicate balancing act between the power of the DPP on one hand and public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the process, on the other hand. It is thus incumbent upon the Court to satisfy itself that such Applications meet the threshold of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process, in resonance with Article 157[11] of *the Constitution*. Such an application, therefore, ought to surmount the triple test housed in Article 157[11] of *the Constitution*, and it so surmounts if the considerations, reasons or evidence advanced are consistent with the need to avoid a possible abuse of the legal process in both public interest and the interest of administration of justice.

2. If the criminal proceedings were instituted in public interest at a time when investigations revealed evidence sufficient to sustain the charges, then it will equally be in the self-same public interest to discontinue the criminal proceedings whenever it emerges from further investigations or inquiries or new evidence or circumstances which can no longer sustain the criminal proceedings or which render the continued prosecution a violation of *the Constitution* and/or statutes thereunder.

3. In this decision, only one question is up for determination namely whether this Application has surmounted the threshold for discontinuation of prosecution of the 2nd Accused, under section 87[a] of the Criminal Procedure Code [hereinafter "the CPC"].

Part II: A Brief Background

4. On the 30th day of July 2024, the Accused persons/Respondents [hereinafter "the Respondents"] were arraigned in Court and charged with 6 diverse counts of offences as follows: [i] as against the 1st Accused, five charges of wilful failure to comply with applicable laws relating to procurement contrary to section 45[2][b] as read with section 48 of the Ethics and Anti-Corruption Act, No. 3 of 2006 were levelled; and [ii] as against the 2nd Accused, 1 charge of abuse of office contrary to section 101 read with section 102[a] of the Penal Code was levelled.

5. This far, out of the thirty-three [33] witnesses listed in the List of Witnesses provided to this Court by the state, six [6] witnesses have been heard by this Court, leaving a balance of twenty-seven [27] witnesses to go.

Part III: Summary Of The Dpp's Application To Withdraw From Prosecuting The 2Nd Accused/ respondent Under Section 87[a] Of The Cpc; And The Attendant Oral Submissions

6. On 1st August 2025, the Director of Public Prosecutions [hereinafter "the DPP"] filed a Notice of Motion of even date, seeking the following orders: [1] That this Honourable Court be pleased to certify this Application as urgent and heard on a priority basis. [2] That the Honourable Court be and is hereby pleased to allow and grant leave to the Applicant to withdraw the charges against AMOS JUMA SIKUKU, the 2nd Accused person herein pursuant to the provisions of section 87 [a] of the Criminal Procedure Code, Cap 75 and sections 23 and 25 of the *Office of the Director of Public Prosecutions Act*,2013. [3] That consequently, this Honourable Court be pleased to allow and grant leave to the Applicant to substitute charges as per the attached draft charge sheet. [4] That each party bear their costs of this Application.

7. The Application is predicated on the grounds set out on the face of the Motion and facts deposed in the Supporting Affidavit of one of the learned Prosecution Counsel in conduct of this matter, Mr. Delroy Mwasaru, sworn on 1st August 2025.

8. On the face of the Motion, it is averred that the criminal proceedings herein arise from the importation and distribution of essential food commodities, in particular rice by the Kenya National Trading Corporation [hereinafter "KNTC"] and that the matter has proceeded with six [6] witnesses having testified and approximately twenty-seven [27] witnesses are yet to testify in order for the prosecution to close its case. It is averred further that the Applicant is empowered pursuant to Article 157 [6] of *the Constitution* and section 25 of the *Office of the Director of Public Prosecutions Act*, 2013, with the permission of the Court, to discontinue a case against any person or authority at any stage before delivery of the judgment. It is averred that the Applicant, under Article 157[11] of *the Constitution* is enjoined in the exercise of its mandate to have regard to public interest, the interest of the administration of justice, and the need to prevent and avoid abuse of the legal process. Further, it is averred that the Applicant in the exercise of his mandate is required to continuously review the evidence and materials presented in line with The Decision to Charge Guidelines and Policies. It is averred that the Applicant is empowered at any stage of a criminal proceedings, and before the close of the prosecution's case, to amend and/or substitute a charge sheet against an Accused person in a criminal trial. It is averred finally that no prejudice will be suffered by the Accused persons if the prayers herein are granted.

9. In the said Supporting Affidavit, the Applicant has rehashed the substance of the Motion and exhibited a draft Charge Sheet, marked DM1, to buttress the Application. It is deposed that he is duly authorised to swear the Affidavit for and on behalf of the Applicant. It is deposed that the 2nd Accused has been charged under Count VI with the offence of Abuse of Office contrary to section 101 as read with section 102 [a] of the Penal Code, on account of rendering a professional opinion in the impugned procurement. In this connection, it is deposed that the subject professional opinion rendered under the impugned tender, was not binding on the Accounting Officer of KNTC, who bore the ultimate responsibility in ensuring compliance with all the applicable procurement laws and regulations, before the issuance of an award to any given bidder. Moreover, it is deposed that the said professional opinion was based on the resultant evaluation report, which had been presented by the Evaluation Committee and that notably, criminal charges have not been preferred against the Evaluation Committee. The learned Prosecution Counsel therefore deposes that consequently, there is insufficient evidence to demonstrate that the 2nd Accused person acted in bad faith, or was unjustly influenced, or drew a financial benefit and/or advantage to render a lopsided professional opinion - to the detriment of KNTC.

10. Regarding amendment and substitution of the Charge Sheet, it is deposed that the statement of offence has been improperly captured and that the Act cited namely the *Anti-Corruption and Economic Crimes Act*, 2006, is erroneous and non-existent.

11. In his oral highlights, learned Prosecution Counsel, Mr. Nyamache, recapitulated the substance of the Notice of Motion and the Supporting Affidavit and added that no prejudice or injustice will be suffered by any party, including the 1st Accused, if the application is granted, since the 1st Accused shall be accorded sufficient opportunity and time to challenge the prosecution's evidence. He further submitted that considering the reasons advanced, it would be prejudicial to the fair administration of justice, public interest and the need to avoid abuse of the Court process, if if the Prosecution is not allowed an opportunity to amend and substitute the charges. In buttressing this position, the learned Prosecution Counsel placed reliance upon the principles which govern exercise of the prosecution power, as laid down by the Supreme Court of Kenya in Saisi & 7 others v Director of Public Prosecutions & 2 others [Petition 39 & 40 of 2019 [Consolidated]] [2023] KESC 6 [KLR] [Civ] [27 January 2023] [Judgment]; and the High Court in Mohamed Ali Swaleh v Director of Public Prosecution & another Ex - Parte Titus Musau Ndome [2017] eKLR. Regarding the amendment and substitution, it is submitted that the applicant will rely on section 214 of the CPC. Learned Prosecution Counsel submitted that in their Replying Affidavits, both the 1st and 2nd Accused have not opposed the application.

12. As a result, this Court is urged to grant this Application.

PartIV: Summary Of The 1St Accused/1St Respondent's Response To The Application; And The Attendant Oral Submissions

13 Prayers 2 and 4 of the Application were not opposed by the 1st Accused/1st Respondent. Actually, the 1st Respondent reinforced prayers 2 and 4 of the application.

14. Vide her Replying Affidavit dated 11th August 2025 and filed on even date, the 1st Accused deposes that the application buttresses her held position that the charges are baseless. The 1st Accused fully associated herself with the depositions set out under paragraphs 2,3,4,5,6,8,10,11,12,14 and 15 of the Applicant's Supporting Affidavit and added that the facts deposed therein also apply, pari pasu, to all the charges against her.

15. Regarding prayer 3 - amendment and substitution of the Charge Sheet – in the context of the Annexture marked DM 1, it is deposed that the prosecution is effectively substituting a defective Charge Sheet with another.

16. In his oral highlights, learned Counsel Mr. Muriithi recapitulated the substance of the 1st Accused's Replying Affidavit. In addition, Mr. added a new element that the 1st Accused was not opposed to prayer 3, in addition to prayers 2 and 4. Learned Counsel however reiterated that the prosecution is effectively substituting a defective Charge Sheet with another but indicated that this point will be raised at the appropriate time, if the 1st Accused is put on her defence. Learned C0unsel conceded to the position held by the applicant that granting the application will not prejudice the case of the 1st Accused.

