Republic v Mackenzie & 30 others (Criminal Appeal E029 of 2024) [2025] KECA 665 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 665 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E029 OF 2024

KI LAIBUTA, GWN MACHARIA & WK KORIR, JJA

APRIL 11, 2025

BETWEEN

REPUBLIC .... APPELLANT

AND

PAUL NTHENGE MACKENZIE ALIAS MTUMISHI ALIAS NABII ALIAS PAPAA .... 1ST RESPONDENT

SMART DERI MWAKALAMA ALIAS MZEE SMART .... 2ND RESPONDENT

STEPHEN SANGA MUYE ALIAS STEVE ALIAS STEVE WA MTWAPA .... 3RD RESPONDENT

EVANS KOLOMBE SIRYA .... 4TH RESPONDENT

KELVIN SUDI ASENA ALIAS ALFRED ASENA ALIAS BABA ASHLEY ALIAS SHITEMI ALFRED .... 5TH RESPONDENT

STEPHEN OMINDE LWANGU ALIAS SERAPHINE AZUNGILA LWANGU ALIAS STEPHANO .... 6TH RESPONDENT

ENOS AMANYA ALIAS AMOS NGALA AMANYA ALIAS ALLELUYA .... 7TH RESPONDENT

JULIUS KATANA KAZUNGU .... 8TH RESPONDENT

CHARLES KALUME CHARO ALIAS MUSA SULEIMAN ...... 9TH RESPONDENT

MICHAEL MWERI BAYA .... 10TH RESPONDENT

TITUS MUNYAO MUSYOKA ALIAS JUSTUS MAKAU MUSYOKA ALIAS TITUS MNONO .... 11TH RESPONDENT

ERNEST SAFARI KAZUNGU KATANA ALIAS EARNEST KAZUNGU .... 12TH RESPONDENT

DAVID AMBWAYA AMANYA .... 13TH RESPONDENT

EMMANUEL AMANI KILUMO ALIAS CHILUMO ALIAS BABA NOAH .... 14TH RESPONDENT

JOSEPH BOKOLE BIMRAMBA ALIAS JOSEPH KENGA BOKOLE .... 15TH RESPONDENT

NEWTON KIMATHI IKUNDA ALIAS KIM ALIAS YUSUFU .... 16TH RESPONDENT

ROBERT KAHINDI KATANA ALIAS BABA NEEMA .... 17TH RESPONDENT

ALEX MUNANGWE ODARI ALIAS ALEX WA GALILAYA 18TH RESPONDENT

LUCAS OWINO OGOLA .... 19TH RESPONDENT

MARK KIOGORA KIARA ALIAS JOHNMARK KIARA .... 20TH RESPONDENT

MAURICE MACHARIA .... 21ST RESPONDENT

MARY KADZO KAHINDI ALIAS MARY SMART .... 22ND RESPONDENT

SIMON MUSEMBI MUNYOKI ALIAS SIMON SIMIYU .... 23RD RESPONDENT

MWINZI KAVENGE ALIAS KITENGELA ALIAS STEPHEN MWINZI .... 24TH RESPONDENT

GILBERT KEA KATANA .... 25TH RESPONDENT

STEVEN NGUGI KIKO .... 26TH RESPONDENT

EDISON SAFARI MNYAMBO ALIAS BABA SIFA .... 27TH RESPONDENT

ALFONZE CHOMBA ELIUD ALIAS ALPHONZE CHOMBA ELIUD ALIAS ALPHONES TSOMBA ELIUD ALIAS BABA NATHAN .... 28TH RESPONDENT

AMANI SAMUEL KENGA ALIAS BABA JOYCE .... 29TH RESPONDENT

ANNE ANYOSO ALUKHWE ALIAS ANN AUKO OKELO .. 30TH RESPONDENT

PETER RAMADHANI KAHASO ALIAS PETER MENZA TUVA ALIAS BABA SARA .... 31ST RESPONDENT

(Being an appeal against part of the Ruling and Orders of the High Court of Kenya at Malindi (M. Thande, J.) dated 17th May 2024 in HCCRA No. E003 of 2024)

JUDGMENT

1. The precis of the instant appeal is that the 31 respondents were charged before the High Court of Kenya at Malindi with 191 counts of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. The gist of the particulars of the 191 counts set out in the information was that on unknown dates between January 2021 and September 2023 at Shakahola area in Malindi Sub-County within Kilifi County, the 31 respondents jointly murdered 11 known children namely SHN, EDN, SE, NM, NR,

JA, SH, EM, EN, SP and PK; 82 unknown male children; 72 unknown female children; and 26 unknown children of an unascertained gender.

3. Consequently, the respondents were arraigned in court for plea taking on 6th February 2024 when they denied all the charges, except for the 4th respondent, who was declared unfit to plead and, consequently, his plea taking was deferred pending mental health treatment and confirmation that he was fit to plead.

4. On the morning scheduled for plea taking, the 1st, 2nd, 4th and 5th respondents (Paul Nthenge Makenzie, Stephen Sanga Muye, Evans Kombe Siya and Kelvin Sudi Asena – hereinafter "the objecting respondents") filed a Notice of Preliminary Objection dated 6th February 2024, but which is not on the record as put to us. Gathering from the impugned ruling on the preliminary objection, the objecting respondents raised the following objections:

> " 1. The charge sheet is defective in several respects by contravening the provisions of Section 134 of the *Criminal Procedure Code* (Cap. 75) Laws of Kenya.
>
> 2. The number of counts numbering 191 in the charge sheet are oppressive and contrary to *the Constitution* (sic) Rights of the accused persons in particular article 50(2), (c), (e).
>
> 3. The number of charges complained of will subject the accused persons to delayed determination of the case and in contravention of the principles of fair hearing as is enshrined in article 50 of *the constitution* of Kenya and other constitutional provisions."

5. The trial court directed that the preliminary objection be canvassed by way of written submissions. In their written submissions, learned counsel for the objecting respondents, M/s. Muoko & Company, contended that the charge sheet ran to 298 pages; and that, on the date scheduled for the respondents' plea taking, the lead prosecutor, Mr. Victor Mule, was assisted by 6 other learned prosecution counsel, showing the complexity and seriousness of the matter.

