REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT AT MILIMANI

ANTI-CORRUPTION CASE NUMBER E041 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS…….. ……APPLICANT

VERSUS

GABREIL BUKACHI CHAPIA *alias* GABRIEL BUKACHI CHAPIA……ACCUSED/1ST RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION……2ND RESPONDENT

RULING 2 OF THE COURT

PART I: INTRODUCTION

(1) I entertain no incertitude in my mind that **"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."**[1] And so is the decision to discontinue criminal proceedings.

(2) Without power or authority or function, conferred by the Constitution or statute, a public officer[2] and/or public office[3] should not to move an inch - let alone imagination of doing so – granted that venturing in that trajectory sum to naught on account of the doctrine of *ultra vires.* This powerful edict is anchored on a well-founded morbid fear that power - except when constrained - is intrinsically perversive and a public officer and/or a public office may fall into the temptation of becoming what ***Lord Mersey*** once described in his riveting analogy - which I conceive to be deployable in the *sui generis* context

[1] **The Rt. Hon. Sir Elwyn Jones, A-G, QC, MP, Cambridge Law Journal, April 1969, at page 49.** This *quasi-judicial* imbroglio has been locally accepted as a true reflection of the conundrum in Kenya in **Stanley Munga Githunguri vs. Republic [1985] eKLR; Kinoti & 7 others vs. Chief Magistrates Court Milimani Law Courts & 4 others; Sanga & 2 others (Interested Parties) [2022] KEHC 11622 (KLR),** *et alia*.

[2] See Article 260 of the Constitution which defines a **"public officer"** to mean: **"(a) any State officer; or (b) any person, other that a State Officer, who holds a public office."**

[3] See Article 260 of the Constitution which defines a **"public office"** to mean: **"an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament."**

of this PO - as **"an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be."**[4]

(3) In this decision, this Court ventures to determine two questions. **First,** *whether EACC lacks locus standi to actively participate in and enjoy the right of audience criminal proceedings involving corruption and/or economic crime, in the capacity of either a "victim" of the said offences or a "victim representative".* **Second,** *whether this Application has surmounted the threshold for withdrawal from prosecuting the Accused, under section 87(a) of the Criminal Procedure Code (hereinafter "the CPC").*

PART II: A BRIEF BACKGROUND

(4) On 6th November 2020, the Accused/1st Respondent (hereinafter "the 1st Respondent") was arraigned in Court and charged with 16 diverse counts of offences as follows: ***(i) three counts of forgery contrary to section 345 read with section 349 of the Penal Code; (ii) five counts of uttering a false document contrary to section 353 read with section 349 of the Penal Code; (iii) one count of providing false information to a public entity contrary to section 46(1)(d) as read with section 46(2) of the Leadership and Integrity Act, 2012; (iv) one count of providing false information to Ethics and Anti-Corruption Commission contrary to section 46(1)(d) as read with section 46(2) of the Leadership and Integrity Act, 2012; (v) three counts of giving false information to a person employed in public service contrary to section 129(a) of the Penal Code; and (vi) three counts of fraudulent acquisition of public property contrary to section 45(1)(a) read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.***

(5) Fourteen witnesses were heard by my predecessor **Hon. Dr. Wakumile,** between 23rd November 2021 and 18th July 2023. This far, the prosecution is one witness away from closing the prosecutor's case. Occasioned by transfer of my learned brother from this Court, on 24th September 2024, I succeeded my brother and effectively took over among others, this part-heard matter.

(6) Since part of the evidence was recorded by my predecessor, the 1st Respondent expressed his desire for hearing of this matter *de novo* and demand for recall of all the 14 witnesses who were heard by my learned brother.

(7) In the Ruling of this Court which was delivered on 30th September 2024, the demand by the 1st Respondent to recall and rehear all the 14 witnesses who had been heard by my learned brother was disallowed for reasons registered in the Ruling. Consequently, this Court issued a direction that the trial of the matter continues from where my learned brother stopped. Consequently, a hearing date was slotted for 28th October 2024.

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[4] See the English House of Lords *cause celebre* decision in **G & C Kreglinger vs. New Patagonia Meat & Cold Storage Co. Ltd [1913] UKHL 1; [1914] AC 25.** It should be noted, however, that the powerful statement was made in the context of an unconscionable clog on the equity of redemption, which should inevitably suffer the consequence of being held void.

PART III: SUMMARY OF THE DPP'S APPLICATION TO WITHDRAW FROM PROSECUTING THE 1ST RESPONDENT UNDER SECTION 87(a) OF THE CPC; THE DPP'S PRELIMINARY OBJECTION; & THE ATTENDANT SUBMISSIONS

(8) On the said date appointed for hearing - 28th October 2024 - the Director of Public Prosecutions (hereinafter "the DPP") filed a Notice of Motion of even date, seeking the following orders: **(i) That this Honourable Court be pleased to certify this Application as urgent and heard on priority basis. (ii) That the case against the Accused/Respondent be withdrawn under section 87 (a) of the Criminal Procedure Code. (iii) That this Honourable Court be pleased to make any further orders that it deems fit in the interest of justice.**

(9) The Application is predicated on the grounds set out on the face of the Motion and facts deposed in the Supporting Affidavit of Jeremiah Walusala, sworn on 28th October 2024.

(10) On the face of the Motion, it is averred that the 1st Respondent was charged in this matter with various offences relating to forgery and providing false information and that he pleaded not guilty. It is averred that the Applicant received a request from the 1st Respondent seeking review of the decision to charge him and upon review of the file, guided by Article 157 (6) & (11) of the Constitution and further guided by sections 4 and 5 of the Office of the Director of Public Prosecutions Act (hereinafter "the ODPP Act") and in the interest of justice, public interest and fair administration of justice, the DPP formed an opinion that the charges against the 1st Respondent should be withdrawn under section 87 (a) of the CPC.

(11) In the said Supporting Affidavit, the Applicant has rehashed the substance of the Motion and exhibited several exhibits to buttress the Application. It is deposed that upon review of the evidence *viz-à-viz* the said letter, the DPP reached the decision that it was not tenable to proceed with the case against the 1st Respondent without occasioning injustice, since pursuing further investigations while the matter is still ongoing in Court would be contrary to the tenets of fair trial as provided for under article 50 of the Constitution. It is deposed that the DPP having considered the fact that the 1st Respondent asserts that he has the qualifications which are the subject of the charges, there is need to withdraw the charges and pursue further investigations first in the interest of ensuring proper administration of justice. It is deposed that the DPP wrote to EACC to conduct further investigations and it will be improper for further investigations in the matter to be conducted whilst the matter is still ongoing. It is deposed that to avoid a miscarriage of justice and in the interest of justice, public interest and fair administration of justice, the DPP has deemed it fit that this matter should be withdrawn from Court under section 87 (a) of the CPC. The deponent exhibited a copy of the letter which was received from the 1st Respondent, marked JW1.

(12) In its Preliminary Objection dated 4th November 2024 and filed on 7th November 2024 (hereinafter "the PO"), the DPP raised a two-pronged

objection. **First,** that EACC has no right to audience in the proceedings, on the basis that the mandate of EACC is limited to investigation as provided under Article 79 and section 3 of the Ethics and Anti-Corruption Commission Act (hereinafter "the EACC Act"). **Second,** that EACC lacks the right and authority to represent victims in a criminal matter under sections 9 and 13 of the Victim Protection Act (hereinafter "the VPA").

(13) The DPP filed two separate written submissions in support of the PO and the Application.

(14) In his written submissions in relation to the PO, dated 5th November and filed on 7th November 2024, learned Prosecution Counsel Mr. Momanyi, instructed by the DPP, proposed two questions for determination: ***(i) Whether an investigative agency has audience in a trial Court in the prosecution of a criminal matter;*** and ***(ii) Whether an investigative agency can represent a victim in a criminal matter.***

(15) It is submitted that Article 157 of the Constitution vests the state power of prosecution in the DPP and this is repeated in section 5 of the ODPP Act. It is submitted that in exercise of this power, the DPP is under no direction or control of any person, body or authority as provided under Article 157(10) of the Constitution. It is submitted that Article 157 (6) of the Constitution provides that the DPP shall exercise State powers of prosecution and may discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP. It is further submitted that Article 157 (8) provides that the DPP may not discontinue a prosecution without the permission of the Court and that section 87 (a) of the CPC provides that in a trial before a subordinate Court a public prosecutor may, with the consent of the Court or on the instructions of the DPP, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal if it is made before the Accused 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.

(16) Learned counsel submits that Article 79 of the Constitution provides that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission and that section 3 of the EACC Act establishes EACC. It is submitted in this connection that section 11 (d) of the EACC Act provides that the function of EACC is to investigate and recommend to the DPP the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the EACC Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter 6 of the Constitution. It is submitted that section 23 of ACECA provides that the Secretary of EACC or a person authorized by the Secretary may conduct an investigation on behalf of EACC and that section 35 of ACECA provides that upon completion of investigations, EACC shall report to the DPP on the results of the investigation, with recommendations. Further, it is

submitted that section 2 of the ODPP Act defines an investigative agency in relation to public prosecutions to mean among other agencies EACC.