PartV: Summary Of The 2Nd Accused/2Nd Respondent's Response To The Application; And The Attendant Oral Submissions

17. The Application is not opposed by the 2nd Accused/2nd Respondent.

18. In his Replying Affidavit sworn by the 2nd Accused on 7th August 2025, the 2nd Accused deposes that he has no objection to withdrawal of the charge under section 87[a] of the CPC and adds that its legal consequence has been duly explained to him by his Advocate.

19. In his oral highlights, learned Counsel Mr. Bundotich, recapitulated the substance of the Replying Affidavit and reiterated that he had explained the 2nd Accused on the legal effect of withdrawal of the charge under section 87[a] of the CPC.

PartVI: Questions For Determination

20. Flowing from the Application, the Accused persons' Replying Affidavits and the rival oral Submissions, two principal questions have crystallized for determination as follows:

    i. Whether this Application has surmounted the threshold for discontinuation of criminal proceedings against the 2nd Accused/2nd Respondent under section 87[a] of the Criminal Procedure Code [hereinafter "the CPC"].

    ii. Whether the application to amend and substitute the Charge Sheet has met the requisite threshold.

PartVII: Analysis And Determination

[i] Whether this Application has surmounted the threshold for discontinuation of criminal proceedings against the 2nd Accused/2nd Respondent under section 87[a] of the Criminal Procedure Code [hereinafter "the CPC"]

21 Even in circumstances where an Application is to be determined ex parte or deemed unopposed, the duty of the Court to consider whether the Application [plus the prayers sought] is legally sound and worthy granting is not taken away thereby. See Lucia Wambui Ngugi v Kenya Railways & Another, Nairobi HCMA Number 213 of 1989 [per Mbito, J., as he then was].

22. Courts are temples of justice and the last frontier of the rule of law and this remains so, even in circumstances where a suit or Application is deemed unopposed. In International Centre for Policy and Conflict v Attorney General & Others, Nairobi Miscellaneous Civil Cause Number 226 of 2013, the High Court expressed itself as follows: "Courts are the temples of justice and the last frontier of the

rule of law and must therefore remain steadfast in defending the letter and the spirit of *the Constitution* no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not Constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."

23. It follows that a Court of Law must consider the Application in the context of the facts, evidence and the relevant law. It is not automatic that for any unopposed Application, the Court will as a matter of cause grant the Orders sought. It behooves the Court to be satisfied that prima facie, with no objection, the Application is legally meritorious and the prayers are worthy granting. The Court is under a duty to look at the Application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the Application a non-starter. In the Supreme Court decision in Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, Ojwang, SCJ [as he then was], Ibrahim, Wanjala, Lenaola and Ndung'u, SCJJ., had this to say about what a Court is expected to do in situations where an Application is unopposed: "[9]...The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the Application, the Court will be excused for therefore deeming the Application as being unopposed entirely. [10] Be that as it may, as a Court of Law, we have a duty in principle to look at what the Application is about and what it seeks. It is not automatic that for any unopposed Application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the Application is meritorious and the prayers may be granted. The Court is under a duty to look at the Application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the Application a non-starter..." [Emphasis supplied]

24. In context of the foregoing, notwithstanding the fact this application is unopposed, this Court remains under obligation to determine whether it surmounts the triple test housed in Article 157[11] of *the Constitution*.

25. Any time before Judgment is pronounced, with the consent of the Court or instructions of the DPP, a public prosecutor may withdraw from the prosecution of an Accused. Section 87 of the CPC [hereinafter "the CPC"] stipulates as follows: "In a trial before a subordinate Court a public prosecutor may, with the consent of the Court or on the instructions of the Director of Public Prosecutions**, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal — [a] if it is made before the Accused person is called upon to make his defence, he shall be discharged, but discharge of an Accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts; [b] if it is made after the Accused person is called upon to make his defence, he shall be acquitted."

26. The DPP is also vested with the power to review a decision to prosecute or not to prosecute any criminal offence. Section 5[4][e] provides as follows: "[4] The Director shall — ... [e] review a decision to prosecute, or not to prosecute, any criminal offence."

27. In such Applications, the presumption ingrained in the maxim omnia praesumuntur rite et solemniter esse acta – better known as the presumption of regularity - applies. This maxim is to the effect whenever a formal act or step is taken by a public officer, the Court is entitled to a rebuttable presumption, until the contrary is proved, that the said act or step, complied with all the necessary formalities and

that the person who acted was duly appointed to so do.[1] In this regard, this Court presumes that the Application by the learned Prosecution Counsel was done after all due formalities were complied with and that he lodged the Application with authority of the DPP. This maxim is ingrained in Article 157[9] of *the Constitution* and sections 83, 86 and 88 of the CPC. The maxim was recognized and invoked in George Taitumu v Chief Magistrates Court, Kibera, Attorney General & Director of Public Prosecutions [2014] KEHC 6173 [KLR] [hereinafter "the Taitumu case"], by DAS Majanja, J. [as he then was] where confronted with an assertion that the Prosecution Counsel failed to exhibit evidence of authority to make an Application to withdraw from prosecuting the Petitioner under section 87[a] of the CPC, His Lordship held as follows: "25. The petitioner's argues that the prosecutor did not have instructions to withdraw the case against him as provided in the chapeau to section 87 of the CPC. Under Article 157[9] of *the Constitution*, the powers of the DPP may be exercised in person or by subordinate officers acting in accordance with general or special instructions. In the matter at hand there is no dispute the prosecutor had authority to exercise the power of the DPP and no objection had been raised by the DPP in that regard. In accordance with the long standing maxim omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly and in this case there is no basis to doubt that the prosecutor had authority to withdraw the case. This argument, in my view, lacks merit."

28. Article 157 of *the Constitution* on the other hand stipulates that "[1] There is established the office of Director of Public Prosecutions. [2] The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President. [3] The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court. [4] The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. [5] The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment. [6] The Director of Public Prosecutions shall exercise State powers of prosecution and may — [a] institute and undertake criminal proceedings against any person before any Court [other than a Court martial] in respect of any offence alleged to have been committed; [b] take over and continue any criminal proceedings commenced in any Court [other than a Court martial] that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and [c] subject to clause [7] and [8], discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph [b]. [7] If the discontinuance of any proceedings under clause [6] [c] takes place after the close of the prosecution's case, the defendant shall be acquitted. [8] The Director of Public Prosecutions may not discontinue a prosecution without the permission of the Court. [9] 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. [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. [11] In exercising the powers conferred by this Article, the Director of Public

[1] See R v Gordon [1789] 1 Leach 515, [1789] 1 East PC 315, the earliest decision which enunciated this maxim in common law. The maxim was adopted and applied in R v Jones [1806] 31 St Tr 251, [1806] 2 Camp 131; R v Verelst [1813] 3 Camp 432; R v Catesby [1824] 2 B & C 814, [1824] 4 Dow & Ry KB 434, [1824] 2 Dow & Ry MC 278; R v Rees [1834] 6 C & P 606; R v Murphy [1837] 8 C & P 297; R v Townsend [1841] C & Mar 178; R v Newton [1843] 1 C & K 469; R v Manwaring [1856] 26 LJMC 10, [1856] Dears & B 132, [1856] 7 Cox 192; R v Cresswell [1876] 1 QBD 446, [1876] 33 LT 760, [1876] 40 JP 536, [1876] 13 Cox 126; R v Stewart [1876] 13 Cox 296; R v Roberts [1878] 14 Cox 101, [1878] 42 JP 630, [1878] 38 LT 690; Gibbins v Skinner [1951] 2 K.B. 379, [1951] 1 All E.R. 1049, [1951] 1 T.L.R. 1159, [1951] 115 J.P. 360, 49 L.G.R. 713; Campbell v Wallsend Shipway and Engineering Co Ltd [1977] Crim LR 351; Dillon v R [1982] AC 484, [1982] 2 WLR 538, [1982] 1 All ER 1017, 74 Cr App R 274, [1982] Crim LR 438; Gage v Jones [1983] RTR 508; Kynaston v Director of Public Prosecutions, 87 Cr App R 200, et alia.