6. Counsel elected to combine and argue Grounds 1 and 3 of the preliminary objection together as they related to the alleged defects in the charge sheet, followed by Ground 2 relating to the alleged overloading of the charge sheet.

7. On the issue as to the alleged defects in the charge sheet, counsel for the objecting respondents submitted that, while the Director of Public Prosecutions (DPP) derived wide prosecution powers from Article 157 of *the Constitution*, sub-article 11 exhorted the DPP to exercise such powers having "regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process"; that,

   whereas the DPP is not subject to control by any person or authority in exercise of his powers, he must ensure that the criminal process is not abused; that it was incumbent upon the said office to draw charges against the accused persons which accord with the facts; and that the charges must reflect the offence and must be in conformity with section 134 of the *Criminal Procedure Code* (the CPC), which provides that:

   134. Offence to be specified in charge or information with necessary particulars

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

8. Counsel further submitted that, in drafting charges, the prosecution should be guided by section 137 of the CPC, which provides that:

> " ...it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.

9. According to learned counsel, all the counts in the instant case did not specify the date, month or year when the offence or offences were committed, if at all; that, in a number of counts, there were no names, age or gender of the victims so as to enable the respondents to come up with a proper defence; that all 31 respondents were accused of the murder of the same individual person in every count in a period spanning 3 years; that all the charges were ambiguous, speculative and confusing to the respondents, who were expected to come up with a robust defence to the allegations, and not mere denials; that the respondents were presumed innocent until proven guilty, and were not expected to fill gaps in the prosecution case where it fell short; that the 191 counts were defective in their current state; and that, unless and until they were amended to give the required particulars, they contravened the respondents' right to a fair trial as enshrined in Article 50(2) (b) of *the Constitution*.

10. Counsel further submitted that the respondents would be seriously prejudiced if, for instance, one wished to tender a defence of alibi, the non- specificity of the particulars as to time of commission of the offences would require the accused person to account for every day between January 2021 and September 2023; that it would not only be difficult for the respondents, but also for all parties, including the prosecution, to go through the evidence with regard to each death and when it occurred.

11. On the issue as to whether the charge sheet was overloaded, counsel submitted that the act of charging accused person(s) with numerous counts of same nature or different, but arising out of the same transaction is referred to as overloading the charge sheet; that in other jurisdictions, such as the United States of America, the practice is referred to as

> " stacking" and is done in order to give the prosecution an advantage so that if some of the counts are dismissed then there is a likelihood that they will get conviction in other counts; that our system of criminal justice does not make a clear provision as to how many counts may be contained in a single charge sheet; that, however, judicial decisions of the High Court and the Court of Appeal have discouraged overloading of the charge sheet, and have recommended 12 counts per charge sheet; and that, considering the time taken by the prosecution to prepare the charges, leading evidence in each and every count by calling testimonies in respect of every victim, and production of expert reports, followed by the defence by every respondent individually, would not only be tedious, but also a waste of judicial time.

12. According to counsel, if public pronouncements by senior government officials in both mainstream and social media was anything to go by, the prosecution's intention was not to expedite the hearing but to punish the respondents indefinitely; and that no public interest would be served by having long and arduous proceedings that would be confusing to all parties. Counsel urged the court to compel the prosecution to select no more than ten counts to prosecute.

13. On his part, learned counsel for the appellant, Victor Mule, Deputy Director of Public Prosecutions also filed written submissions. In response to the ground that the information was defective, counsel submitted that the counts contained therein met all the legal requirements and, more particularly, the provisions of section 134 of the CPC, which provides for the substance and form of charges; that

each of the 191 counts contained a statement thereof and the particulars necessary to give reasonable information as to the nature of the offence; that the statement of each of the offences informed each of the respondents that they are jointly charged with Murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap. 63); and that, for each offence, the respondents were informed that on an unknown date between January 2021 and September 2023 at Shakahola area in Malindi Sub-County within Kilifi County, they jointly murdered the victims identified in each of the counts.

14. Counsel submitted that even if the information were defective as suggested by the respondents, which the appellant denied, any such defect would be curable under section 382 of the CPC, which provides:

    382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings

    Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

    Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

15. Regarding the issue as to whether the number of counts was oppressive and contravened the respondent's rights under Article 50(2) (c) and (e) of *the Constitution*, counsel submitted that the description "oppressive charge sheet or information" is alien to criminal law; that the charges in the information met the threshold of section 135(1) and (2) of the CPC as regards joinder of counts in view of the fact that all the respondents were charged with the same offence of murder; that the respective counts in the information were founded on the same facts; and that each count had a description of the offence charged.

16. Counsel further submitted that the respondents had not particularized how the information as is would prejudice and or embarrass them in their defence by reason of having been charged with the 191 counts in the information to invoke the court's power under section 135(3) of the CPC to order a separate trial of any count or counts thereof, or that they be tried separately for any one or more offences, and neither did they demonstrate how the information as is would contravene their right to fair hearing.

17. According to counsel, nothing would turn on the joinder of the respondents as the objecting respondents and their co-accused were properly charged together as provided for under section 136 of the CPC, which provides:

    136. Joinder of two or more accused in one charge or information

    The following persons may be joined in one charge or information and may be tried together—

    a. persons accused of the same offence committed in the course of the same transaction;

    b. persons accused of an offence and persons accused of abetment, or of an attempt to commit the offence;...

18. Citing section 20 of the *Penal Code*, counsel submitted that the respondents were properly joined in the information by dint of section 20 of the *Penal Code* under which every person who actually does

the act or makes the omission which constitutes the offence, does or omits to do any act for the purpose of enabling or aiding another person to commit the offence, aids or abets another person in committing the offence, and/or counsels or procures any other person to commit the offence, is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say that, in the last-mentioned case, he may be charged either with committing the offence or with counselling or procuring its commission.

19. With regard to the objection that the number of counts would delay the trial, counsel submitted that the decision as to the number of counts post-2010 is vested in the DPP under Article 157(6) (a) of *the Constitution*, which provides that the DPP shall exercise State powers of prosecution, and may "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"; that the said provision also vests in the DPP the power to determine the offence and the number of counts with which to charge accused persons, subject only to the provisions of Article 157(11) of *the Constitution*; and that the objecting respondents had not established how the prosecution of the counts, based on the same transaction and evidence, would delay the trial.