(17) Regarding victims, it is submitted that section 2 of the VPA defines a victim as any natural person who suffers injury, loss or damage as a consequence of an offence and the same section defines a victim's representative as an individual designated by a victim or appointed by the Court to act in the best interest of the victim. Counsel submits that section 7 of the VPA provides for the relevant details as relates to a victim and section 9 (1) (a) thereof provides that a victim has a right to be present at their trial either in person or through a representative of their choice. It is submitted that section 9 (3) of the VPA provides that the victim's views and concerns may be presented by the legal representative acting on their behalf and that section 13 thereof provides that where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to subject to the provisions of the Evidence Act, adduce evidence that has been left out and/or give oral evidence or written submissions.

(18) Reliance is placed upon **Roy Richard Elirema & anor vs. Republic [2003] eKLR,** for the proposition that in a criminal trial, there must be a Prosecutor who must play the role of deciding the witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. Further reliance is placed on **Ahmed Rashid Jabril & another vs. Director of Public Prosecutions [2020] eKLR**, for the proposition 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. In addition, the DPP cited the holding in **Geoffrey K. Sang vs. DPP & 4 Others [2020] eKLR,** which 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."**

(19) In regard to victim participation, reliance was placed upon **Joseph Lendrix Waswa vs. Republic [2020] eKLR,** for the proposition that a victim can participate in a trial in person or via a legal representative and once a victim or his legal representative makes an Application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim's views and concerns, their impact on the Accused person's right to a fair trial, and subsequently, in the judge's discretion, determine the extent and manner in which a victim can participate in a trial, and for the further propositions that the DPP must at all times retain control of and supervision over the prosecution of the case.

(20) This Court is, hence, urged to find that EACC, being an investigative agency, lacks the right of audience.

(21) This Court also urged to find that EACC, being an investigative agency, is not a victim contemplated under sections 2 and 7 of the VPA and that it has no capacity of a victim representative under the VPA.

(22) In his written submissions concerning the Application to withdraw from prosecuting the Accused dated 28th October 2024, learned Prosecution Counsel Mr. Momanyi, again instructed by the DPP, proposed two questions for determination: ***(i) Whether the DPP has exercised his discretion in line with the law;*** and ***(ii) Whether the DPP has given justifiable reasons to warrant the withdrawal of the matter from Court.***

(23) For the DPP, it is submitted that Article 157 of the Constitution of Kenya 2010, vests state power of prosecution upon the Office of the DPP and that this is restated in section 5 of the ODPP Act. It is submitted in this connection that in exercise of this power, the DPP is under no direction or control of any person, body or authority as provided for under Article 157(10) of the Constitution. It is further submitted that Article 157 (6) of the Constitution provides that the DPP shall exercise State powers of prosecution and may discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP. Counsel submits that Article 157 (8) provides that the DPP may not discontinue a prosecution without the permission of the Court.

(24) In relation to the power to review cases, it is submitted that section 5 (4) (e) of the ODPP Act confers the DPP with power to review a decision to prosecute or not to prosecute any criminal offence and that section 87 (a) of the CPC provides that in a trial before a subordinate Court a public prosecutor may, with the consent of the Court or on the instructions of the DPP, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal if it is made before the Accused 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.

(25) For the DPP, it is submitted that the National Prosecution Policy, page 5, provides that the decision to prosecute as a concept envisages two basic concepts, namely that the evidence available is admissible and sufficient (evidential test) and that public interest requires a prosecution be conducted (public interest test). It is submitted that in **Praxidis Namoni Saisi & others vs. DPP & 2 others SC Petition 39 and 40 of 2019,** at paragraph 82, the Supreme Court gave the following criteria in determining abuse of prosecutorial powers where 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. Further reliance is paced on **Reuben Mwangi vs. DPP & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR** and **Anthony**

Murimi Waigwe vs. Attorney General & 4 others [2020] eKLR, for the proposition that the DPP is enjoined in exercising the powers conferred by the aforesaid Article 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 and in this regard, the DPP should only pursue a prosecution if there is belief that the case is prosecutable and where there is no belief, the Accused should be let free. For a similar proposition, further reliance is placed upon **Mohammed Ali Swaleh vs. DPP & anor *Ex Parte* Titus Musau Ndome [2017] eKLR; Waweru Munyi Jackson vs. DCI & 4 others; Grace Wamboi Mukuna (Interested Party) [2021] eKLR**; **R vs. Leonard Date Sekento [2019] eKLR**; **Ahmed Rashid Jabril & another vs. Director of Public Prosecutions [2020] eKLR; Diamond Hasham Lalji & another vs. Attorney General & 4 others [2018] eKLR**; **Johnson Kamau Njuguna & anor vs. DPP [2018] eKLR**; **Eunice Khalwali Miima vs. Director of Public Prosecutions & 2 others [2017] eKLR; Kipkoi Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR;** and **Geoffrey K. Sang v DPP & 4 Others [2020] eKLR**.

(26) In conclusion, learned Prosecution Counsel urged this Court to find that the continuance of the criminal proceedings against the 1st Respondent without the benefit of further investigations to confirm whether the Accused is culpable would amount to abuse of prosecutorial powers as was held in **Praxidis Namoni Saisi & others vs. DPP & 2 others SC Petition 39 and 40 of 2019**, since there is no evidence of abuse of the discretionary power of the DPP. It is submitted that withdrawing the matter to allow further investigations is in consonance with the National Prosecution Policy which provides that public interest should be one of the considerations to inform the decision to prosecute and that public interest does not require a prosecution to be conducted where there is a likelihood that further investigations might establish no wrongdoing on the Accused person's part. It is submitted that in this matter, public interest tilts in favour of withdrawing the matter, having advanced justifiable reasons.

(27) In his oral highlights, learned Prosecution Counsel, recapitulated the substance of the written submissions and underlined the said questions proposed for determination.

PART IV: SUMMARY OF THE 1ST RESPONDENT'S RESPONSE TO THE APPLICATION & PO; AND THE ATTENDANT SUBMISSIONS

(28) Both the DPP's PO and Application were not opposed by the 1st Respondent. Actually, the 1st Respondent reinforced both.

(29) Vide his Replying Affidavit dated 5th November 2024 and filed on even date, in support of this Application but in opposition to the Replying Affidavit sworn by Daniel Tipape Loomu on 31st October 2024, on behalf of EACC, the 1st Respondent deposes – based on information and advice of his counsel which he verily believes to be true - that EACC lacks the constitutional authority to oppose the withdrawal of this matter in Court. The 1st Respondent deposes that the mandate of EACC is limited to investigation of corruption offenses and

making recommendations to the DPP as stipulated under section 11 of the Anti-Corruption and Economic Crimes Act (hereinafter "ACECA").

(30) Further, it is deposed that the DPP is constitutionally mandated to independently review all recommendations made by the EACC and decide to prosecute or not, based on evidence and legal standards but not on basis of recommendations of EACC alone and that the DPP is thus not bound by EACC's findings or opinions. The 1st Respondent deposes further that it is crucial to uphold the distinct roles of the EACC as an investigator and the DPP as a prosecutor to ensure a fair and transparent criminal justice process.

(31) In addition, the 1st Respondent deposes that EACC's differing opinion does not interfere with the DPP's constitutional mandate to exercise independent discretion over matters presented before him in accordance with Article 157 of the Constitution, which grants prosecutorial powers solely to the DPP, free from the influence or control of any authority, including the EACC.

(32) The 1st Respondent deposes further that on 29th July 2024, the DPP directed the EACC to conduct further investigations on academic certificates the 1st Respondent submitted to the DPP, but EACC failed to respect the directive. It is deposed that EACC's failure to comply with the DPP's instruction to verify the certificates, as confirmed by the DPP's follow-up communication on 10th September 2024, is indicative of a pattern that undermines the DPP's independent prosecutorial process. It is deposed that the consistent disregard by EACC of DPP's directives suggests an attempt to withhold relevant information, potentially influencing the DPP's ability to reach an impartial decision, and raising concerns over the EACC's conduct in this matter.

(33) In his Further Affidavit dated 5th November 2024 and filed on even date, in opposition to the affidavit sworn by Daniel Tipape Loomu on 31st October 2024, on behalf of EACC, the 1st Respondent rehashed the substance of the Replying Affidavit that EACC lacks the constitutional authority to oppose the withdrawal of this matter in Court.

(34) In his written submissions dated 6th November and filed on even date, learned Counsel Mr. Simiyu, instructed by the firm of Messieurs AMA Advocates LLP, rehashed the substance of the 1st Respondent's response and I find it unnecessary to reproduce it here.

(35) Learned counsel proposed three issues for determination as follows: ***(a) whether the ODPP, in exercising its prosecutorial discretion under Article 157 and Section 87(a) of the CPC, is justified in withdrawing charges against the Accused in light of new exculpatory evidence; (b) whether withdrawal of charges aligns with the principles of justice, public interest, and the prevention of abuse of Court process, as required under Article 157(11); and (c) whether the EACC's attempt to oppose the ODPP's decision to withdraw infringes upon the ODPP's***

constitutional mandate and the Accused's right to a fair and impartial prosecution.