Prosecutions shall 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. [12] Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions."

29. Gleaning from Article 157 of *the Constitution*, the following are the cardinal principles which I conceive to have this far emerged therefrom.

30. First, subject only to Article 157[11], the exercise of the power vested in the DPP is independent and not subject to directions of any person. See the Supreme Court of Kenya [hereinafter "the SCORK"] holding in Saisi & 7 others v Director of Public Prosecutions & 2 others [Petition 39 & 40 of 2019 [Consolidated]] [2023] KESC 6 [KLR] [Civ] [27 January 2023] [Judgment] [hereinafter "the Saisi case"], at paragraphs 81 & 83, where the Court held that "81. Article 157[6] of *the Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any Court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157[10] of *the Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings, neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157[11] requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process... 83. We are also minded of this Court's decision in Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others, SC Petition No 42 of 2019; [2021] eKLR where the Court upheld the High Court's position to the effect that in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Further that the only exception where a Court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy." The position in the Saisi case was adopted by the SCORK in its subsequent decision in respect to a similar challenge of the DPP's powers in Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 [KLR] [hereinafter "the Dande case"].

31. And so, in Geoffrey K. Sang v DPP & 4 Others [2020] eKLR, the Court held that "The DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution."

32. Although this Court acknowledges the fact that the decision was rendered before promulgation of *the Constitution* of Kenya 2010, the decisional independence of the DPP was especially accentuated by the Court of Appeal [Omolo, Tunoi & Lakha, JJA, as they then were] in Roy Richard Elirema & another v Republic [2003] KECA 165 [KLR], and it still remains good law post-2010 Constitution, where the Court expressed the following judicial view: "In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of *the Constitution* and the Code, there must a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution." A similar emphasis was voiced in Kipkoi Oreu Tasur v Inspector General of Police & 5 Ors [2014] eKLR, where the Court underscored as follows: "The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of

the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated." For a similar holding, see also Republic v Leonard Date Sekento [2019] eKLR; Mohammed Ali Swaleh v DPP & anor Ex Parte Titus Musau Ndome [2017] eKLR; Waweru Munyi Jackson v DCI & 4 others; Grace Wamboi Mukuna [Interested Party] [2021] eKLR; Ahmed Rashid Jabril & another v Director of Public Prosecutions [2020] eKLR; Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR; Johnson Kamau Njuguna & anor v DPP [2018] eKLR; Eunice Khalwali Miima v Director of Public Prosecutions & 2 others [2017] eKLR; Kipkoi Oreu Tasur v Inspector General of Police & 5 Ors [2014] eKLR; and Geoffrey K. Sang v DPP & 4 Others [2020] eKLR.

33. Second, the decision to prosecute is discretionary. In Thuita Mwangi & Anor v The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013 [hereinafter "the Thuita case"], DAS Majanja, J. [as he then was] expressed a judicial view that "The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157[10]...These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013...In the case of Githunguri v Republic [Supra at p.100], the Court observed...The Attorney General of Kenya...is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy ..." See also the Court of Appeal holding in Ethics and Anti-Corruption Commission v James Makura M'abira [2020] eKLR [hereinafter "the Makura case"], paragraphs 23-25.

34. Third, in light of the fact that the power to prosecute is discretionary, the DPP is hence not obligated to prosecute merely because the investigator forms a strong opinion that the suspect should prosecuted since *the Constitution* does not envisage situations where the investigator is also the prosecutor. The mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as the decision surmounts the test in Article 157[11] of *the Constitution*. In delineating the respective mandates between EACC and DPP in the Makura case, the Court of Appeal [Ouko [P], Koome, JA [as she then was], Makhandia, Murgor & J. Mohammed, JJA] held as follows: "[23] Both cases, that is the Kangangi and Susan Mbogo Ng'anga cases authoritatively state that the power to prosecute were then vested in the AG [now in the DPP], whereas the power to investigate was vested in KACC [now EACC]. This is stated under Part IV of the Act which is headed "INVESTGATIONS" and states that the Director of KACC or a person authorized by him may conduct investigations on behalf of KACC. The provisions of that part are consistent with those in Section 7 in Part III that sets out the functions of KACC... [24] What happens after the investigations are completed, the two decisions are also in agreement, a position that we too agree was right, in that the power to prosecute under ACECA resided with the AG [now DPP]. That the KACC was obligated under Section 35 of ACECA to submit the investigation report to the AG with recommendation that the person may be charged with the economic crimes. The decision whether to charge or not resided with the AG. This to us, is for the simple reason that an investigator cannot also be the prosecutor. It is also necessary to point out that the Court in the Kangangi case having found that a procedural step under Section 35 of ACECA was not followed, observed that the omission did not bar the appellant therein from being re-charged with the same offences upon the procedure being followed. The Court declined to quash the charges on the grounds that the merits thereto were not discussed." See also the Sang case, at paragraphs 132-136, where Odunga, J. expressed the following rendition: "132. In my view, the mere fact that those entrusted with

the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution... 136. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157[11] of *the Constitution* as read with section 4 of the Office of Public Prosecutions Act, No. 2 of 2013... 144. Accordingly, I must make it clear that the 2nd Respondent herein, the Director of Criminal Investigations has no powers at all under our current legal frame work to present any charges before a Court of law particularly where the Director of Public Prosecutions, the 1st Respondent has not consented to the same." Similarly, see R. v Director of Criminal Investigation Department & Others [2016] eKLR, where the respective powers between the DCI [an investigator] and DPP was considered indepth.

35. It follows that in his discretionary power, depending the evidence gathered, the DPP may decide to prosecute where it is considered that there is sufficient evidence or refuse to prosecute where it is considered that there is no sufficient evidence, the strong opinion of the investigator notwithstanding. While delineating the respective powers of the DPP and EACC, in Charles Okello Mwanda v Ethics and Anti-Corruption Commission & 3 Others [2014] eKLR, Mumbi Ngugi, J. rendered herself as follows: "I would also agree with the 4th Respondent [DPP] that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157[10] is clear...However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157[10] set out above, the 1st Respondent [EACC] has no authority to 'absolve' a person from criminal liability...so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent [DPP] ..."

36. The said discretionary power is not without a philosophical foundation. The philosophical foundation was elucidated by Sir Elwyn Jones in Cambridge Law Journal – April 1969 at page 49 as follows: "The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration." This philosophical foundation was cited with approval by Odunga, J. in the Sang case. Similarly, in the Court of Appeal of Singapore in Ramalingam Ravinthran v Attorney General [2012] SGCA 2, at paragraph 53, the learned Judges [Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA] had the following to say: "The Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of the society, i.e. to maintain law and order as well as to uphold rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system

that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore not all offences are provable in a Court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not be prosecuted and what offence or offences a particular offender should be prosecuted for. The Attorney General's final decision will be constrained by what public interest requires." This philosophy was recognized and adopted locally by in Republic v Director of Public Prosecutions & 2 others; Wanyama [Ex Parte Applicant] [2024] KEHC 7362 [KLR]; Mbuthia v Attorney General & 3 others [2022] KECA 980 [KLR]; Development Bank of Kenya Ltd v Director of Public Prosecutions & Inspector General of Police; Giriama Ranching Company Limited [Interested Party] [2020] KEHC 9416 [KLR]; Joseph Karanja Kanyi t/a Kanyi J & Co Advocates v Director of Public Prosecutions, Ethics and Anti-Corruption Commission & Chief Magistrates' Court, Mombasa; Kikambala Development Company Limited, Jane Njeri Karanja, Fredrick Otieno Oyugi, Maurice Milimu Amahwa, Ephraim Maina Rwingo, Seline Consultants Limited, Joan Zawadi Karema, Renson Thoya Juma, Harry John Paul Arigi, Joy Kavutsi Mudavadi alias Joy K Asiema & Kenya Ports Authority Retirement Benefit Scheme [Interested Parties] [2020] KEHC 5987 [KLR]; Diamond Hasham Lalji & Ahmed Hasham Lalji v Attorney General, Director of Public Prosecutions, Commissioner of Police, Ethics & Anti-Corruption Commission & Banadurali Hasham Lalji [2018] KECA 856 [KLR], et alia.