20. In its ruling dated 17th May 2024, the High Court (M. Thande, J.) held that the long period of alleged commission of the offences and the fact that some victims had not been identified by name did not render the charge sheet defective; that the details in each count contained sufficient information to the respondents to answer the same; that when the information was read to the respondents, they all responded with a plea of not guilty, indicating that they were sufficiently aware of and understood the charges they faced and the nature thereof; and that the objection on that ground that the charge sheet was defective therefore failed.

21. Turning to the objection on the ground that the information was overloaded, the learned Judge cited the case of Peter Ochieng v Republic [1985] eKLR (Peter Ochieng) where this Court considered an appeal where the appellant had been subjected to a charge sheet of 44 counts and held that it was undesirable to charge an accused person with so many counts in one charge sheet as that alone may occasion prejudice; that it was proper for a court to put the prosecution to its election, at the inception of the trial, as to the counts upon which it wishes to proceed; that usually, though not invariably, no more than twelve counts should be laid in one charge sheet, and that the others can be withdrawn under section 87(a) of the CPC.

22. In addition, the learned Judge cited the case of Eliphaz Riungu v Republic [1997] eKLR (Eliphaz Riungu) where the High Court cited with approval the case of Novac [1977] 65 CAR 107 (Novac) in which the court criticised the overloading of the indictment which contained 19 counts (out of an original 38) against four defendants, and which led to a long and complex trial taking, in all, 47 working days, which put an immense burden on judge and jury.

23. In the instant case, the learned Judge recalled the length of time it took just to read out the 191 charges against the respondents during plea taking. She concluded that it may take much longer for evidence to be adduced against each of the 31 respondents and recorded in respect of the 191 charges; that it will be virtually impractical to manage the trial, which is likely to be prolonged and clearly occasion delay in conclusion of the trial; and that this would lead to violation of their right to a fair hearing, particularly the right to an expedited hearing as enshrined in Article 50(2) (e) of *the Constitution*.

24. In addition to the foregoing, the learned Judge held that the reasonable thing to do in the interest of all concerned was for the prosecution to withdraw some counts in the information and remain with a manageable number; that proceeding with the trial with the information containing 191 counts was not in the public interest or in the interests of the administration of justice, contrary to the expectations

on the DPP in the exercise of prosecution powers as provided in Article 157(11) of the Constitution; and that, under Article 165(3) (d) (ii), the High Court has the power to intervene as well as the jurisdiction to interrogate the exercise by the DPP of his mandate in this matter. In conclusion, the learned Judge ordered thus:

> " 33. In the end and in view of the foregoing, I do concur with the defence that the charge sheet containing 191 counts is clearly overloaded. I accordingly direct the Prosecution to file an amended information with reduced counts not exceeding 12."

25. Aggrieved by the ruling and orders of the High Court (M. Thande, J.), the appellant filed the instant appeal on 4 grounds set out in its Memorandum of Appeal dated 1st July 2024, faulting the learned Judge for:

    (i) directing the filing of an information of counts not exceeding 12 in contravention of the Constitutional mandate of the DPP;

    (ii) directing the filing of an information of counts not exceeding 12 without applying her mind to the proper applicable tests;

    (iii) directing the filing of an information of counts not exceeding 12 in a manner not in conformity with the provisions of section 135(3) of the *Criminal Procedure Code* (Cap. 75); and

    (iv) arriving at a conclusion that was at variance with its analysis and finding that the charges were properly drafted.

26. In support of the appeal, learned counsel for the appellant, Mr. Jami Yamina (Acting Assistant Director of Public Prosecutions), filed written submissions, a list of authorities and case digest dated 17th October 2024. In his submissions, counsel elected to collapse the 1st and 4th grounds into one main ground and the 2nd and 3rd grounds into the second.

27. On their part, learned counsel for the respondents, M/s. Mouko & Company, filed written submissions dated 8th November 2024.

28. Having considered the record of appeal, the grounds on which it is anchored, the respective submissions of learned counsel, we form the view that two main issues fall to be determined, namely: whether the learned Judge applied the wrong tests or principles in faulting the joinder of the 191 counts in the information; and whether the learned Judge's decision contravened the DPP's constitutional mandate and the provisions of the CPC on joinder of counts.

29. On the 1st issue as to whether the learned Judge was at fault in disallowing the joinder of the 191 counts in the Information, we first take the liberty to replicate in extenso the dicta of the learned Judge who, on the authority of numerous judicial decisions that we have taken to mind, had this to say:

> " 20. The Court is aware that there is no legal provision in our laws that sets the maximum number of counts with which an accused person may be charged in a charge sheet or information. There is however useful guidance in case law.

21. In the oft cited case of Peter Ochieng v Republic [1985] eKLR the Court of Appeal considered an appeal where the appellant had been subjected to an overloaded charge sheet of 44 counts and stated:

> 'There is one other matter to which we should refer. It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts, upon which it wishes it to proceed. Usually, though not invariably, no more than twelve counts should be laid in one charge sheet. The others can be withdrawn under section 87 (a) of the *Criminal Procedure Code* (cap 75), which will entitle the prosecution to bring them again if necessary....'

(See R v Hudson and Hagan [1952] 36 CAR 94 at p 95)

In the more recent case of R v Novac & Others [1977] 65 CAR 107 at p 118 the Court of Appeal said:

> 'We cannot conclude this judgment without pointing out that, in our opinion, most of the difficulties which have bedevilled this trial, and which have led in the end to the quashing of all convictions except on the conspiracy and related counts, arose directly out of the overloading of the indictment. How much worse the difficulties would have been if the case had proceeded to trial on the original indictment, containing 38 counts, does not bear contemplation. But even in its reduced form the indictment of 19 counts against four defendants resulted, as is now plain, in a trial of quite unnecessary length and complexity.'