(36) Regarding the question whether the ODPP, in exercising its prosecutorial discretion under Article 157 and Section 87(a) of the CPC, is justified in withdrawing charges against the Accused in light of new exculpatory evidence, it is submitted that Article 157 of the Constitution grants the ODPP extensive powers to institute, conduct, and discontinue criminal proceedings prior to judgment. It is further submitted that specifically, Article 157(6) provides the ODPP with discretion to terminate prosecutions in line with public interest and justice, while Article 157(10) ensures that this power is exercised independently, free from influence or control by other bodies, including the EACC. Article 157(11) further mandates the ODPP to weigh public interest, justice, and the avoidance of abuse of process in exercising its prosecutorial discretion. Learned counsel has buttressed this proposition with the decision of the Court of Appeal in **Mbuthia vs. Attorney General & 3 Others [2022] KECA 980**, urging that the decision underscored the exclusive authority of the ODPP in prosecutorial matters and that Courts should be reluctant to interfere with the ODPP's prosecutorial discretion unless it violates constitutional or statutory guidelines. Further reliance is placed upon **Diamond Hasham Lalji & Another vs. The Attorney General & 4 Others [2015] eKLR**, which counsel argues that it also clarified that while the ODPP's discretion is broad, it is subject to the principles of fairness, public interest, and prevention of abuse.

(37) It is submitted that the mandate of EACC is under ACECA, is strictly investigatory, with no constitutional or statutory authority to challenge the ODPP's prosecutorial decisions, drawing the attention of this Court to section 11 of ACECA.

(38) In relation to the question whether the withdrawal of charges aligns with the principles of justice, public interest, and the prevention of abuse of Court process, as required under Article 157(11), counsel reasons that public interest is a core principle underlying the ODPP's prosecutorial discretion as per Article 157(11) and that the public's confidence in the justice system hinges upon the assurance that prosecutions are conducted fairly, based on sufficient and credible evidence, and that wrongful prosecution is avoided. It is urged that this principle is particularly relevant in cases where new evidence undermines the original allegations, as in the present case, where exculpatory certificates provide material context for the Accused's defense. Learned counsel cites the decision in **Republic vs. Attorney General *Ex Parte* Kipngeno Arap Ngeny [2001] eKLR,** arguing that in that matter, the Court stressed that the purpose of prosecution must align with public interest and justice and that in instances where prosecution is unsupported by the full scope of available evidence, it risks leading to an unjust outcome, which not only contravenes the Accused's rights but also erodes public confidence in the criminal justice process. Further reliance is placed in **Republic vs. Director of Public Prosecutions *Ex Parte* Patrick Ogolla Onyango [2016] eKLR,** reasoning that in the matter, the Court affirmed that the interests of justice require prosecution decisions to be fair and impartial. Counsel concludes by a

rendition that an unjust prosecution that disregards critical exculpatory evidence fails to serve public interest, potentially opening the state to claims of malicious prosecution and misappropriating judicial resources, citing **Okiya Omutata vs. Director of Public Prosecutions & Others** to buttress this proposition. It is submitted that the Court held that prosecution should be conducted without undue external influence and that the ODPP's role in the criminal justice system is to ensure cases are pursued only when evidentiary standards are met, and that public confidence is best served by discontinuing prosecutions based on incomplete or flawed investigations. It is urged that this holding exemplifies the ODPP's obligation to respect public trust by withdrawing charges where a prosecution risk prejudicing the Accused's right to a fair trial or compromising judicial integrity.

(39) It is urged that the right to a fair trial, enshrined under Article 50 and deemed absolute under Article 25 of the Constitution, is central to Kenya's justice system and in this connection, it is submitted that this right encompasses the Accused's right to access and present exculpatory evidence and to be presumed innocent until proven guilty and that denial of this right contravenes this right and amounts to a denial of justice.

(40) Citing **Republic vs. Chief Magistrates Court at Mombasa *Ex Parte* Ganjee & Another [2002] eKLR,** it is submitted that prosecutors serve as ministers of justice and are duty-bound to disclose all material evidence, including exculpatory evidence, to guarantee fairness in prosecution and protecting the Accused's right to a fair trial. Further reliance is placed on **Republic vs. Director of Public Prosecutions & 2 Others *Ex Parte* Stephen Oyugi Ojino [2015] eKLR,** to buttress a proposition that acting in the interests of justice, envisages that charges should be withdrawn when evidence suggests the prosecution lacks a sound basis.

(41) And finally, regarding the question whether the EACC's attempt to oppose the ODPP's decision to withdraw infringes upon the ODPP's constitutional mandate and the Accused's right to a fair and impartial prosecution, it is submitted that section 11 of ACECA limits the EACC's mandate to investigating alleged offenses and recommending cases for prosecution and that Article 157 vests the DPP with the sole prosecutorial authority. This Court is urged to incline in the direction that for proper functioning of Kenya's criminal justice system, the distinct roles should be upheld and respected, with each entity exercising its authority independently, as required by law. In this connection, it is submitted that EACC's conduct — of disregarding the ODPP's directive to verify the Accused's certificates — demonstrates a breach of its investigative role and that it will be in order for this Court to grant the Application to prevent abuse of Court process contemplated under Article 157(11) and Section 87(a) of the CPC, by pursuing charges without sufficient evidence, citing **Director of Public Prosecutions vs. Martin Maina & 3 Others [2021] eKLR** and **Mbuthia vs. Attorney General & 3 Others,** to fortify this proposition.

(42) In their oral highlights, learned Counsel Mr. Simiyu and learned Counsel Mr. Tunen recapitulated the substance of the written submissions and underlined the said questions proposed for determination. In addition, Mr. Tunen submitted that in a criminal trial, there are three players: the Court, the DPP and the Accused. Counsel submitted that the constitution confers the DPP with power to withdraw a case at stage of trial before the final order is made, even after the prosecution case is closed. He submitted that contrary to the position taken by EACC that the power to withdraw is predicated on the consent of the victim is an erroneous position of the law, unsupported by the constitution. It is submitted that contrary to the position taken by EACC that the withdrawal will be premature, the constitution actually envisages premature conclusion of a criminal case, especially where the DPP is persuaded that without withdrawal, the continuation will occasion a miscarriage of justice. He submitted that the role of EACC is limited to investigation and that the role ends at the stage of submitting recommendations to the DPP. Learned Counsel Mr. Simiyu submitted that the 1st Respondent is entitled to fair trial, a right which is non-derogable under Articles 25 and 50 of the Constitution. Mr. Simiyu submitted that once EACC made the recommendations, the rest of the process like making a decision to charge or withdraw remains with the DPP.

(43) As a result, this Court is urged to grant this Application.

PART V: SUMMARY OF EACC'S RESPONSE TO THE APPLICATION & PO; AND THE ATTENDANT SUBMISSIONS

(44) Both the DPP's PO and Application were opposed by EACC.

(45) In the Replying Affidavit sworn by Daniel Tipape Loomu, the lead Investigating Officer, for and on behalf of EACC, deposes that the Commission received and commenced the investigation herein following a report that the 1st Respondent falsified academic certificates and used them to secure employment. It is deposed that upon completion of investigations into the matter, it was established that 1st Respondent sought and secured employment at Moi Teaching and Referral Hospital in 2009 as ICT Manager; Kenya Investment Authority in 2010 as Manager ICT; and Nairobi City County in 2014 as a Ward Administrator.

(46) It is further deposed that the investigation revealed that the 1st Respondent secured employment at the Moi Teaching and Referral Hospital in 2009, the Kenya Investment Authority in 2010, and Nairobi City County in 2014 by using Bachelor of Science (Computer Science) degree certificate No. 027344, purported to have been issued by Maseno University on 26th November 2002. It is deposed that inquiry from the University, it was established that the certificate was forged and the 1st Respondent was never a student at the University. In this regard, the EACC exhibited a copy of the letter from Maseno University marked DTL1.

(47) Further, it is deposed that investigations further revealed that the 1st Respondent also secured employment at the Kenya Investment Authority in

2010 and at the Nairobi City County in 2014 using a Master of Information Technology Certificate No. 030475, purported to have been issued by Daystar University on 24th November 2009 and that according to Daystar University, the stated Master of Information Technology Certificate No. 030475 was not issued by them and the university does not offer such a Course. In this connection, a copy of the letter from Daystar University was exhibited, marked DTL2.

(48) It is deposed that upon conclusion of investigations, EACC forwarded the file with a recommendation for prosecution of the 1st Respondent to the DPP, for offences including fraudulent acquisition of public property, forgery and uttering forged documents and that upon independent review of the evidence, the DPP concurred with EACC and directed that the 1st Respondent be charged for the said offences. In this connection, a copy of the letter from DPP dated 29th September 2020 is exhibited, marked DTL3.

(49) It is deposed that the 1st Respondent was arraigned in Court and took plea on 6th November 2020 and the DPP has been prosecuting the case where fourteen (14) witnesses have testified and produced exhibits and that the deponent of the affidavit is only witness remaining. It is deposed that arising from the arraignment before Court, the Accused was suspended from duty effective 22nd January 2021. A copy of the suspension of even date is exhibited marked DTL4.