37. Whereas section 87 of the CPC is couched in alternative and disjunctive terms - that the discontinuance can be effected either with the consent of the Court or on the instructions of the DPP and although the DPP is entitled to institute, undertake, take over and continue criminal proceedings - the power to discontinue prosecution is subject to permission of the Court under Article 157[8] of *the Constitution*, upon merit catapulted by cogent reasons consistent with the edicts enshrined in Article 157[11] of *the Constitution*. In granting the permission, the Court should be satisfied that the exercise of the power to discontinue the subject proceedings by the DPP, is consistent with public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. And finally, granted that the power of the Court to grant permission is discretionary, it should be exercised judiciously.

38. Further, gleaning from Article 157[11] of *the Constitution*, the following are the cardinal principles which govern the power to discontinue criminal proceedings.

39. First, it requires the permission of the Court, which turns on public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. See Article 157[11] of *the Constitution* as construed in the Taitumu case. In construing the interplay between section 87[a] of the CPC and Article 157 of *the Constitution* in the Taitumu case, DAS Majanja, J. [as he then was] had the following to say: "23. I now turn to consideration as to whether the Court may review the magistrates' decision to discharge the petitioner. Although the Director of Public prosecutions is entitled to institute and undertake criminal prosecutions and take and continue over criminal proceedings under Article 157[6] of *the Constitution*, his responsibility to withdraw any criminal case is subject to the consent of the Court. Article 157[8] of *the Constitution* provides that, "The Director of Public Prosecutions may not discontinue a prosecution without the permission of the Court." ... 26. The petitioner argues that the learned magistrate did not exercise his discretion in accordance with *the Constitution* and the law. This Court is entitled to review the decision by the learned magistrate to determine whether it complies with legal standards... Section 87[a] of the CPC gives the learned magistrate broad discretion to accept or reject an Application for withdrawal of charges presented by the prosecutor. In light of Article 157[11] of *the Constitution* such discretion

has to be exercised judiciously taking into account the facts of each case and in particular whether the Application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process." In this connection, in Republic v Fahmi Salim Said [2013] KEHC 1743 [KLR] [hereinafter "the Said case"], the trial magistrate declined to grant a similar Application on ground of failure to demonstrate that it was in public interest and the High Court was approached to call the decision and satisfy itself as to the legality, propriety or correctness of the decision. Muya, J. had the following to say: "The Court is asked to make a declaration that a magistrates Court cannot exercise supervisory jurisdiction over actions of the Director of public prosecutions. I find that particular prayer to be very broad and lacking specificity. However, in respect to the matter at hand article 157 [8] of *the constitution* is very clear that the permission of the Court has to be sought before the withdrawal of a case by the Director of Pubic prosecutions. Secondly in exercising those powers conferred by *the constitution* article 157 [11] he shall 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. Those are the guiding factors to be adhered to before a withdrawal can be entertained. Now, what is the role of a magistrate in whose Court an Application for withdrawal of a case is made by the Director of public prosecutions... I do not think that the act of interrogating the reasons given by the DPP in withdrawing a case is tantamount to interpretation of *the constitution* which powers are donated to the High Court under article 165 of *the Constitution*. I do find that there was nothing sinister by the office of the DPP to call for the necessary files and make a decision on the matter. What I find to have been rather hasty is the decision to make an Application for withdrawal even before the necessary files had been perused. There is also the matter of the complainant herself. She ought to have been given a hearing before the Application was made more so because of the reasons that there is in existence a Civil Suit which is hinged on these criminal proceedings. A withdrawal of the criminal proceedings would invariably boost the Accused Civil Suit in which he has claimed loss of earnings of Ksh. 30,000/= per day as a result of Court attendances in the Criminal Cases against him. I do not find good grounds to interfere with the ruling of the learned trial magistrates dated 19th June, 2013. The cases will proceed to hearing as earlier ordered..." See also Ahmed Rashid Jabril & another v Director of Public Prosecutions [2020] eKLR, where the Court stated that "...the DPP has the legal and constitutional mandate to withdraw criminal cases instituted by itself or taken over by itself. In doing so, however, the DPP must obtain permission of the Court. It therefore behooves on the DPP that it must furnish justifiable reasons for such withdrawal or discontinuance. It is upon the furnishing of such justifiable reasons that the Court would proceed to allow the withdrawal or discontinuance...Again the element of consent of the Court is noted regarding Applications for withdrawal under section 87 of the Criminal Procedure Code. This can only mean that for the Court to issue the consent for the withdrawal, the prosecution must convince the Court by giving good reasons that would justify the action. A denial of the consent would properly ensue if no good reasons have been given."

40. Second, although the DPP is independent, it does not at all imply that the exercise of his power is free from scrutiny by the Court to satisfy itself whether it surmounts the 157[11] constitutional test. And so, whenever faced with such an Application, it is not envisaged by *the Constitution* that the Court will be a mere rubber stamp or conveyer belt and certainly, it is not envisaged abuse of the power, for which the Court is then empowered to quash. See the SCORK holding in the Saisi case, at paragraph 82, although it's instructive to acknowledge that the guidelines were crafted in the context of quashing charges by a judicial review Court, they are equally forceful, relevant and thus deeply persuasive when faced with an application for discontinuation. In the Saisi case, SCORK held as follows: "Stemming from these provisions of the law, the Courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the Court process, to settle scores or to put an Accused person to great expense in a case which is clearly not otherwise prosecutable, then the Court may intervene. These decisions include Commissioner of Police & the Director of Criminal Investigation Department

& another v. Kenya Commercial Bank Ltd & 4 others, Civil Appeal No 56 of 2012 [2013] e KLR by the Court of Appeal. It also includes the case of Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others, SC Petition No 38 of 2019; [2021] eKLR where this Court held that although the DPP is not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157[11] have not been met, then the High Court under article 165[3][d][ii] can properly interrogate any question arising and make appropriate orders…" The position in the Saisi case was adopted by the SCORK in the Dande case. See also Republic v Enock Wekesa & another [2010] KEHC 4133 [KLR], where the Prosecution Counsel presented a nolle presqui [to discontinue criminal proceedings against two Accused persons] but the trial magistrate disallowed the Application on grounds that no reasons were assigned and the High Court was approached to call the decision and satisfy itself as to the legality, propriety or correctness of the decision. Koome, J. [as she then was, now CJ] rendered herself as follows: "5. According to Mr. Onderi, the learned Senior Principal Magistrate has no powers under *the Constitution* to question the writ of nolle prosequi. The Attorney General is authorized to enter nolle and is not bound to give any reasons to the trial Court. In this regard counsel made reference to the case of Mwangi And Seven Others Vs Atornney General {2002} 2KLR. 6. The other reason urged by the state counsel is that he is mandated by legal Notice No. 331 to exercise the powers under sections 81 and 82 of the Criminal Procedure Code. Under Kenya Gazzete supplement No. 61 he was similarly gazetted under *the Constitution* of Kenya 2010 to carry out the powers conferred under article 157[9] of *the Constitution* of Kenya thus he had the requisite authority to enter a writ of Nolle Prosequi which should not have been questioned by the trial magistrate… 8. I have considered the ruling by the learned trial magistrate and the reasons given for her refusal to grant leave to the State to enter the writ of Nolle Prosequi with an anxious mind for the reasons which will become clear in this ruing. Firstly, the learned trial Magistrate held that under the new Constitution the State Counsel should give reasons for the Court's consideration and she rightly held that the Provisions of *the Constitution* overrides the provisions of the Criminal Procedure code. That holding is trite law, it is basic as provided for under Article 2 of *the Constitution* of Kenya 2010, I do not think that is the preserve of the High Court to determine. 9. The learned trial magistrate also held that the prosecution should have given reasons pursuant to the provisions of Article 157 [11] of *the Constitution*. Finally she made a finding that the Accused persons are also facing a fourth count of gang rape which the writ of Nolle Prosequi did not address … 10. It is a general principle borne out of practice that the whole fundamental objective of the interpretation of statute is to give it the overarching objective which was meant by a particular legislation. *The Constitution* recognizes as fundamental respect of human rights, equality before the law and other values. The protection of human rights in my humble view includes those of the Accused person[s] and also the complainant[s]. This is in line with provisions of Article 159 [2] of *the Constitution* of Kenya 2010 which provides as follows: … 11. The above provisions resonate well with Provisions of Article 157[11] of *the constitution*; if the Director of Public Prosecutions decides to exercise his or her powers to enter a writ of Nolle Prosequi, they should have regard to the public interest, the interests in the administration of justice and the need to prevent and avoid abuse of the legal process. The learned trial magistrate was faulted for making a constitutional interpretation and questioning the powers granted to the learned State Counsel to enter the writ of nolle Prosequi. 12. As I understand the ruling by the learned Senior Principal Magistrate, she made an inquiry which can now be made under *the Constitution* so as to satisfy herself on whether the powers in the writ of nolle prosequi are in consonant with the provisions of *the constitution*. This is a thin line to be drawn on whether that enquiry is an interpretation of *the constitution*. The magistrate while exercising judicial powers must adhere to the principles set out in *the constitution*. By trying to satisfy herself that the order sought meets the thresholds set out in *the constitution*, that cannot be termed a usurpation of powers of the DPP… 14. Surely if the case were to be terminated, should the complainant not be given a reason?