22. Flowing from the cited case, it can be readily seen that charging an accused person with many counts in one charge sheet is frowned upon. This is because of the potential prejudice that may be occasioned to such accused person. The Court of Appeal stated that in such circumstances, the prosecution should put to its election at the inception of the trial, as to the counts upon which it wishes it to proceed. The Court recommended that no more than 12 counts should be laid in one charge sheet.

23. And in the case of Eliphaz Riungu v Republic [1997] eKLR, O'kubasu and Owuor, JJ (as they then were) considered an overloaded charge and stated:

> 'Then in Novac [1977] 65 C.A.R. 107 the Court criticised the overloading of the indictment which contained 19 counts (out of an original 38) against four defendants and which led to a long end complex trial taking in all 47 working days which put an immense burden on judge and jury. In its judgment the court stated at pp.118 and 119
>
> 'Quite apart from the question whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wide and mere important question has to be

> asked whether in such a case the interests of justice were likely to be better served by one very long trial, or by one moderately long and four short separate trials.'
>
> The court in the above case was of the view that whatever advantages are expected to accrue from one long trial they were heavily outweighed by the disadvantages.
>
> … ….

24. As can be seen from the cited Novac case, the court faulted the prosecution for overloading the indictment which contained 19 counts against 4 defendants, which led to a long and complex trial lasting 47 working days. This put an immense burden on both judge and jury. The learned Judges went on to state:

> 'Recording of evidence even in respect of the first twenty counts will take a considerable length of time. As this taking of evidence in respect of the 90 counts continues, the applicant (Eliphaz Riungu) is expected to patiently sit in the dock waiting for his turn to listen to the evidence in the last three counts. We think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And *the constitution* which is the mother of all laws clearly states that the accused shall be afforded a fair hearing within reasonable time. Justice demands that the guilt be appropriately punished and the innocent be let free. A long trial which is likely to lead into confusion of prosecution case as to result into acquittal of the guilty is certainly not in interest of public interest and justice.'"

30. On the authority of the afore-cited cases, the learned Judge concluded that it is undesirable to have too many counts in a charge sheet, and that overloading an information militates against the public interest and the interests of justice. Hence, her recommendation that no more than 12 counts be contained in one information.

31. Taking issue with the reasoning and the conclusion drawn by the learned Judge, counsel for the appellant submitted that the court applied the wrong test in arriving at the impugned decision and, more specifically, the finding that the information was overloaded, and that it would occasion the accused persons prejudice due to the perceived lengthy, burdensome and confusing trial. Counsel drew the Court's attention to the general rule under section 135(1) of the CPC, submitting that offenses founded on the same facts, or form or are part of a series of offences of the same or a similar character, ought to be charged together. More specifically, counsel contended that each offense should, by dint of section 135(2) of the CPC, be described and set out in a separate charge called a count, the underlying policy being to enhance the effective and efficient administration of justice while promoting the right to a fair hearing

32. According to counsel, the 191 counts were in compliance with section 135(3) of the CPC, and their joinder could not occasion any prejudice to the accused persons and, accordingly, the question of an unfair trial did not arise. Counsel argued that all the 191 counts are founded on the same facts, and are in the same character; that the only distinction was the identity of the deceased; that, more importantly, the evidence to be presented in support of each count is the same for all the counts and, as such, no prejudice would be occasioned to any of the respondents; that the available evidence would

be admissible and corroborative of the evidence in support of one count after another in a manner that allows an accused properly to defend himself in each count; and that, by extension, the witnesses' testimony and the exhibits would be adduced or produced at one trial and for all or most of the counts.

33. Counsel cited the case of The People (DPP) v. Gierlowski [2021] IECA where the Irish Court of Appeal stated that:

> " Barron J. in The People (DPP) v. BK ... stated: - "While there may be cases where the trial judge may be able to charge a jury so that an accused is not unfairly prejudiced where evidence admissible on one count is inadmissible on another, in most cases the real test whether several counts should be heard together is whether the evidence in respect of each of several counts to be heard together, would be admissible on each of the other counts."

34. Addressing himself to the judicial authorities on which the impugned decision was founded, learned counsel submitted that the trial court ought to have applied the existing binding decisions in the specific circumstances of this case; that, by failing to do so, the trial court misapplied the decisions in Peter Ochieng and Eliphaz Riungu, whose circumstances were different, and which decisions addressed the specific circumstances in those cases; that none of the decisions in Peter Ochieng and Eliphaz Riungu set a maximum number of 12 counts chargeable in one information/charge sheet, nor declared that an excess of 12 counts is impermissible for overload; and that, therefore, there is no basis at law to direct reduction of the counts to a maximum of 12.

35. Counsel submitted further that the circumstances in Eliphaz Riungu are distinguishable from the instant case in that, at the time of filing his interlocutory appeal, Mr. Riungu was halfway through a trial in which he was facing only 3 out of the 93 counts that would have taken another 2 or so years to conclude; and that the court found that the time the case had taken while he sat listening to evidence in 90 counts unfairly lengthened the period for the conclusion of his trial in the 3 counts.

36. Counsel pointed out the fact that the charge sheet in Peter Ochieng's case had no less than 44 counts covering 12 different transactions, all charging at least 3 distinct offences of forgery, uttering, and stealing, and yet the prosecution could fairly have elected to proceed with some and drop others to eliminate the prejudicial effect. In Peter Ochieng, this Court approvingly cited a passage from the Court of Criminal Appeal of England in R v Hudson and Hagan where the court referred to the undesirability of a large number of counts in one indictment where prisoners are on trial on a 'variety of offenses'.

37. Counsel urged that, in Peter Ochieng, the mode of charging replicated into many counts numbering 36 (12 counts of stealing, 12 counts of obtaining, and 12 counts of forgery, all of the same series), but the court recommended that it would have been possible to pick 12 and still do justice to the case. Unlike in Peter Ochieng, counsel submitted that the information in the instant case does not reveal a variety of offenses, or even closer to 191 murders of the same series or similar character, but one distinct offense of murder spread over 191 counts found on the same facts and the same character committed against 191 children, and that the instant case is therefore distinguishable.

38. Turning to the Novac case, which was cited with approval in Eliphaz Riungu, counsel drew the Court's attention to the fact that the 4 accused individually faced a variety of offenses totalling 19 out of the initial 38 in some counts and jointly in others; that the 19 counts comprised one conspiracy charge against 3 accused alongside related specific offence counts connected to sexual assaults (buggery, gross indecency, persistently importuning in a public place for immoral purposes).