(50) The Investigation Officer deposes that EACC received from the DPP a letter dated 29th July 2024, a copy of which is exhibited as DTL 5, with copies of academic certificates and transcripts submitted by the Counsel representing the Accused person for verification constituting the following: (i) Master of Arts in Communication Studies (Development Communication) awarded on 11th December, 2020 by the University of Nairobi and transcript serial No.5222550 dated 25th January 2021 issued by the said University; (ii) Bachelor of Arts in Communication and Journalism, awarded on 14th October, 2017 by the Kenya Methodist University and transcript serial No. KB18288 dated 14th October, 2017; (iii) Kenya Certificate of Secondary Education (KCSE) certificate No.1241917 for examination of November/December 1997; (iv) Certificates issued by The Institute for the Management of Information (IMIS) Systems which were as follows: (a) Certificate on Foundation Diploma awarded by IMIS on 13th March,2002 and a transcript dated 17th February,2003; (b) Certificate of completion of a module of the IMIS Diploma Course, Information Technology 1 for Examination session in December 2002; (c) Certificate of completion of a module of the IMIS Diploma Course, Business Communications for Examination session in December 2002; (d) Certificate of completion of a module of the IMIS Diploma Course, Information Technology 2 for Examination session in December 2002; (e) Certificate for completion of a module of the IMIS Diploma Course, Financial and Quantitative Methods for Examination session in December 2002; and (f) Certificate of completion of a module of the IMIS Diploma Course, Microcomputer and Networked Systems for Examination session in December 2002.

(51) It is deposed that EACC responded to DPP's letter indicating that the case before Court was not based on the afore-listed documents and thus not relevant. In this connection, a copy of the response letter is exhibited, marked DTL6.

(52) For EACC, it is thus deposed that no new evidence that has come into the possession of the DPP to exonerate the 1st Respondent from the offences with which he is charged with to warrant withdrawal of the matter before Court. Further, it is deposed that the 1st Respondent used the forged academic documents, to fraudulently secure employment and consequently earn salaries totalling to Kshs. 9,790,694.50 from the three public institutions.

(53) In her written submissions dated 31st October 2024 and filed on even date, learned Counsel Ms. E. Mwangi, instructed by EACC, rehashed the substance of the response and this Court finds it needless to regurgitate.

(54) Regarding the question whether EACC has a right of audience, it is urged that EACC was granted a chance to respond to the Application in order to assist it make a just determination. It is argued that the invitation is well-grounded since EACC is the investigating agency and that it is important to point out that the DPP intends to withdraw the case under Section 87(a) of the CPC following a request seeking review by the 1st Respondent. Learned counsel submits that EACC's participation in this Application will assist the Court come to a just and balanced determination. Counsel for EACC submits that EACC represents the Kenyan public, the victims of the corruption and that victim participation is recognised under the Constitution and section9 (d) of the VPA.

(55) Regarding the question of withdrawal, it is submitted that the DPP cannot withdraw the matter without the permission of the Court, citing the provisions of section 87 of the CPC and Article 157(8) of the Constitution.

(56) Counsel for EACC submits that this Application is **"manifestly irrational, capricious and an abuse of prosecutorial power and against public interest"**, placing reliance upon **Ahmed Rashid Jabril & another vs. Director of Public Prosecutions [2020] eKLR**, where the Court stated that **"The Applicant is constitutionally bound to exercise its power of withdrawal of criminal cases having regard to the three (3) elements of public interest, interest of administration of justice and the need to avoid abuse of the legal process".**

(57) For EACC, it is submitted that since 6th November 2020 to October 2024, a period of 4 years, the DPP has been consistent that the charges against the Accused person as per the charge sheet and the charges were proper and ought to proceed to trial. It is submitted that copious judicial time and public resources have been expended by the Court, the DPP and the Commission in bringing 14 witnesses.

(58) Further, it is urged that there is no discovery of new and important evidence that would warrant the matter not to proceed to its logical conclusion

as all documents pertaining to the case were properly served and an inventory prepared. It is submitted that the request by the DPP to conduct further investigations into this matter based on documents that were not part of the evidence is in bad faith and not in fair administration of justice since the justification for withdrawal stated in the Supporting Affidavit effectively means that the evidence presented before this Court has been tested and a determination made thereby effectively making the DPP play the role of the Judiciary.

(59) It is further submitted that regarding withdrawal of charges by the DPP, in **Joseph Kipkoech Sirma vs. DPP, Criminal Revision App. NO. E008 of 2023,** it was held that the task of analysing evidence adduced in a case and finally pronouncing whether the Accused is guilty or innocent belongs to the Court itself and not the parties or the litigators and that the DPP cannot in the course of a trial make 360-degrees turn and declare Accused persons or any of them innocent.

(60) In her oral highlights of the Submissions of EACC, learned Counsel Ms. Mwangi for EACC, recapitulated the substance of the written submissions and urged this Court to find both the Application and the PO, without merit and direct that the case against the 1st Respondent be heard and determined on its merits.

PART VI: QUESTIONS FOR DETERMINATION

(61) Flowing from the PO, the Application and the rival Submissions, two principal questions have crystallized for determination as follows:

(i) Whether EACC lacks *locus standi* to actively participate in and enjoy the right of audience in criminal proceedings involving corruption[5] and/or economic crime[6], in the capacity of either a "victim" of the said offences or a "victim representative".

(ii) Whether this Application has surmounted the threshold for withdrawal from prosecuting the Accused, under section 87(a) of the Criminal Procedure Code (hereinafter "the CPC").

PART VII: ANALYSIS AND DETERMINATION

(i) Whether EACC lacks *locus standi* to actively participate in and enjoy the right of audience in criminal proceedings involving corruption[7] and/or economic crime[8], in the capacity of either a "victim" of the said offences or a "victim representative"

(62) Flipped, the question is whether EACC is a **"victim"** of corruption and economic crimes in criminal proceedings or a **"victim representative"**

[5] As defined by section 2 of ACECA.

[6] As also defined by section 2 of ACECA.

[7] See 5 *supra.*

[8] See 6 *supra.*

thereof, as to deserve *locus standi* (the right to audience) as envisaged by the Constitution and the VPA.

(63) First things first. In relation to this question, since jurisdiction is everything and ought to be settled at the earliest opportunity by any judicial or *quasi-judicial* body[9], I find it useful to underline from the onset that this Court is conscious to its limited jurisdiction enacted under section 8 of the Magistrates' Courts Act, 2015 (Chapter 10 of the Laws of Kenya) under authority donated to Parliament by Article 23(2) of the Constitution, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, limited to the rights guaranteed by Article 25(a)&(b) of the Constitution. This Court will, hence, endevour to resist the temptation of jurisdictional overreach, to the jurisdictional space of the High Court under Article 165(3) (b) & (d) (to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and jurisdiction to hear any question respecting the interpretation of the Constitution). In this PO, I have not been invited to determine a question respecting the interpretation of the Constitution, although this question will not avoid inquiry into the constitutional and legislative framework of the functions, powers and authority of EACC. See **Ethics and Anti-Corruption Commission vs. Miriam Riungu & 7 others; Director of Public Prosecution (Interested Party) [2019] KEHC 2213 (KLR), per A.Mabeya, J.;** and the Court of Appeal **(Makhandia, JA; Ouko & Odek, JJA as they then were)** decision in **Samuel Otieno Obudo, Mary Gathiga Kanyiha, Keith Musyoki Kisunguh, Alloys Nyambaraiga Tinega, David Mulinge Kithua, George Omondi Arum & Benjamin Njathi Kagutu vs. Republic [2019] KECA 729 (KLR),** where the limits of a Magistrates' Court were illuminated.

(64) Whenever confronted with either a PO or an evidentiary objection or both, proof is unnecessary since in such matters, a Court is permitted by law to take judicial notice of all written laws, all laws, rules and principles, written or unwritten, having the force of law; the general course of proceedings and privileges of Parliament; Articles of War for the Kenya Military Forces; the public seal of Kenya; the seals of all the Courts of Kenya; in the appointment was published in the Gazette, the accession to office, names, titles, functions and signatures of public officers; the existence, title and national flag of every State and Sovereign recognized by the Government; natural and artificial divisions of time, and geographical divisions of the world, and public holidays; the extent of the territories comprised in the Commonwealth; the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons; the names of the members and officers of

[9] See the Court of Appeal decision in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR;** and the Supreme Court decision in **Macharia & another vs. Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling).**

the Court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it; the rule of the road on land or at sea or in the air; the ordinary course of nature; the meaning of English words; and all matters of general or local notoriety. See section 60 of the Evidence Act.