Should the Court that gives the leave to terminate the proceedings be a mere rubberstamp? Is asking questions that will satisfy the Court that there is no abuse of process interference with the powers of the Director of Prosecutions? The criminal charges that are before the learned trial magistrate involve both the Accused persons and the complainants who were the victims. By the trial Magistrate seeking for reasons so as to satisfy herself that there is no abuse of the legal process cannot be said to overstep on the powers of the Director of Prosecutions. 16. Finally the learned trial magistrate also paused a very important question "what will happen to the fourth count of defilement?" this question was not answered by the State because the writ of nolle prosequi was only in regard to the offences of capital robberies. Even on this ground alone, the Court was entitled to dismiss the writ for being vague and abuse of the Court process." {Emphasis supplied}

41. Third, in considering an allegation of abuse of the prosecution power, the Court should be guided by the following rays: whether continuation of the criminal proceedingsis likely to amount to an abuse of the process of the Court; whether discontinuation is likely to secure the ends of justice; whether there is a legal bar against continuation of the said proceedings; whether the allegations do not prima facie constitute the offence alleged; or whether the allegations constitute an offence alleged but there is no prima facie evidence to prove the charges. See the Saisi case, paragraph 82, where the SCORK laid down the following guidelines which may be applied by the Court to gauge whether the DPP's power has been abused or not: "... The Court found the following guidelines read alongside article 157[11] of *the Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers: i. Where institution/continuance of criminal proceedings against an Accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice; ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction; iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge." These guidelines in the Saisi case were adopted by the SCORK in the Dande case. See also Reuben Mwangi v DPP & 2 others; UAP Insurance & another [Interested Parties] [2021] eKLR; Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, et alia.

42. Fourth, although the said discretionary power can be challenged, the Court should exercise its power sparingly and upset the discretion in exceptional circumstances and in the clearest of cases, where it is plain and obvious that there was improper exercise of the discretionary power. See Richard Malebe v Director of Public Prosecutions, Chief Magistrate's Court [Anti-Corruption Court] [Nairobi] & Attorney General [2020] KEHC 5413 [KLR], at paragraph 149, where Mumbi Ngugi, J. expressed the following judicial view: "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*." Similarly, in Saisi & 7 others v Director of Public Prosecutions & 2 others [Petition 39 & 40 of 2019 [Consolidated]] [2023] KESC 6 [KLR] [Civ] [27 January 2023] [Judgment], the Supreme Court of Kenya [hereinafter "the SCORK"] was emphatic at paragraph 89 as follows: "We are emphatic that the High Court, whether sitting as a constitutional Court or a judicial review, may only interfere where it is shown that under article 157[11] of *the Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the Court process..." The position in the Saisi case was adopted by the SCORK

in the Dande case. In Johnson Kamau Njuguna & anor v DPP [2018] eKLR, the Court crafted the following guidelines in considering whether the discretion can be upset: "It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations: Where there is an abuse of discretion; Where the decision-maker exercises discretion for an improper purpose; Whether decision-maker is in breach of the duty to act fairly; Whether decision-maker has failed to exercise statutory discretion reasonably; Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; Where the decision-maker fetters the discretion given; Where the decision-maker fails to exercise discretion; and Where the decision-maker is irrational and unreasonable. It is upon these criteria that the actions of the DPP in this case must be tested." See also Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR, where the Court of Appeal held as follows: "Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases." For a similar holding, see also Eunice Khalwali Miima v Director of Public Prosecutions & 2 others [2017] eKLR; Kipkoi Oreu Tasur v Inspector General of Police & 5 Ors [2014] eKLR; Reuben Mwangi v DPP & 2 others; UAP Insurance & another [Interested Parties] [2021] eKLR; Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR, et alia.

43. What constitutes public interest? Since it has received no definition either in *the Constitution* or statutes, this Court resorts to secondary sources. The Black's Law Dictionary [Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., 9th ed., 2009], at page 1350, defines the phrase 'public interest' as follows: "1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation."

44. The most significant component of the public interest principle is the rule of law, now recognized by Article 10[2][a] of *the Constitution*, which binds all State organs, State officers, public officers and all persons whenever either applying or interpreting *the Constitution* or enacting, applying or interpreting any law or making or implementing public policy decisions. Certainly, it is in the general welfare of the public and it deserves not only recognition but in addition jealous protection, that laws of the land are followed. It is not, certainly, in public interest if in the same name of public interest, laws are trampled upon in complete disregard of the rule of law embraced by Article 10 [2][a] of *the Constitution*. It follows that *the Constitution* is an embodiment of the supreme public interest and its provisions must be upheld by the Courts. *The Constitution* embraces the rule of law and Courts must stick to that path even if the public may in any particular case desire the opposite trajectory.

45. In this connection, it in public interest that which most favours protection and upholding of *the Constitution*. When the Supreme Court rendered itself in Okoiti v Portside Freight Terminals Limited & 12 others [Petition E011 of 2024] [2025] KESC 44 [KLR] [30 June 2025] [Judgment], at paragraph 147, it elegantly stated that "... In other words, the protection of the supremacy of *the Constitution* is critical and there can be no greater public interest or interest of national security than to uphold *the Constitution*, its values and principles, as well as obeying the law."

46. At no time, therefore, should public interest be confused or substituted with public agitation, although they sometimes converge. Public agitation, at times, is erroneously equated with public interest. Whereas public agitation is what the public wants - notwithstanding the firm position of *the Constitution* and laws of the land as recognized by section 3 of the *Judicature Act* and Article 2 [5] & [6] of *the Constitution* - public interest on the hand is what the public needs, in conformity with the same Constitution and the said laws thereunder. Notably and often, public agitation comes with a deep measure of annoyance if it's not satisfied with the desired action. Speaking to this distinction in

Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another [2006] eKLR [hereinafter "the Murungaru case"], the Court of Appeal [Omolo, Tunoi & O'Kubasu, JJA, as they then were] did not define what public interest constitutes but it described what it may include in the following words: "Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the Courts because of Applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, *the Constitution* of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of *the Constitution* and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The Courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions. Occasionally, those who have been mighty and powerful are the ones who would run to seek the protection of the Courts when circumstances have changed. The Courts must continue to give justice to all and sundry irrespective of their status or former status..."