39. Counsel pointed out that the related offences were committed in different time periods, all outside the period of the commission of the conspiracy charges; that some accused persons were charged with

offences in counts separate from others accused in the same case; that the material times and material places of commission of the offences, and that the complainant victims were further varied in each of the counts; that the evidence in support of the counts depended on testimonies of several police officers who had kept the accused under surveillance at various distinct locations; that the trial was by jury, and that the trial judge had to surmount a big challenge instructing or summing up; and that the jury instructions, such as isolating evidence of the accused in a specific count from the rest presented a challenge termed by the court as akin to engaging in 'mental gymnastics' beyond their lay abilities.

40. According to learned counsel, the attributes of the Novac case do not feature in the instant case to warrant separating the counts/trials on grounds of overload of counts. On the afore-cited authorities, counsel submitted that some of the features in Novac are reflected in the case of Eliphaz Riungu thereby justifying its application in Eliphaz Riungu.

41. Distinguishing the instant case from Novac's and Eliphaz Riungu's, counsel submitted that the appellant's case is that all the accused persons, together with others not before the trial court, entered into a suicide pact to religiously fast to death for their souls to transition to 'Jesus'; and that in that regard, they face 238 counts of manslaughter charges in Mombasa CMCR 112 of 2023 (without any objection); that the separation of offenses as between murder and manslaughter among others is sufficient; that the causes of death are consistently aligned with the theory and, where the prosecution calls say 15 witnesses in support of the theory of a suicide pact roping in a minor in support of one count, this evidence is relevant, admissible and corroborative of all the other 191 counts; and that, in such a case, where the same evidence cuts across all counts, the case cannot be said to be unmanageable burdensome or unimaginably convoluted in proportion.

42. Counsel cited R v. Kray [1970] 1 QB 125 for the proposition that offenses cannot be regarded as of a similar character for joinder unless some sufficient nexus exists between them; that such nexus is certainly established if the offenses are so connected that evidence of one would be admissible on the trial of the other, but that it is clear that the rule is not restricted to such cases; that the judicial discretion whether or not to order separate trials should recognize the inevitable prejudice that was created when an accused had to face charges of two murders instead of one; and that, nevertheless, that consideration was not conclusive where the two cases exhibit unusual common features which rendered a joint trial desirable in the general interests of justice, regard being had to the interests not only of the accused in question, but also of other accused, the Crown, the witnesses, and the public.

43. In counsel's view, it was incumbent on the trial court to first determine whether the evidence in support of one or another count was admissible in others, and to what extent this could go in respect of all the 191 counts charged; that it is by doing so that the court would assign proper weight or 'burden' (if any) before concluding burdensomeness and unmanageability or convolution of unimaginable proportions that the court would face; and that the learned Judge ought to have considered the potential prejudice of ordering separate trials before arriving at its decision.

44. Counsel further submitted that, even in the Novac case, the court devised the principle of absolute necessity when it found it would be justifiable in certain instances to not sever a case on grounds of difficulties in managing a trial because of complexities and lengthy trial where the case was of an exceptional nature; and that the Shakahola cases are unprecedented in Kenya and notoriously exceptional enough to justify the application of this principle.

45. In conclusion, learned counsel submitted that offences of a similar character, or forming a series of similar offences, should be tried together unless an incurable prejudice might arise against the accused; that, in this regard, the true test that makes the charges 'undesirably too many or overloaded' is not the simple fact of being numerous; but that an overload of a charge is decipherable from the manner

in which the offenses and counts are charged and the prejudicial effect thereof. Counsel urged us to allow the appeal.

46. In rebuttal, counsel for the objecting respondents submitted that, in Peter Ochieng, the emphasis was on the length of time for prosecution of the overloaded charge sheet, which would have caused a lot of delay, confusion and inconvenience to all parties inclusive of the court if it were to be proceeded with or without reduction of the counts; that the appellant's contention that if the counts were to be reduced to 12 as directed by the court, then they would have to later proceed with the remaining counts, which is far from the truth; that the position is that the DPP may file fresh charges of the remaining counts if they found it necessary; and that the suggestion that they would have to file several charges later against the accused persons and call same witnesses is merely speculative and unrealistic.

47. According to counsel, the learned Judge appreciated that the DPP has wide powers in prosecution, but which are not absolute; that she took into account various cases on similar issues, which are no less than the present; that she referred and quoted the case of Eliphaz Riungu which had relied on the case of Novac, an English decision in which the court had expressed its doubts as to what advantage could accrue to the prosecution from one long trial; that she reminded herself of various decisions in similar cases which are more less the same as the present one; and that is how she reached the conclusion that the 191 charges should be reduced to no more than 12 counts.

48. Counsel further submitted that it was incumbent upon the appellant to show how different the decided cases relied upon by the accused persons and the court were different from the present case, but that the appellant failed to do so; that the authorities cited by the appellant have not recommended more charges; and that there is no reason to depart from the court's previous holdings in the cases of Peter Ochieng and Eliphaz Riungu, which are the leading authorities in the subject.

49. Having considered the impugned judgment, the rival submissions and the judicial decisions that inform the respective views of the learned Judge and counsel, we hasten to observe that no case is identical to the other in all respects so as to raise the expectation for a one-fit-all approach. In every case, care must be exercised to take account of the peculiar circumstances of each case, having regard to the nature of the offence or offences charged, the number of counts, the number of those accused, the nature of evidence anticipated at the trial, the number of witnesses intended to be called by both the prosecution and the defence, the practical procedure proposed to be followed to guarantee expedition and obedience to the constitutional guarantees of the right to fair trial.

50. That said, we need not overemphasise the peculiar nature and novelty of the offences in issue in the instant appeal, which call for purposive interpretation of the Constitutional right to fair trial, statute law and the *Criminal Procedure Code*, and having regard to the unique circumstances of this case. To this end, we take to mind the provisions of section 135 of the CPC, which reads:

    135. Joinder of counts in a charge or information

        1. Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

        2. Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

51. The 31 appellants are charged with one offence, to wit, the alleged murder of 191 victims in respect of whom the 191 counts are set out in the Information. It is also noteworthy that the offence charged is founded on the same set of facts. Section 135(1) of the CPC permits joinder of counts where the

offence or offences charged “are founded on the same facts, or form or are part of a series of offences of the same or a similar character”.