(65) Power is conferred by either the Constitution or statutes or both. The constitution frowns on arrogation of power. See Article 2(2) thereof which stipulates that **"No person may claim or exercise State authority except as authorised under this Constitution."**

(66) Without power or authority or function, conferred by the Constitution or statute, a public officer and/or a public office should not to move an inch - let alone imagination of doing so – granted that venturing in that trajectory sums to naught on account of the doctrine of *ultra vires,* within the original meaning formulated by ***Lord Russell CJ*** in his Lordship's leading Judgment[10] in **Kruse vs. Johnson [1898] 2 QB 91,** and as later amplified by ***Lord Reid***[11] in **Anisminic vs. Foreign Compensation Commission [1969] 2 WLR 163; [1969] 2 AC 147.** This powerful edict is anchored on a well-founded morbid fear that power - except when constrained - is intrinsically perversive and a public officer and/or a public office may fall into the temptation of becoming what ***Lord Mersey*** once described in his riveting analogy as **"an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be."** See the English House of Lords *cause celebre* decision in **G & C Kreglinger vs. New Patagonia Meat & Cold Storage Co. Ltd [1913] UKHL 1; [1914] AC 25.**

(67) In the foregoing framework, a public officer or public office should work within the powers expressly conferred either by the Constitution or legislation or both, but not by implication. In **Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others [2020] eKLR** (hereinafter "the Sang case"), there was a tussle between the Directorate of Criminal Prosecution (hereinafter "the DCI") and the DPP on the question of signing chargesheets and prosecution of suspects. **Odunga, J.** had the following to say about how power is conferred, at paragraph 123: **"123. The law is very clear that powers must be expressly conferred; they cannot be a matter of implication. In testing whether a statute has conferred jurisdiction on a person or authority, wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a statutory Tribunal created statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore, where the language of an Act is clear and explicit the Court must give effect to it whatever may be the consequences for in that case the words of the statute speak the**

[10] Whereas Chitty LJ, Wright J, Darling J, and Channell J concurred with Lord Russell CJ, Matthew J dissented.

[11] Whereas Lords Pearce and Wilberforce concurred with Lord Reid, Lords Pearson and Morris of Borth-y-Gest dissented.

intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration." See also **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon [1972] EA 575; Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. Kenya Revenue Authority *Ex Parte* Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530;** and **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

(68) In order to put the questions in perspective, this Court will necessarily take a deep dive into the constitutional and legislative framework governing EACC, victims of offences and representatives of victims.

(69) This main question raises fundamental derivative questions emanating from the PO -which are intricately connected to the main question - and which then this Court must of necessity answer. The derivative questions are as follows: ***(a) Who is the proper complainant in criminal proceedings generally, and in corruption and economic crimes criminal proceedings? (b) Who is the victim of corruption and economic crimes? (c) Who is or should be deemed to be a "victim representative" in corruption and economic crimes criminal proceedings? (d) And who is the proper mouthpiece of the complainant in criminal proceedings generally, and in corruption and economic crimes criminal proceedings?***

(70) The Constitution makes it obligatory upon Parliament to enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of Chapter 6 of the Constitution. See Article 79 of the Constitution. In this connection, Parliament enacted the Ethics and Anti-Corruption Commission Act, Chapter 7H of the Laws of Kenya (hereinafter "the EACC Act") whose preamble states that it is "**An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes."**

(71) The status and powers conferred upon commissions by Chapter 15 of the Constitution, applies to EACC, although Article 248(1) of the Constitution seems to have excluded it. See Article 79 of the Constitution.

(72) It is thus safe to conclude that the status and powers of commissions enshrined in Chapter 15 of the Constitution and the EACC Act are the principal references of the primary objects, authority, powers, functions, privileges and

status of EACC. It is necessary, therefore, to delve into the status and powers of commissions under Chapter 15 of the Constitution and the EACC Act, at length.

(73) The objects of commissions are to protect the sovereignty of the people; secure the observance by all State organs of democratic values and principles; and promote constitutionalism. See Article 249 (1) of the Constitution.

(74) The general powers and functions of commissions reside in Article 252 of the Constitution, which this Court wishes to quote verbatim: **"(1) Each commission, and each holder of an independent office — (*a*) may conduct investigations on its own initiative or on a complaint made by a member of the public; (*b*) has the powers necessary for conciliation, mediation and negotiation; (*c*) shall recruit its own staff; and (*d*) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution. (2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute Court proceedings under Article 22 (1) and (2). (3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations — (*a*) the Kenya National Human Rights and Equality Commission; (*b*) the Judicial Service Commission;(*c*) the National Land Commission; and (*d*) the Auditor-General."**

(75) Section 3 of the EACC Act establishes EACC. Section 11 of the EACC Act adopts the powers and functions set out under Article 252 of the Constitution (to conduct investigations on its own initiative or on a complaint made by a member of the public; powers necessary for conciliation, mediation and negotiation; power to recruit its own staff) and adds the following functions which this Court wishes to reproduce in extenso: **"(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall — (a) in relation to State officers,— (i) develop and promote standards and best practices in integrity and anti-corruption; (ii) develop a code of ethics; (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption; (c) receive complaints on the breach of the code of ethics by public officers; (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution; (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct; (f) oversee the enforcement of codes of ethics prescribed for public officers; (g) advise, on its own initiative, any person on any matter within its functions; (h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the**

requirements of the Anti-Corruption and Economic Crimes (Cap. 65) as to confidentiality; (i) subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and (j) institute and conduct proceedings in Court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya. (2) Deleted … (3) The Commission may cooperate and collaborate with other State organs and agencies and any foreign government or international or regional organisation in the prevention and investigation for corruption. (3A) State agencies and organs referred to in subsection (3) may grant the Commission access to relevant information in the prevention and investigation of economic crime. (4) The Commission shall have all powers necessary or expedient for the efficient and effective execution of its functions, under the Constitution, this Act or any other written law. (5) The Commission may request and obtain professional assistance or advice from such persons or organizations as it considers appropriate. (6) The functions of the Commissioners shall be to — (a) assist the Commission in policy formulation and ensure that the Commission and its staff, including the Secretary perform their duties to the highest standards possible in accordance with this Act; (b) give strategic direction to the Commission in the performance of its functions as stipulated in this Act; (c) establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sector; (d) deal with reports, complains of abuse of power; impropriety and other forms of misconduct on the part of the commission or its staff; and (e) deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the Commission or its staff. (7) The Commissioners shall meet at least once every quarter or as often as the need arises for the execution of their functions." Relevant to this decision is section 11 (d) of the EACC Act.

(76) What then is the remit of the power of an investigator envisaged by section 11 (d) of the EACC Act? Foremost, section 2 of ACECA defines an **"investigator" to** mean **"a person authorized by the Director under section 23 to conduct an investigation on behalf of the Commission."** Further, section 2 of the ODPP Act defines an **"Investigative Agency"** in relation to public prosecutions to mean **"the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law."** In this regard, section 23 of ACECA is germane and it stipulates that **"(1) The Secretary or a person authorized by the Secretary may conduct**

an investigation on behalf of the Commission. (2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Secretary or an investigator. (3) For the purposes of an investigation, the Secretary and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Secretary or investigator has under this Part. (4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the National Police Service Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator."

(77) Also pertinent to this decision is section 35 of ACECA which provides that upon completion of investigation, EACC shall report to the DPP conveying the results of investigation and the recommendation of EACC.

(78) Turning to victim participation and representation, Article 50(9) of the Constitution mandated Parliament to enact legislation to provide for protection, rights and welfare of victims of offences and it stipulates as follows: **"(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."** In conformity with this mandate, Parliament enacted the Victim Protection Act (hereinafter "the VPA").

(79) Whereas the term "victim" is defined by section 2 of the VPA and section 329A of the CPC, the term "complainant" is not defined by the CPC.

(80) Section 2 of the VPA defines a **"victim"** to mean **"any natural person who suffers injury, loss or damage as a consequence of an offence."** However, to the extent that this definition was found unconstitutional for being discriminatory against juristic persons in **Odhiambo vs. Attorney General & 2 others; Nyanchoga (Interested Party) (Petition E400 of 2021) [2024] KEHC 354 (KLR) (Constitutional and Human Rights) (26 January 2024) (Judgment)** (hereinafter "the Nyanchoga case"), it follows that the definition was thereby modified to constitute natural and juristic persons and this Court shall accordingly construe the meaning thereof to have been altered to that extent in conformity with ***the Nyanchoga case.***

(81) And in the limited context of a victim impact statement provided under Part IXA of the CPC, section 329A of the CPC defines a **"victim"** to mean **"a primary victim or a family victim."** And a **"primary victim"** is defined in the same section to mean **"(a) a person against whom the offence was committed; (b) a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence."** And a **"family victim"** is defined is defined in

the same section to mean **"a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence."** The same section defines a **"member of the primary victim's immediate family"** to mean **"(a) the victim's spouse; (b) the victim's de facto spouse, being a person who has cohabited with the victim for at least 2 years; (c) a parent, guardian or step-parent of the victim; (d) a child or step-child of the victim or some other child for whom the victim is the guardian; or (e) a brother, sister, step-brother or step-sister of the victim."**

(82) A **"victim representative"** is not a word of art in Kenya. Section 2 of the VPA defines a **"victim representative"** to mean **"an individual designated by a victim or appointed by the Court to act in the best interests of the victim."**