47. Granted that public interest turns on the fulcrum of the rule of law, it follows that it will certainly not amount to public interest that prosecution which is instituted purely and simply to appease the spirits of the public yearning for the blood of its perceived victims. In Republic v Director of Public Prosecution & Ethics and Anti-Corruption Commission Ex Parte Chamanlal Vrajlal Kamani, Deepak Chamanlal Kamani & Rashmi Chamanlal Kamani [Judicial Review Application 78 of 2015] [2015] KEHC 7666 [KLR] [Judicial Review] [18 September 2015] [Judgment] [hereinafter "the Chamanlal case"], G.V. Odunga, J. [as he then was] expressed a judicial view congruent to that of the Court of Appeal in the Murungaru case in the following rendition at paragraph 125: "In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See Richardson v Mellish [1824] 2 Bing 229."

48. The foregoing edifice of public interest explains why a principle was enunciated in R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 [UR], to the effect that "A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

49. And so, in Mohammed Gulam Husseign Fazal Karmali & Hyundai Motos Kenya Limited v Chief Magistrate's Court Nairobi & Attorney General [2006] KEHC 3433 [KLR] [hereinafter the Fazal case], Nyamu, J. used substantially the same language in describing public interest as follows:

"Although the concept of public interest has somewhat been changing with the times and evasive of a precise definition, in the context of Kenya, public interest is reflected for example in securing and enforcing the fundamental rights and freedoms. It is also reflected in the limitations to those rights and freedoms by law, for example in limitations that are reasonably required in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights of others, as stipulated in *the Constitution*." In the Fazal case, Nyamu, J. proceeded to lay down the following test in determining whether something is in public interest or not: "Public interest is also capable of being defined by the answer to the following questions: [1] If the interest affected has a general Application; [2] Is there a collection or commercial interest and are public moneys being expended and to what extent and purpose in the interest under scrutiny; [3] Whether the public or community at large can reasonably and legitimately expect fair play in the decision making process.

50. Similarly, it is not in the interest of justice to enact or implement a law that may violate *the Constitution* and in particular the Bill of Rights since constitutional supremacy has a higher place than public interest. See the principle which was laid by the Court of Appeal [Musinga, Murgor & Kiage, JJA] in Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] KECA 994 [KLR] [popularly known as the Security Laws Amendment Act or simply SLAA case], where the Court pronounced itself thus: "While the Court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate *the Constitution* and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of *the Constitution* has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace."

51. In this spirit, superior Courts have laid a caution against the temptation of a Court to elect convenience at the expense of the rule of law. In one such cautions, Ringera, J. [as he then was] in Kinyanjui v Kinyanjui [1995-98] 1 EA 146 [hereinafter the "Kinyanjui case"] sounded the following caution: "For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law."

52. The rendition of public interest in the Murungaru case was applied by Odunga, J. in Republic v Commissioner of Lands & Another Ex Parte Chetan Devji Shah & Another [2011] eKLR. Further, the judicial view on public interest in the Kinyanjui case was applied by Odunga, J. in the Chamanlal case.

53. If a body is constituted or an act done in public interest but it disregards the law, then it defeats the very public interest for which it was constituted or done. See Republic v Judicial Commission of Inquiry into The Goldenberg Affair & 2 others Ex-parte George Saitoti [2006] KEHC 3533 [KLR], where Nyamu, Wendoh & Emukule, JJ. reached a conclusion that "It is also vital to mention that the Commission was appointed in the public interest. However any disregard of the relevant law defeats that public interest. Legitimate expectation is after all about fairness."

54. Similarly - like in the Murungaru case - in British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health, Tobacco Control Board & Attorney General of Kenya [2015] KEHC

8193 [KLR], Mumbi Ngugi, J. [as she then was] also avoided defining the phrase public interest and instead described what it envisages as follows: "53. I however, also agree with the petitioner that the public interest demands that laws and processes that are laid down for the enactment of legislation and regulations to control any industry should be followed. It may, in the long term, do greater damage to the public interest to turn a blind eye on allegations of constitutional or fundamental rights violations or threat of violation, where a prima facie case has been made out, in the name of protecting the public interest." This judicial view was adopted in Republic v Ministry of Health, Cabinet Secretary Ministry of Health & Attorney General Ex-parte Kennedy Amdany Langat & 14 others & Amit Kwatra & 12 others [2018] KEHC 5221 [KLR] [hereinafter "the Amdany case"], by Aburili, J.

55. In circumstances where the public and private interests are equally compelling, public interest must prevail. See paragraph 135 of the Amdany case.

56. The overarching objective of the interests of the administration of justice as envisaged by Article 157 [11] of *the Constitution* is to do justice to all irrespective of status and avoid abuse of the legal process. See the Wekesa case, paragraph 13. In Modevao v Department of Labour [190] INZLR 464 at 481-482, which was cited in approval in the Fazal case, Manson CJ quoted in JAGO [1989] 168 CLR at 30, where Richardson J, reproduced the two policy considerations as follows: "The first is that the public interest in the administration of justice require that the Court protects its ability to function as a Court of law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the Court protects its ability to function in that way its failure will lead to an erosion of public confidence by reason of concern that the Courts processes may lend themselves to oppression and injustice..."

57. Abuse of the process essentially means that a Court's function and authority reposed by Article 159 of *the Constitution* should not be misused for purposes other than the one envisaged thereunder. The process of the Court must thus be used properly, honestly, and in utmost good faith with the aim of attaining justice. Put differently, the process of the Court should not be used improperly, dishonestly, in bad faith, driven with the intention to vex or oppress or ulterior purposes. See Bullen, Leak and Jacob's precedents of pleadings, 12th ed., at page 148, which defines the phrase as follows: "The term "abuse of the process of the Court" is a term of great significance. It connotes that the process of the Court must be carried out properly, honestly and in good faith; and it means that the Court will not allow its functions as a Court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation."

58. The concept of abuse of the process was discussed in Jared Benson Kangwana v Attorney General Nairobi High Court Misc. Application No. 446 of 1995 [unreported] [hereinafter "Kangwana Case"] Khamoni, J. reasoned that "The essence of abuse as stated in the case of Spautz v Williams...is that: 'the proceedings complained of were [instigated and] instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person [instigating], instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process."

59. The Court of Appeal [Omollo, Akiwumi & Bosire, JJA, as they then were] in J.P. Machira T/A Machira & Company Advocates v Wangethi Mwangi & another [1998] eKLR, defined it as follows: "Abuse of the process of the Court means in brief, misuse of the Court machinery or process." See also George P. B. Ogendo v James Nandasa & 4 others [2006] eKLR, per GBM Kariuki, J. [as he then was].

60. In an Australian decision namely Jago v District Court of NSW and Others [1989] HCA 46, which was adopted by Odunga, J. in the Chamanlal case, the Court exemplified how an abuse of the process of Court happens in the following words: "An abuse of process occurs when the process of the Court

is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the Accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the Court's control unless it be said that an Accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law." And in Lawrence v Lord Norreys, 15. A.C. 210 at p. 219, cited in approval by the Court of Appeal in D.T. Dobie & Company [Kenya] Limited v Joseph Mbaria Muchina & Another [1980] eKLR, Lord Herschell expressed himself as follows: "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved." In Jared Benson Kangwana v Attorney General Nairobi High Court Misc. Application No. 446 of 1995 [UR], Khamoni, J. [as he then was] had this to say about abuse of the Court process: "The essence of abuse as stated in the case of Spautz v Williams...is that: 'the proceedings complained of were [instigated and] instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person [instigating], instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process...whether there are circumstances which will make the proceedings an abuse of the process of the Court. Acts of such abuse are not restricted to what the prosecution or the State does but extend to acts of any party...and the prosecution or the Respondent should not be telling this Court not to rely on anything done by the victim to decide whether there is an abuse...The Court should ask whether its process is being fairly invoked...The functions of abuse of the process of the Court are not limited to what the prosecution or the State or the Court does. They extend to what any other interested party, like the person aggrieved, does and case authorities have shown that it is not the events at the trial that necessarily give rise to the granting of a prohibition on the ground of abuse of the process of the Court. They can be events outside the Court. They can be events not done by the State but done by the person aggrieved who succeeds in getting the unsuspecting State or Public Prosecutor to prosecute the Accused person...to institute civil and criminal proceedings to exert pressure for the payment of a debt bonafide disputed, when those civil and criminal proceedings are not for the purpose of deciding the disputed debt or are not under the law which make provisions for deciding the disputed debt, constitutes an abuse of the process of the Court..."