52. We agree with the learned Judge’s observation that “… there is no legal provision in our laws that sets the maximum number of counts with which an accused person may be charged”. Our only point of departure is the learned Judge’s interpretation and application of the persuasive authority of Peter Ochieng v Republic [1985] eKLR which, in our respectful view, is distinguishable from the instant case.

53. In Peter Ochieng’s case, “[t]here were twelve separate transactions which were the subject in all of no less than forty-four counts charging the Appellant with forgery, fraudulent false accounting, uttering and stealing by a person employed in the public service, covering a period of nearly six months.” As the Court aptly observed, “[a]mong his duties was the receipt of invoices from transport companies which had ferried police officers on travel warrants issued by the police, and the preparation of payment vouchers to those companies for payment on invoices so presented. His duty on preparation of the voucher was to pass the voucher, the invoice and the accompanying travel warrants, to the authorising officer who would then authorise payment. Payment on the voucher would then be made by cashier to the transporter and the transporter would sign the voucher at the rear on receipt of payment.”

54. It is noteworthy that Peter Ochieng v Republic (supra) involved 12 different transactions, 4 accused persons, 4 different offences with multiple counts of forgery, fraudulent false accounting, uttering and stealing by a person employed in the public service” for a period of over 6 months, amounting in all to 44 counts.

55. We appreciate that the series of transactions involving 4 accused persons in Peter Ochieng’s case, the multiplicity of offences and counts, the number of State departments and offices used to perpetrate the different offences, the array of witnesses to be called in support of the prosecution case and the expert evidence required to prove each of the 44 counts in the 4 offences charged, all presented a measure of complexity that led the trial court to conclude that the 44 counts with which Peter Ochieng and 4 others were charged resulted in an undesirable overload of the charge sheet which, in turn, posed the risk of prejudice and possible breach of his and the other accused persons’ right to a fair trial.

56. The same applies to the case of R v Novac & Others [1977] 65 CAR 107, which the learned Judge considered in reaching her decision. In that case, the court observed that “… most of the difficulties which … bedevilled [the] trial, and which … led in the end to the quashing of all convictions except on the conspiracy and related counts, arose directly out of the overloading of the indictment”. It must be borne in mind that Novac’s case involved 3 accused persons (Novac & 2 others), who were charged with 38 counts of numerous offences, namely: theft of 2 motor vehicles; and, as against Novac, three specific offences of indecent assault termed “aggravated criminal sexual assault; ” on named boys under the age of sixteen . We find no difficulty appreciating the trial court’s view in Novac’s case, which involved 38 counts of unrelated offences leading to the complexity occasioned by the joinder and trial of those offences in one proceeding, which understandably posed the risk of “embarrassment and prejudice to the defence”.

57. Turning to the more graphic case of Eliphaz Riungu v Republic [1997] KEHC 88 (KLR) on which the learned Judge anchored her decision, it is also noteworthy that, out of the 93 counts with which the five accused were charged, only three counts related to him. It was for that reason that he sought, inter alia, “a declaration that continued hearing of Chief Magistrate Criminal Case No. 2208 of 1995 Republic versus Kamlesh Mansukhalal Damji Pattni, Wilfred Karuga Koinange, Eliphaz Riungu, Michael Wanjihia Onesmus and Goldenberg International Limited [then] pending in the Court of the Chief Magistrate at Nairobi on the basis of the indictment laid in the charge sheet has, is likely

to contravene the provision of Sections 70, 77(1) and 77(2) of the [defunct] Constitution of Kenya in relation to [him]"; and severance of charges and reduction of counts in a separate trial of the 3 counts that affected him. The constitutional provisions relied on provided guarantees to the applicant's inalienable right to a fair trial.

58. Eliphaz Riungu's case was that he was accused No. 3; that only three of those counts, namely count Nos. 91, 92 and 93 (relating to forgery, theft and attempting to obtain by false pretence) affected him; that his application for severance of the charges and reduction of the counts was dismissed; that, as a result of the pendency of the trial, he was unable to plan his affairs having had the same hang over his head for the last one- and-a-half years; that the trial was likely to take months if not years to conclude due to the magnitude of the charges and number of accused persons involved; that the trial would prove extremely expensive due to its length, the complexity of the charges and the evidence to be led; and that,if the charges were not severed and the counts reduced, he would be compelled to remain in court for an unnecessary period of time, thus incurring costs and unnecessary expenses which he could hardly afford.

59. The pertinent question in the three afore-cited cases and in the instant case was articulated in R v Novac (supra) thus:

> " Quite apart from the question whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wider and more important question has to be asked whether in such a case the interests of justice were likely to be better served by one very long trial, or by one moderately long and four short separate trials."

60. We take to mind and share the sentiments of the learned authors in Blackstone's Criminal Practice (1992) on the issue of joinder of counts and indictment. Paragraph D8.29 at p.1119 reads:

> " Two or more accused may be joined in one indictment either as a result of being named together in one or more counts on the indictment or as a result of being named individually in separate accounts, albeit that there is no single count against them all.
>
> … ….
>
> … the decision whether or not to grant severance is one within the discretion of the trial judge, and that the decision should be in favour of joint trial unless the risk of prejudice is unusually great."

61. In support of a joint trial in R v Ludlow (1971) AC 29, Lord Pearson stated, inter alia:

> " In my opinion this theory - that a joinder of counts relating to different transaction is in itself so prejudicial to the accused that such a joinder should never be made - cannot be held to have survived the passing of the Indictments Act 1915… Also in most cases it would be oppressive to the accused, as well as expensive and inconvenient for the prosecution to have two or more trials when one would suffice."