(83) This Court also finds section 9 of the VPA generally, and 9(1)(a) particularly germane and states as follows: **"(1) A victim has a right to — (a) be present at their trial either in person or through a representative of their choice; (b) have the trial begin and conclude without unreasonable delay; (c) give their views in any plea bargaining; (d) have any dispute that can be resolved by the Application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law; (e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence; (f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and (g) be informed of the charge which the offender is facing in sufficient details. (2) Where the personal interests of a victim have been affected, the Court shall—(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and (b) ensure that the victim's views and concerns are presented in a manner which is not — (i) prejudicial to the rights of the Accused; or (ii) inconsistent with a fair and impartial trial. (3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf."** {Emphasis supplied}

(84) And section 13 of the VPA provides that **"Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to — (a) subject to the provisions of the Evidence Act (Cap. 80), adduce evidence that has been left out; (b) give oral evidence or written submission."**

(85) In **Waswa vs. Republic [2020] KESC 23 (KLR)** (hereinafter "the Waswa case"), at paragraph 78, the Supreme Court of Kenya (hereinafter "the SCORK") construed the VPA and enunciated the following guidelines, threshold and the procedure to be invoked before participation of a victim: **"Conscious**

that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the *Supreme Court Act* as the Court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an Application by a victim or his legal representative to participate in a trial and the manner and extent of the participation: a. The Applicant must be a direct victim or such victim's legal representative in the case being tried by the Court; b. the Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for; c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings; d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation; e. Victim participation must not be prejudicial to or inconsistent with the rights of the Accused; f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor; g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the Accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial; h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP; i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest; j. the Court may hold proceedings in camera where necessary to protect the privacy of the victim; k. While the Court has a duty to consider the victim's views and concerns, the Court has no obligation to follow the victim's preference of punishment."

(86) It emerges both from Article 50(9) of the Constitution and sections 2, 9 and 13 of the VPA, and the rendition thereof in ***the Waswa case,*** and sections 329A-329F of the CPC - that quite unlike civil proceedings where, apart from the main parties and with the leave of Court, a person can join the civil proceedings as either an interested party or a friend of the Court (*amicus curiae*) complete with *locus standi* (with right of audience) - in criminal proceedings, separate from the Accused and the DPP who enjoy *locus standi* (automatic right of audience), the third player who can possibly join the proceedings and enjoy the right of audience is a **"a victim"** (whether a natural or juristic person, who suffered injury, loss or damage as a consequence of the offence) or the **"victim representative"** (an individual designated by the victim or appointed by the Court to act in the best interest of the victim). The fourth player who can possibly join criminal proceedings with a right of passive participation (without a right to audience) is a natural or juristic person self-represented or instructed by a person who has an interest in the criminal proceedings, which interest does not however rise to the threshold of a **"victim"** of the offence as to deserve active participation, who then enjoys the right popularly known as watching brief. The right to watching brief has for

eons enjoyed affirmation by Courts for reasons discussed hereinafter. Put differently, if a player is neither an Accused nor the DPP in criminal proceedings, the player must have attained the character and capacity of a **"victim"** or a **"victim representative"** as a pre-qualification for active participation (*locus standi*) in the proceedings.

(87) It follows that whereas *locus standi* in case of the Accused and DPP is automatic, *locus standi* in case of a **"victim"** is conditional. It further follows that whereas the Accused and the DPP do not require an application for admission, a **"victim"** must make an application to join the proceedings in such capacity. Consequently, a player seeking to have a *locus standi* and the attendant right to active participation must avail himself within any of the three (either as the Accused or the DPP or a **"victim/victim representative"**). Otherwise, any other player with interest in the proceedings which does not pass the test of a **"victim"**, can possibly enjoy the right to passive participation by way of watching brief.

(88) ***Who then is the victim of corruption and economic crimes?*** Gleaning from both the VPA as construed in ***the Waswa case,*** it's incontestable that in corruption and economic crimes, the direct victims are what the Constitution refers to as the people of Kenya.

(89) This leads me to the next question: ***Who then is the proper complainant in criminal proceedings generally, and in corruption and economic crimes criminal proceedings?*** In this regard, there being no statutory definition, this Court resorts to secondary sources. The proper complainant in criminal proceedings generally, and in corruption and economic crimes criminal proceedings is the Republic. See **Roy Richard Elirema & another vs. Republic [2003] KECA 165 (KLR)** (hereinafter "the Elirema case"), **the Court of Appeal (Omolo, Tunoi & Lakha, JJA,** as they then were) reasoned that the **"complainant" in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic…"** For a similar holding, see also **Kamau John Kinyanjui vs. Republic [2010] eKLR; Republic vs. Ethics & Anti-Corruption Commission, Director of Public Prosecution & Chief Magistrates' Anti-Corruption Court Malindi Law Court *Ex parte* Stephen Sanga Barawa [2017] KEHC 7049 (KLR)** (hereinafter "the Barawa case"); **Republic vs. Faith Wangoi (2015) eKLR; Director of Public Prosecutions (DPP) vs. Nairobi Chief Magistrate's Court & another [2016] eKLR; Philomena Mbete Mwilu vs. Director of Public Prosecutions, Director of Criminal Investigations, Chief Magistrate's Court (Anti-Corruption Court Nairobi) & Attorney General; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] KEHC 11366 (KLR)** (hereinafter "the Mbete case"), *et alia.*

(90) Having reached a conclusion that the Republic is the complainant, ***which body then is the representative and/or mouthpiece of the Republic (the complainant)?***

(91) In ***the Barawa case,*** the Court reasoned the DPP is the representative and/or mouthpiece of the complainant (the Republic). The Court explained as follows, at paragraphs 25 & 29: **"25.** Article 157 **of the** Constitution **gives powers to the DPP to 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. The DPP also has powers to take over and continue criminal proceedings commenced in any Court other than a Court martial that have been instituted or undertaken by another person or authority with the authority of the person or authority. 26. The gist of the provisions of the Constitution and the statutes in relation to the matter before this Court, is that the DPP is the complainant and not the Applicant. Precedents too have given expressions to this school of thought…29. The prosecutor represents the Republic who is the complainant in whose name all criminal prosecutions are brought. A person who reports a crime may seek to withdraw his complaint but the DPP, in whose name the criminal proceedings began and are to be sustained, must be a part of the withdrawal process."** See also **Republic vs. Faith Wangoi (2015) eKLR; R vs. Mwaura 1979 KLR 209;** and **Ruhi vs. Republic 1985 KLR 373.**

(92) Emerging from the foregoing confab, it's also incontrovertible that all criminal justice system players serve the Republic and therefore represent the people of Kenya (the sovereign). See Article 1 of the Constitution. And so, in corruption and economic offences criminal proceedings, whereas the Republic is the complainant, the DPP is the prosecutor on behalf of the people of Kenya and EACC is the investigation agency on behalf of the people of Kenya. See ***the Barawa*** and ***Mbete cases.***

(93) ***Who is, or should be deemed a "victim representative" in corruption and economic crimes criminal proceedings?*** It's irrefutable that EACC is neither the Accused nor the DPP. And so, in criminal proceedings like this, EACC can only seek to fit either the place of a victim/a victim representative or watching brief. Can EACC properly so, claim to be the victim of corruption and economic crimes or victim representative of the victims of corruption and economic crimes (the people of Kenya) in the context of Article 50(9) of the Constitution, the VPA and the rendition thereof in ***the Waswa case?***

(94) Having audited the Constitutional and legislative infrastructure in regard to this question, and having subjected it to the PO and the response of EACC, plus all the rival written submissions, this Court reaches the following conclusions.

(95) Gleaning from the net legal effect of the foregoing analysis of the constitutional and legislative legal infrastructure, EACC, being an incontestable investigation agency, failed to avail itself within either the powers or functions or authority or privilege or rights or objects of EACC as

conferred by Articles 249(1) and 252 of the Constitution; sections 3 and 11 of the EACC Act as read with sections 2, 23 and 35 of the ACECA as further read with section 2 of the ODPP Act and indeed failed to avail itself within any law which expressly confers upon it the power or function or authority or privilege or right to be a victim representative for the people of Kenya in the manner envisaged by Article 50(9) of the Constitution, the VPA and the rendition thereof in ***the Waswa case,*** having unsuccessfully availed itself within the meaning of a "victim" and "victim representative" within the meaning and context assigned thereto by sections 2, 9 and 13 of the VPA as construed in ***the Waswa case.***

(96) It follows that EACC unsuccessfully demonstrated that its active participation surmounted the test and threshold to acquire the status of active participation, envisaged by the VPA and construed in ***the Waswa case.***

(97) Besides, EACC unquestionably failed to demonstrate that it followed the proper procedure adopted for admission as a **"victim representative"** as enacted in section 9(1) of the VPA and construed in ***the Waswa case*.** EACC is consequently found an improper **"victim representative"** of the people of Kenya.