61. And in Williams v Spautz [1992] 66 NSWLR 585, at page 600, the High Court of Australia observed that "If the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of the process of the Local Court and will inevitably result in the discharge of the Defendant...And that the charges against the Defendant lack any foundation, the Supreme Court would be justified in intervening to halt the proceedings in limine in order to prevent the Defendant from being subjected to unfair vexation and oppression...For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court [of its inherent power to prevent abuse of its process."

62. It follows that a Court of law is enjoined by *the Constitution* to nip a prosecution, if the criminal proceedings were instituted for extraneous matters and/or nefarious reasons, divorced from the interests of the administration of justice as envisaged by Article 157 [11] of *the Constitution* which is to do justice to all, irrespective of status. See the Kuria case, where Court held that "The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the Court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform..." See also R v DPP & Others Ex Parte Qian Guo Jun & Anor [2013] eKLR.

63. It further follows that in exercising the discretionary power, it should be exercised judiciously and not to merely undertake prosecution anyway with the mentality that the suspect will anyway raise whatever defences he has in the trial Court, notwithstanding the fact that it would not have been necessary in the first place. See R. v The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006, where the Court reasoned that "It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial Court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the Applicants."

Determination and reasons therefor

64. Having abundantly illuminated the legal framework within which this question should be determined, I now turn to examine and consider the merits of the considerations, reasons and evidence advanced in support of this Application [to withdraw from prosecuting the 2nd Accused] in the context of the foregoing legal framework.

65. The crux of the Application is that following the Accused's request for review of the matter, the DPP did review the case against the 2nd Accused and reached a conclusion that the 2nd Accused having been charged under Count VI, with the offence of Abuse of Office contrary to section 101 as read with section 102 [a] of the Penal Code, on account of rendering a professional opinion in the impugned procurement and granted the fact that the subject professional opinion was not binding on the Accounting Officer of KNTC, who bore the ultimate responsibility in ensuring compliance with all the applicable procurement laws and regulations, before the issuance of an award to any given bidder and that the said professional opinion having been based on the Evaluation Report prepared by the Evaluation Committee whose members are not facing criminal charges, there is insufficient evidence to demonstrate that the 2nd Accused person acted in bad faith or was unjustly influenced or drew a financial benefit and/or advantage to render a lopsided professional opinion to the detriment of KNTC.

66. No doubt, the DPP has authority to review criminal proceedings and even discontinue where necessity arises. It's apposite to underline the irrefutable position that *the Constitution* actually envisages premature conclusion of a criminal case, particularly where the DPP is persuaded that without withdrawal, the continuation will offend public interest and/or injure the interests of the administration of justice and/or perpetuate abuse of the legal process. I hasten to add that conceptually, a withdrawal in circumstances contemplated by Article 157[11] is part of the right to fair trial envisaged by Articles 25[c] and 50[2] of *the Constitution*. In this connection, I do concur with the position taken by learned Counsel Mr. Nyamache representing the DPP; Mr. Muriithi representing the 1st Respondent; and Mr. Bundotich representing the 2nd Respondent, that Constitution confers the DPP with exclusive power to withdraw a case at any stage of trial before the final order is made, even after the prosecution case is closed, but with the permission of the Court. Also concur with the overall

exposition of the law, on the principles which govern discontinuation, as so aptly advanced by learned Counsel for the Applicant, Mr. Nyamache, that the DPP has discretionary power to discontinue criminal proceedings, with the permission of the Court, to avoid a possible abuse of the legal process in both public interest and the interest of administration of justice.

67. The test upon which this Application turns, gleaning from article 157[11] of *the Constitution*, is whether the reason or reasons advanced surmount the test resident in Article 157[11] of *the Constitution*.

68. An application to discontinue proceedings, invariably, warrants a delicate balancing act between the power of the DPP on one hand and public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the process, on the other hand. It is thus incumbent upon the Court to satisfy itself that such Applications meet the threshold of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process, in resonance with Article 157[11] of *the Constitution*. See the Wekesa case, paragraph 15.

69. Further, it cannot be gainsaid that the effect of criminal proceedings on the Accused is deeply immense and so is its purpose in society and so, the public interest underlying every criminal prosecution should be zealously guarded while balancing it with the private interest regarding rights of the Accused. See Kuria & 3 Others v Attorney General [2002] 2 KLR 69 [hereinafter "the Kuria case"].

70. Therefore, at this stage - where the Application turns on the constitutional test ingrained in Article 157[11] of *the Constitution* - minded of the precautionary principle ingrained in Article 50[2][a] of *the Constitution* which guarantees the 2nd Respondent a right to be presumed innocent until the contrary is proven after full trial, this Court is expected not to pronounce itself with finality regarding the evidence on record. And so, in considering whether or not the said test has been surmounted, this Court will as a matter of necessity resist the temptation of venturing into the merits of this case and/or reaching conclusive views thereon and/or interrogating the facts and evidence in a trajectory which is likely to be prejudicial to pending case.

71. Relatedly, at this stage, it will be inconceivable and actually a travesty of justice and prejudicial to the 2nd Respondent to apply the principles of a prima facie case before crossing the bridge of section 210 or 211 of the CPC.

72. Yet this Court cannot absolutely avoid testing this Application against the prima facie evidence only in the context of the Applicant's decision to charge, which was informed by the Applicant's twin tests namely the public interest test and evidential test, by subjecting grounds advanced in support of this Application to the acid test of the said twin tests. In this regard, this Court must of necessity, venture into an inquiry on whether the Applicant's review of the decision to charge has invalidated or rescinded or reversed the prima facie evidence upon which the prosecution was launched using the two twin tests.

73 Although it will be premature and impermissible to conclude at this stage that the evidence upon which reliance was placed by DPP to charge the 2nd Accused can or will pass the standard of proof for criminal cases [as to sustain a conviction] yet this Court having taken judicial notice of The Guidelines on the Decision to Charge, 2019, must observe that before the DPP makes a far-reaching decision to charge, it is expected that a evidence must have been subjected to the standard which satisfied the DPP that there was a reasonable prospect of conviction. In order to reach this conclusion, either a two-stage test [which constitutes the evidential and public interest test] or a threshold test must have been applied. See Chapter 3 of The Guidelines on the Decision to Charge, 2019. Whereas the two-stage test is the norm, the threshold test is the exception. In relation to the evidential test, the DPP must have been satisfied that there is sufficient evidence to provide a realistic prospect of conviction,

considering the key indicators namely relevance, admissibility, reliability, credibility, availability, and the strength of the rebuttal evidence arising from the suspect's explanation, certain priviliges entitled to the suspect, et alia. See paragraph 3.2.1 of The Guidelines on the Decision to Charge, 2019, at pages 27-29. In relation to the public interest test, the DPP must have paid consideration and answered in the affirmative that mounting this prosecution was in the best interest of administration of justice, by examining the culpability of the suspect, impact or harm to the victims or community [the People of Kenya], the suspect's age at the time of the offence, whether prosecution was the only proportionate response, et alia. See paragraph 3.2.2 of The Guidelines on the Decision to Charge, 2019, at pages 29-32. In exceptional circumstances, the threshold test is applied, to charge a suspect based on prima facie evidence and a reasonable prospect of additional evidence being available. This test is deployable in early stages of serious offences. Since it is anticipatory, it is expected that is this test was applied, the DPP must have reviewed such a case within 14 days, to affirm whether the anticipated evidence was available. See paragraph 3.2.3 of The Guidelines on the Decision to Charge, 2019, at pages 32-33.