62. In addition to the foregoing, our reading of the headnote in the case of R v Assim [1966] 2 QB 249 sums the position admirably as follows:

> "Questions of joinder, be they of offences or of offenders, are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice …"

63. From the afore-cited authorities, it is safe to conclude that a joint trial is preferable unless it can be shown that a joint trial would be prejudicial or embarrassing to the accused person or persons. It is not lost on us that the question of joinder, whether of offences or of offenders, are matters of practice on which the Court, unless restrained by statute, has inherent power both to formulate or vary its own rules in light of current experience and the needs of justice. Simply put, there is no hard rule that mandates joinder or severance of charges or of offenders in any particular case. Declining Eliphaz Riungu's application for severance and separate trial of the three counts by which he was personally affected, the trial court in that case correctly observed that each case depends on its own peculiar circumstances.

64. To our mind, the instant case is distinguishable from those of Peter Ochieng, Novac and Eliphaz Riungu, whose circumstances stand in sharp contrast in that, they involved multiple counts of several offences tantamount to an overload, numerous co-accused persons, apparent evidential burdens, all of which posed the risk of complexity and prejudice to the defence on account of prolonged trials. However, the length of a trial cannot, of itself, be the sole reason for severance of counts or offences, unless justice demands directions to that end.

65. We form this view mindful of the decision of the United States Court of Appeals in United States v. Butera 677 F.2d 1376 (11th Cir. 1982) where the court observed that:

> "In order to demonstrate that the defendants have engaged in the 'same series of acts or transactions' the government must show that the acts alleged are 'unified by some 'substantial identity of facts or participants.' United States v. Dennis, 645 F.2d 517, 520 (5th Cir.), cert. denied… This requirement is designed to prevent joinder of separate and unrelated offenses in multiple defendant situations. See United States v. Levine, 546 F.2d 658 (5th Cir. 1977) (two entirely separate conspiracies; misjoinder); United States v. Gentile, 495 F.2d 626 (5th Cir. 1974) (separate and individualized drug sales; misjoinder); United States v. Bova, 493 F.2d 33 (5th Cir. 1974) (no indication that events are part of series; misjoinder)."

66. In exercise of its discretion to uphold joinder of offences or of offenders, or to order severance of offences, the trial court would also do well to be guided by case law in the manner described by Sachs, J. in the case of R v Assim (supra) thus:

> "…questions of joinder, be they of offences or of offenders, are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Thus, in Tizard's case, it was specifically stated that the relative principles have been evolved as rules of practice, and attention was drawn to the fact that the court need not be astute so to define the rules as to preclude joinders in view of the overall discretion of the judge to order separate trials where the interests of justice so require. Moreover, in R. v. Lockett, Grizzard, Gutwirth and Silverman, where the position as regards joinder of offences was fully reviewed shortly before

the passing of the Indictments Act, 1915, it was stated by SIR RUFUS ISAACS, C.J. (sitting with BRAY, J., a master of procedural questions, and LUSH, J.) that:

> '... in dealing with these and similar questions which arise upon indictments we are only dealing with matters of practice and procedure devised by the judges who have presided in the past at criminal trials, for the purpose of protecting prisoners from oppression, and that they are not laid down as, and are not, rules of law, but are guides to the course which will and can in such circumstances be adopted by judges, which will entitle them, if as a matter of prudence and discretion they think it right, either to quash the indictment or to call upon the prosecution to make its election.'"

67. Be that as it may, the powers and discretion of the prosecution in preferring charges, preparing the charge sheet and prosecuting the charge cannot be wished away. However, if this power and discretion is exercised in such a manner as to result in overloading of a charge sheet to the prejudice of the accused, it would be subject to challenge and intervention by the courts. Also worthy of consideration are the factors identified by the Irish Court of Appeal in R v Christou [1997] AC 117, including: the complexity of the evidence; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the length of the trial having regard to the evidence to be called; and the impact of ordering two or more trials on a defendant and his family, on the victim and their families, on press publicity.

68. In Ludlow v Metropolitan Police Commissioner [1971] AC 29, Lord Pearson held that:

> " The judge has no duty to direct separate trials ... unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice. In some cases, the offences charged may be too numerous and complicated ... or too difficult to disentangle... so that a joint trial of all the counts is likely to cause confusion and the defence may be embarrassed or prejudiced. In other cases, objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused..."

69. Other factors that may influence a trial court's decision to sever offences or counts in proper cases include the need to balance the interests of the accused with that of the public, witnesses and victims of the offence or offences charged. In R v Kray [1970] 1 QB 125, the subject was an application for severance of an indictment which related to two alleged murders some 18 months apart. The indictment charged A with committing both murders; B with being accessory to the first and committing the second; and other defendants with either committing the first or with being accessory to the second. The Court of Appeal, while upholding the trial court's refusal to sever the indictment observed that:

> " When the judge came to exercise his discretion to sever the indictment he had to recognise - and we think he did recognise the inevitable prejudice which is created where a defendant has to face charges of two murders instead of one. Nevertheless, this consideration is not conclusive where the two cases exhibit unusual common features which render a joint trial desirable in the general interests of justice, regard being had to the interests, not only of the defendants in question, but also of other defendants, the Crown, the witnesses and the public. These two cases did exhibit such features, the two murders having many unusual factors in common. Thus, each was committed in cold blood and without obvious motive: each bore the stamp of a gang leader asserting his authority by killing in the presence of

witnesses whose silence could be assured by that authority. Neither killing would have been possible except on the basis that members of the "firm" would rally round to clear up the traces and secure the silence of those who might give the offender away. All these factors made it desirable in the public interest that these two unusual cases should be examined together, and this was also in the interests of one of the defendants, namely, Anthony Barry. Finally, the interest of the press in this affair was so great that if the two murders had been tried separately the publicity attending the first trial would have made a fair trial of the remaining charges impossible."

70. In the instant case, it is instructive that the 31 accused persons are charged with one offence of murder of 191 known and unknown persons to whom the counts relate; and that the offence was founded on one set of transactions, to wit, an alleged suicide pact unified by some substantial identity of facts or participants. We are persuaded by learned counsel for the appellant that, apart from the identification of the individual bodies by their next of kin (where possible), the evidence of the cause of death in one count would invariably apply to the others, unless otherwise proved by the post-mortem reports; that the 191 post-mortem reports would invariably be produced by one or more pathologists who carried out the post-mortem; that other formal witnesses, such as the investigating officers would testify in relation to their findings; and that the appellants, who are apparently represented by one counsel, would have the opportunity to present their individual defences. Needless to say, any cross-examination of such witnesses would be in relation to the entire case as opposed to the 191 counts.