(98) Inasmuch as the thinking of EACC is evidently underpinned with noble intentions – gleaning from the apt representations of Ms. Mwangi, learned Counsel for EACC - the nobility is regrettably unfortified by the Constitution and legislation enacted pursuant thereto, and hence detrimentally pulling in the opposite direction of the rule of law principle enshrined in Article 10(2)(a) of the Constitution and a subversion of Article 2(2) of the Constitution, which prohibits any person or state organ from arrogating power or function. In construing the Constitution, this Court is enjoined to promote its purposes, values and principles and not subversion; advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. See Article 259(1) of the Constitution. In permitting development of the law, a Court cannot confer upon a state organ more power or authority or right than conferred by the Constitution and/or Legislation, for that will be *ultra vires.*

(99) Had Parliament intended to confer that function upon EACC, nothing would have been easier than to slot it under section 11 of the EACC Act, since Article 79 of the Constitution gave Parliament the full leeway to enact legislation to confer powers or functions or authority or privilege or rights upon EACC.

(100) In any event, even if this Court was to find that EACC is properly so either a victim or a victim representative, the SCORK held in ***the Waswa case*** that whereas a victim's right to participation is limited to views and concerns, a victim has no active role in the decision to prosecute, or the determination of the charge upon which the Accused will finally be tried as this power is exclusively conferred in the DPP. At paragraph 76, the Court expressed the following rendition: **"We agree with this view and adopt it as the correct**

position in law. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the Accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process."

(101) However, this PO has provoked a fundamental conversation which Parliament may wish to pick and offer redress, by identifying an appropriate institution to stand in the gap of a **"victim representative"**, in matters where the people of Kenya at large are the victims. Compelled by the doctrine of checks and balances, and considering further the objectivity such a delicate position deserves, the Commission on Administrative Justice comes to my mind.

(102) Consequently, this Court reaches a conclusion that EACC lacks *locus standi* to actively participate and enjoy the right of audience in criminal proceedings involving corruption[12] and/or economic crime[13], in the capacity of either a **"victim"** of the said offences or a **"victim representative".**

(103) It follows that the response and submissions filed by EACC are unsupported by any known law, resultantly void and as Lord Denning elegantly put it in **Benjamin Leonard Mcfoy vs. United African Company Limited (UK) [1962] AC 152**, **"If an act is void, then it is in law a nullity. It is not only bad …and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

(104) Nevertheless, for purposes of a possible revision or appeal or judicial review, this Court has consciously resisted the temptation of expunging them from the record. In lieu, this Court has elected a lesser draconian option of disregarding the response and submissions in considering the merits of DPP's Application to withdraw from prosecuting the 1st Respondent.

(105) The foregoing finding notwithstanding, it's instructive to underscore that the practice of watching brief - which EACC has been enjoying hitherto - is disparate to victim participation envisaged under Article 50(9) of the Constitution and the VPA as construed in ***the Waswa case.*** Whereas practice of watching brief affords a party no right of audience, and thus passive, victim participation affords a party the right of audience and hence active. See the Court of Appeal (**AM Githinji, JA, as he then was, GG Okwengu, A Mohammed, JJA**) decision in **Joseph Lendrix Waswa vs. Republic [2019] KECA 752 (KLR),** where at paragraph 21, the Court drew parallels between that practice of watching brief and victim participation as follows:

[12] As defined by section 2 of ACECA.

[13] As also defined by section 2 of ACECA.

"The concept of *"watching brief"* in a criminal trial where an advocate for the victim does not play any active role in the trial process is now outdated. The Constitution and the VPA now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the Court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process." This distinction was upheld by SCORK in ***the Waswa case.***

(106) In the foregoing context, this Court has found no law depriving any person interested in the criminal proceedings, apart from the victim, from enjoying a right to passive participation, either through the traditional practice of watching brief or any other passive manner. In any event, this Court is unable to find fault in the practice of watching brief, since it is an appendage of the doctrine of open Court, which in turn is part of package of non-derogable right to fair hearing, guaranteed by Article 50(1) of the Constitution, operationalized by section 77 of the CPC and construed in **Khalid Salim Ahmed Balala vs. Republic [1992] eKLR** (hereinafter "the Balala case"). The concept of open Court was calculatingly crafted to achieve the often-quoted maxim that justice must not only be done, but also be seen to have been done which in turn is founded on the principle that as a Court tries, the Court is also on trial by people of Kenya (the sovereign). In ***the Balala case,*** the High Court had occasion to discuss the essence of the doctrine of open Court and **R.S.C. Omolo, J.** (as he then was), had the following to say: **"The principle underlying these provisions is clear. Unless the parties to a dispute themselves wish it; or unless the Court orders to the contrary, all criminal trials are to be held in open Court. The concept behind this requirement is obvious: justice can best thrive only in the full glare and scrutiny of the public. Otherwise what would be the point in such old maxims as "Justice must not only be done but must manifestly be seen to be done"? If justice were to be administered behind closed doors, how would anyone see that it has been done? What has all this got to do with this Application? I have already referred to the distance between Mombasa and Voi. The relatives of the Applicant are resident in Mombasa as are his friends and sympathizers. If they want to listen to his case, they all must travel to Voi, some 160 kilometres away. Relatives, friends and sympathizers of an Accused person are the persons most likely to be interested in attending and hearing the proceedings against an Accused person. They are the members of the public to whom the Court shall remain open, unless they or any of them is excluded by the Court or cannot all conveniently be accommodated in the place of trial. If an Accused person is taken a distance of some 160 kilometres away from them how can they be expected to attend the proceedings? In my view, the prosecution is not entitled to make these statutory provisions merely illusory, and that is what they are doing in this case by charging the Applicant at Voi and not in Mombasa."**

(107) In this connection, this Court finds the passive right of participation which Counsel instructed by EACC has been enjoying in the proceedings by way of watching brief, without fault and consequently directs that the right will be sustained and protected.

(ii) Whether this Application has surmounted the threshold for withdrawal from prosecuting the Accused, under section 87(a) of the CPC

(108) 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."**

(109) 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."**

(110) 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.[14] 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 vs. Chief Magistrates Court, Kibera, Attorney General & Director of Public**

[14] See **R vs. 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 vs. Jones (1806) 31 St Tr 251, (1806) 2 Camp 131; R vs. Verelst (1813) 3 Camp 432; R vs. Catesby (1824) 2 B & C 814, (1824) 4 Dow & Ry KB 434, (1824) 2 Dow & Ry MC 278; R vs. Rees (1834) 6 C & P 606; R vs. Murphy (1837) 8 C & P 297; R vs. Townsend (1841) C & Mar 178; R vs. Newton (1843) 1 C & K 469; R vs. Manwaring (1856) 26 LJMC 10, (1856) Dears & B 132, (1856) 7 Cox 192; R vs. Cresswell (1876) 1 QBD 446, (1876) 33 LT 760, (1876) 40 JP 536, (1876) 13 Cox 126; R vs. Stewart (1876) 13 Cox 296; R vs. Roberts (1878) 14 Cox 101, (1878) 42 JP 630, (1878) 38 LT 690; Gibbins vs. 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 vs. Wallsend Shipway and Engineering Co Ltd [1977] Crim LR 351; Dillon vs. R [1982] AC 484, [1982] 2 WLR 538, [1982] 1 All ER 1017, 74 Cr App R 274, [1982] Crim LR 438; Gage vs. Jones [1983] RTR 508; Kynaston vs. Director of Public Prosecutions, 87 Cr App R 200, *et alia.***

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."**

(111) 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 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."

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

(113) **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 vs. 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 vs. Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)** (hereinafter "the Dande case").

(114) And so, in **Geoffrey K. Sang vs. 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."

(115) 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 vs. 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 vs. 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 vs. Leonard Date Sekento [2019] eKLR**; **Mohammed Ali Swaleh vs. DPP & anor *Ex Parte* Titus Musau Ndome [2017] eKLR; Waweru Munyi Jackson vs. DCI & 4 others; Grace Wamboi Mukuna (Interested Party) [2021] eKLR**; **Ahmed Rashid Jabril & another vs. Director of Public Prosecutions [2020] eKLR; Diamond Hasham Lalji & another vs. Attorney General & 4 others [2018] eKLR**; **Johnson Kamau Njuguna & anor vs. DPP [2018] eKLR**; **Eunice Khalwali Miima vs. Director of Public Prosecutions & 2 others [2017] eKLR; Kipkoi Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR;** and **Geoffrey K. Sang v DPP & 4 Others [2020] eKLR**.

(116) **Second,** the decision to prosecute is discretionary. In **Thuita Mwangi & Anor vs. 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 –vs- 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 vs. James Makura M'abira [2020] eKLR** (hereinafter "the Makura case"), paragraphs 23-25.

(117) **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 a*nd *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. vs. Director of Criminal Investigation Department & Others (2016) eKLR,** where the respective powers between the DCI (an investigator) and DPP was considered indepth.

(118) 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 vs. 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) …"**

(119) 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 vs. 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.*

(120) 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.

(121) Further, gleaning from Article 157(11) of the Constitution, the following are the cardinal principles which govern the power to discontinue criminal proceedings.