74. "Reason is the life of the law; nay, the common law itself is nothing else but reason. Law ... is the perfection of reason," so said Lord Edward Coke.[2] Lord Coke further posits that "The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof he shall soon forget his superficial knowledge; but when he findeth the right reason of the law and so bringeth it to his natural reason that he comprehendeth it as his own, this will not only serve him for the understanding of the particular case, but of many others: for cognitio legis copulata et complicata; this knowledge will remain with him."[3] So that "How long soever it hath continued, if it be against reason, it is of no force in law"[4], adds Lord Coke. My exposition of the principle of public interest – in relation to the DPP's power to institute and discontinue criminal proceedings under Article 157[6][a]&[b] of *the Constitution* - is that if the criminal proceedings were instituted in public interest at a time when investigations revealed evidence sufficient to sustain the charges, then it will equally be in the self-same public interest to discontinue the criminal proceedings whenever it emerges from further investigations or inquiries or new evidence or circumstances which can no longer sustain the criminal proceedings or which render the continued prosecution a violation of *the Constitution* and/or statutes thereunder. Put differently, public interest should always inform all the powers vested in the DPP namely the power to institute, undertake, take over and continue, and discontinue at any stage before judgment criminal proceedings. In this connection, I have minded to remind myself that the power to discontinue criminal proceedings at any stage before judgment is undeniably in public interest especially when deployed to forestall a claim of malicious prosecution, in circumstances where further investigations or inquiries or new evidence or circumstances lead to the inescapable conclusion that continued criminal prosecution will offend *the Constitution* and/or statutes thereunder.

75. My further exposition of the Article 157[11] of *the Constitution* test is that it is an objective test which, by its own nature, conceives nothing less than precise, tangible, cogent, compelling, and verifiable considerations, reasons and/or evidence, capable of disaffirming or repudiating or invalidating or negating either the DPP's public interest test or evidential test or threshold test or all, which informed the DPP's decision to charge. Therefore, in prosecuting an Application for discontinuation, a proper account of the review of the decision to charge should ordinarily accompany the Application, to elucidate the what, which, when and how the very evidence the DPP relied upon to commence charges of the Accused, is no longer sufficient to sustain the unaltered charges.

2 The First Part of the Institutes of the Laws of England [1628] bk. 2, ch. 6, sect. 138.

3 The First Part of the Institutes of the Laws of England [1628] bk. 2, ch. 6, sect. 93.

4 The First Part of the Institutes of the Laws of England [1628] bk. 1, ch. 10, sect. 80

76. Upon subjecting the reasons advanced to the triple-test, this Court has been persuaded that this application is not based merely on an application for review, but the outcome of the review the charge against the 2nd Resp0ondent, in which the DPP reached the foregoing conclusion that the charge is no longer sustainable. This Court is further persuaded that the outcome of the review and the attendant conclusion collectively constitute a consideration, reason or evidence capable of surmounting the requisite threshold of being precise, tangible, cogent, compelling, and verifiable as to be capable of repudiating the DPP's public interest test or evidential test or threshold test or all tests, which initially informed the DPP's decision to charge. Proceeding on the watershed peremptory principle that if the criminal proceedings were instituted in public interest at a time when investigations revealed evidence sufficient to sustain the charges, it will equally be in the same public interest to discontinue the criminal proceedings whenever it emerges from further investigations or inquiries or new evidence or circumstances which can no longer sustain the criminal proceedings or which render the continued prosecution a violation of *the Constitution* and/or statutes thereunder, this Court has been firmly persuaded this Application is in conformity with the precepts of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

77. Wherefore, I reach a conclusion that the considerations, reasons and evidence canvassed in support of this Application, have generated persuasion in my mind that this application has eminently passed the triple-test housed under Article 157[11] of *the Constitution* [of public interest, interest of administration of justice and the need to prevent abuse of the legal process].

[ii] Whether the application to amend and substitute the Chargesheet has met the requisite threshold

78. It bears repeating that even in circumstances where an Application is to be determined ex parte or deemed unopposed, the duty of the Court to consider whether the Application [plus the prayers sought] is legally sound and worthy granting is not taken away thereby. See Lucia Wambui Ngugi v Kenya Railways & Another, Nairobi HCMA Number 213 of 1989; International Centre for Policy and Conflict v Attorney General & Others, Nairobi Miscellaneous Civil Cause Number 226 of 2013; Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, all discussed herein above.

79. Section 214 of the CPC provides that "[1] Where, at any stage of a trial before the close of the case for the prosecution, it appears to the Court that the charge is defective, either in substance or in form, the Court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the Court thinks necessary to meet the circumstances of the case: Provided that— [i] where a charge is so altered, the Court shall thereupon call upon the Accused person to plead to the altered charge; [ii] where a charge is altered under this subsection the Accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the Accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination. [2] Variance between the charge and the evidence adduced in support of it with prosecution respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time [if any] limited by law for the institution thereof. [3] Where an alteration of a charge is made under subsection [1] and there is a variance between the charge and the evidence as described in subsection [2], the Court shall, if it is of the opinion that the Accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

80. The purpose served by a charge is to provide both information and notice to the Accused. This explains why section 134 of the CPC requires at the bare minimum, that every charge "shall contain, and shall

be sufficient if it contains, a statement of the specific offence or offences with which the Accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

81. It is now trite law the DPP has a right to amend the charges subject to permission by the Court subject to the following principles: [i] First, in instances where the charge is substituted or amended after some witnesses have testified, ex debito justitiae, the Accused must be granted an opportunity to demand for recall of the witnesses who have already testified for further cross-examination as a result of the substitution or amendment, new issues are imported. [ii] Second, if in the opinion of the Court the substitution or amendment will offend Accused's right to fair trial, the application ought to be declined. In the latter case, if for example all witnesses or a substantial number of witnesses have already testified in proceedings which have taken inordinately long and if the application if granted it will demand recall of all the witnesses with the result of acerbating the already bad situation, then it will be prudent to decline the application. See Republic v Michael Ezra Mulyoowa [2015] KEHC 7555 [KLR], the Magistrate's Court had declined to grant an application for amendment and substitution of charges after 17 witnesses had testified remining with only one witness, in a trial which had already taken 5 years and this decision was upheld by the High Court.

82. Having subjected the application to amend and substitute the charges to the foregoing principles, this Court finds that the effect of the proposed amendment which is to adjust the statement of the offence will not necessitate recall of the witnesses who have already testified, and that this trial, having this far spanned approximately one year and one month with an insubstantial number of six witnesses having testified, with twenty-seven witnesses remaining, has not taken inordinately long as to offend the 1st Accused's right to fair trial.

PartVIII: Disposition

83. Wherefore, this Court grants the application with the following orders and directions:

    i. Pursuant to section 87[a] of the CPC, this Court grants the Applicant leave to discontinue criminal proceedings against the 2nd Accused/2nd Respondent, Amos Juma Sikuku, under section 87[a] of the CPC.

    ii. Consequently, this Court grants leave to the Applicant to substitute the charges, in the form and manner proposed in the Draft Charge Sheet marked DM1 and annexed to the Supporting Affidavit of the Applicant.

    iii. The Applicant is directed to formally file the amended and substituted Charge Sheet before the next date appointed for hearing of the case against the remaining Accused.

    iv. Accordingly, pursuant to section 214[1][i] of the CPC read with section 207[1] of the CPC, the substance of the amended charges shall be stated afresh to the remaining Accused as the first business of the Court in the next date appointed for hearing.

    v. If circumstances so demand as a direct result of the amendment, pursuant to section 214[1][ii], the remaining Accused is at liberty to demand that the witnesses or any of them be recalled for further cross-examination.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MILIMANI ANTI-CORRUPTION COURT THIS 22ND DAY OF AUGUST, 2025.

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

The 1st Accused

The former 2nd Accused

Prosecution Counsel: Mr. Nyamache, Mr. Mwasaru & Mr. Akula

Advocate for the 1st Accused: Mr. Muriithi holding brief for Mr. Ombati

Advocate for the former 2nd Accused: Mr. Bundotich

Court Assistant: Mr. Mule