(122) **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 vs. 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 vs. 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."**

(123) **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 vs. 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}

(124) **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 vs. DPP & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR; Anthony Murimi Waigwe vs. Attorney General & 4 others [2020] eKLR,** *et alia.*

(125) **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 vs. 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 vs. 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 vs. 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 vs. 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 vs. Director of Public Prosecutions & 2 others [2017] eKLR; Kipkoi Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR; Reuben Mwangi vs. DPP & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR; Anthony Murimi Waigwe vs. Attorney General & 4 others [2020] eKLR,** *et alia.*

(126) 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."**

(127) 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 a reflection 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.

(128) 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 vs. 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…"**

(129) And so, in **Mohammed Gulam Husseign Fazal Karmali & Hyundai Motos Kenya Limited vs. 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."**

(130) 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 vs. 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."**

(131) The rendition of public interest in ***the Murungaru case*** was applied by **Odunga, J.** in **Republic vs. 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 **Republic vs. Director of Public Prosecution & another *Ex Parte* Chamanlal Vrajlal Kamani & 2 others [2015] eKLR.**

(132) 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 vs. 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."**

(133) Similarly - like in ***the Murungaru case*** - in **British American Tobacco Kenya Ltd vs. 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 vs. 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.**

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

(135) 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 vs. 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…"**

(136) 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."**

(137) The concept of abuse of the process was discussed in **Jared Benson Kangwana vs. 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."

(138) The Court of Appeal (**Omollo, Akiwumi & Bosire, JJA,** as they then were) in **J.P. Machira T/A Machira & Company Advocates vs. 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).

(139) In an Australian decision namely **Jago vs. District Court of NSW and Others [1989] HCA 46,** which was adopted by **Odunga, J.** in **Republic vs. Director of Public Prosecution & another *Ex Parte* Chamanlal Vrajlal Kamani & 2 others [2015] eKLR**, 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 vs. Lord Norreys, 15. A.C. 210 at p. 219,** cited in approval by the Court of Appeal in **D.T. Dobie & Company (Kenya) Limited vs. 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 vs. 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..."

(140) And in **Williams vs. 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."**

(141) 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 vs. DPP & Others *Ex Parte* Qian Guo Jun & Anor [2013] eKLR.**

(142) 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. vs. 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."**

(143) 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 Accused) in the context of the foregoing legal framework.

(144) The crux of the Application is that following the Accused's request for review of the matter, the DPP addressed a letter to EACC directing further investigations, but in response, EACC declined to carry further investigations. The DPP advances a position that the discontinuation sought will offer further investigations an opportunity, to avoid a possible abuse of the legal process in both public interest and the interest of administration of justice.

(145) No doubt, the DPP has authority to review criminal proceedings and even discontinue where necessity arises. I concur with the position taken by the DPP, Mr. Simiyu and Mr. Tunen to the following extent. **First,** 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. **Second,** that the power to withdraw is not predicated on the consent of the victim. **Third,** 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. **Fourth,** 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.

(146) 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.

(147) 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.

(148) 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 vs. Attorney General [2002] 2 KLR 69** (hereinafter "the Kuria case").

(149) 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 1st 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 the main case pending conclusion against the 1st Respondent.

(150) Relatedly, at this stage, it will be inconceivable and actually a travesty of justice and prejudicial to the 1st Respondent to apply the principles of a *prima facie* case before crossing the bridge of section 210 of the CPC.

(151) 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.

(152) 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 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.***

(153) **"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.***[15] ***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."**[16] So that **"How long soever it hath continued, if it be against reason, it is of no force in law"**[17], 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.

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

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

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

(154) It will be remiss of this Court if it fails to underline the fact that I agree with the overall exposition of the law, on the principles which govern discontinuation, as so aptly advanced by both Counsel for the Applicant and the 1st Respondent (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). I also concur with Counsel for the Applicant and 1st Respondent that although the huge number of witnesses who have testified is a significant factor generally, in an application to discontinue proceedings, the factor by and in itself, cannot stand in the way of the DPP's power to discontinue the proceedings, 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.

(155) 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.

(156) Whereas it's not anticipated and this Court cannot purport to close the assemblage of possible reasons of the calibre afore-described, and even though the consideration, reason and evidence advanced by the DPP in buttressing this Application cannot, properly so, be characterized as non-justiciable on account of the doctrine justiciability, it is the finding of this Court that it's jurisdiction was prematurely invoked in view of the fact that the said consideration, reason and evidence is unripe on account of the doctrine of ripeness. Upon subjecting this Application to the acid test of the DPP's own public interest test, evidential test, and threshold test, this Court finds that the evidence adduced unreasonably anticipates this Court to cross the bridge before it gets there, by pronouncing itself on a question contingent upon a speculative consideration, reason and/or evidence, when it a well-founded principle of law that a Court of law cannot base its decision on a speculative consideration, reason and/or evidence. Illustrative is the High Court decision (**Onguto J.,as he then was**) in **Wanjiru Gikonyo and Others vs. National Assembly of Kenya and 4 Others [2016] eKLR,** where the learned judge reasoned that **"[34]...The Court ought not to engage in premature adjudication of matters... It must not decide on what the future holds either."** Regarding the dim view taken by superior Courts regarding speculative considerations, reasons or evidence, see also the recent SCORK holding in **Legal Advice Centre t/a Kituo Cha Sheria vs. Attorney General (Advisory Opinion Reference E001 of 2023) [2024] KESC 15 (KLR) (12 April 2024) (Ruling).** See also the High Court decision in **Gichuhi S.C & 2**

others vs. Data Protection Commissioner; Mathenge & another (Interested Parties) (Judicial Review E028 of 2023) [2023] KEHC 18612 (KLR) (Judicial Review) (16 June 2023) (Ruling), per **Chigiti, J.**

(157) Since this Application was based on the 1st Respondent's request for review, this Court was not persuaded the said 1st Respondent's request for review, by and in itself, constituted a consideration, reason or evidence capable of surmounting the threshold of being precise, tangible, cogent, compelling, and verifiable as to be capable of disaffirming or repudiating or invalidating or negating either the DPP's public interest test or evidential test or threshold test or all tests, which informed the DPP's decision to charge. The contrary will certainly hold true, if upon investigation, new evidence emerged as to render the decision to charge the 1st Respondent unsustainable. Contrary to the foregoing, this Application was instead based purely on the 1st Respondent's request for review of the decision to charge, as opposed to new evidence emerging from the anticipated review. The prematurity condemns this Court and DPP to speculation, of which this Court of a firm persuasion that it is not 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. For this reason alone, I, consequently, decline the invitation.

(158) **Second,** if the prematurity was caused by the EACC's refusal to investigate as to bring the consideration, reason or evidence to maturity, then in circumstances where the body charged with the mandate to investigate abdicates or blatantly refuses or declines or derelicts it's duty to carry either investigations or further investigations as asserted by the Applicant, and if inter-agency negotiation or mediation fail, then the conduct stems a fundamental juridical question which can be appropriately resolved by the High Court sitting in its jurisdiction as a Judicial Review Court, which bears a lesser deleterious effect uncharacteristic of a discontinuation of the main proceedings which bears a profound lethal effect of nullification of the proceedings which will finally demand commencing *de novo,* if ultimately the decision is reached that the charges should be relaunched against the Accused.

(159) **Third,** in any event, in exceptional cases, further investigations sparked by a request for review of the decision to charge, can run parallel to the criminal proceedings. See **Dennis Edmond Apaa & 2 Others vs. Ethics and Anticorruption Commission &Another; [2012] KEHC 1352 (KLR)** and ***the Taitumu case***. In this connection, withdrawal of a matter is not a condition precedent for further investigations.

(160) Consequently, this Court reaches a conclusion that the consideration, reason and evidence advanced in support of this Application have failed to generate persuasion in my mind that it passes the article 157(11) of the Constitution test of public interest, interest of administration of justice and abuse of the legal process.

PART VIII: DISPOSITION

(161) Wherefore, this Court issues the following final orders and directions:

(i) EACC lacks *locus standi* to actively participate in and enjoy the right of audience in criminal proceedings involving corruption[18] and/or economic crime[19], in the capacity of either a "victim" of the said offences or a "victim representative". However, and for avoidance of doubt, the right to watching brief by Counsel instructed by EACC, having been found sustainable and protectable, will continue.

(ii) This Application has failed to surmount the threshold for withdrawal from prosecuting the Accused, and this Court consequently declines to grant the Application to withdraw under section 87(a) of the CPC.

(162) Granted that the final orders negatively affect all parties to this Application, recognizing the far-reaching effects of the final orders and alive to the guidelines which were enunciated by SCORK in *the Waswa case* in relation to interlocutory appeals in the context of the unique circumstances of this Application, each party (the Applicant, the 1st Respondent and the 2nd Respondent) is granted leave to either lodge an appeal or seek judicial review remedies or seek revision remedies, lasting for 30 days from the date of this Ruling.

Virtually Delivered, Signed and Dated in Open Court at Milimani Anti-Corruption Court this 25th November 2024

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C.N. Ondieki
Principal Magistrate
In the presence of:
The Accused
Prosecution Counsel: Mr. Momanyi
Counsel for the Accused: Mr. Simiyu & Mr. Tunen
Court Assistants: Mr. Mule & Ms. Miriam

[18] As defined by section 2 of ACECA.

[19] As also defined by section 2 of ACECA.