71. In view of the foregoing, we do not see how this case can be termed complex on account of the perceived "overload" of counts. The very fact that the appellants jointly face one charge of murder allegedly perpetrated by means of the same series of acts or transactions dispels the respondents' fear that the trial would prejudice them. While the learned Judge correctly identified the general principles and factors that call for joinder of counts or offenders, or for the severance of counts, we form the respectful view that she was at fault in applying the wrong tests or principles to the circumstances of this case; and in faulting the joinder of the 191 counts in the information.

72. Turning to the 2nd and last issue as to whether the learned Judge's decision contravened the DPP's constitutional mandate or the provisions of the CPC on joinder of counts, the learned Judge observed:

> " 27. The right to an expedited trial is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict. Accordingly, this Court must ensure that the right of the Accused in this regard is protected throughout the trial.
>
> … ….
>
> 31. The office of the DPP is an independent constitutional office which is not subject to the control, direction and influence of any other person… The independence of that office is however not absolute. Article 157(11) requires the holder of the office to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process in exercising the powers conferred by *the Constitution* and the Act."

73. Faulting the learned Judge for the impugned decision, counsel for the appellant submitted: that the DPP properly exercised its professional judgment in instituting the 191 counts in line with this Court's guidance in the Peter Ochieng case to those who make prosecutorial decisions on joinder of counts; that the learned trial Judge erred in law in finding that the 191 counts fell short of the expectation under Article 157(11) of *the Constitution*; that if the trial court's direction to elect a maximum of 12

counts was left to stand, a number of problematic consequences would arise; that the remaining 179 counts may proceed later in batches of an impossible 15 cases, resulting in much more burdensome work; that prosecution witnesses would suffer great inconvenience for being required to testify up to 15 times; that some victims' families would have to contend with the reality that their cases would never reach the court; that it would be extremely expensive to the court and the parties to facilitate witnesses in 15 separate trials against limited judicial time, and the needs of other cases in addition to the dangers of delays, memory lapses, conflicting findings on the same issues, or secondary judicial-based victimization of surviving traumatized victims; and that, finally, there is the potential violation of the rights to a fair trial enjoyed by the deceased child victims through their surviving immediate family members.

74. According to counsel, the DPP's decision to institute the 191 counts was aimed at promoting the public interest and the interests of the administration of justice as enshrined in Article 157(11) of *the Constitution*. Counsel submitted that the DPP's decision was also in tandem with the rules on joinder of counts and offenders under section 135(1) and (2) of the CPC; that the DPP enhanced victims' rights of access to justice and a fair trial as enshrined in Article 50(1) of *the Constitution* by ensuring that the information appreciated the magnitude of the crime, a fact that would not only enhance victim participation at sentencing, but also allow the court to punish and sentence the accused only for the deaths for which they had been tried and convicted; and that, exclusion of the 179 counts would reduce the aggravated nature of the charges and pose the potential for miscarriage of justice against the victims and the public, which can only be cured by trial for each death.

75. Counsel cited the case of Waswa v Republic [2020] KESC 23 (KLR) where the Supreme Court held that:

> "The trial Judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution, and, by acknowledging the victim's interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary."

76. In conclusion, counsel contended that the learned trial court should have exercised great deference to the DPP as far as the number of counts is concerned, in line with the independence of the DPP under Article 157 (10) of *the Constitution*.

77. On their part, counsel for the respondents submitted that the court's supervisory powers over subordinates is to ensure that they do not go rogue when exercising their powers; that Article 157(11) of *the Constitution* does not give the DPP absolute rights to do what he wishes, but to be fair for purposes of administration of justice, which includes both the victim and the accused persons; that those powers are not absolute, and that the DPP must consider both public and private interest which, in their view, includes fair trial as is envisaged in Article 50 (2) (e) of *the Constitution*.

78. With due respect to the rival submissions of learned counsel, we hasten to observe that nothing turns on this issue. Granted, Article 157 of *the Constitution* establishes the office of the Director of Public Prosecutions (DPP) whose powers and functions are, inter alia: to prosecute criminal cases and related matters; to initiate and prosecute criminal cases in any court, except a court martial; to take over and continue criminal proceedings started by another person or authority; and to decide to charge and determine the charges to be brought in a criminal case.

79. Be that as it may, those powers are by no means absolute. While the office of the DPP is an independent constitutional office which is not subject to the control, direction and influence of any other person, it is nonetheless subject to the constitutional imperatives of fair trial and the administration of justice with regard to which the High Court plays a pivotal role. To this end, Article 165 of *the Constitution* establishes the High Court as a superior court with unlimited original jurisdiction in civil and criminal matters. In discharge of its judicial functions in criminal matters, the court has supervisory jurisdiction over, among others, the DPP to ensure that, in exercise of the powers conferred by Article 157, the Director of Public Prosecutions has regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. To this end, the court exercises wide discretionary powers as was the case here.

80. In principle, a judge's discretionary decision can only be challenged on grounds that the judge: acted outside their legal authority; failed to consider relevant factors; considered irrelevant factors; reached a decision that is demonstrably unreasonable or irrational; abused their discretion by using it for an improper purpose; or followed improper procedures when making the decision. In essence, such a decision cannot stand if, based on the facts and law presented, it was "plainly wrong" (see Joseph Lendrix Waswa v Republic [2020] eKLR; and Ruto v Republic [2024] KEHC 316 (KLR)).

81. One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. Black's Law Dictionary, 10th Edition defines judicial discretion as:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

82. The Supreme Court of Kenya in Joseph Lendrix Waswa v Republic [2020] eKLR had this to say of judicial discretion:

> " 72. Discretionary pronouncements of a Court, as we have stated in several decisions, form an integral part of a Court's jurisdiction and should not be interfered with unless an Appellate Court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a Court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice."

83. The doctrine of judicial discretion as defined in De Smith, Stanley A., and J. M. Evans. "De Smith's Judicial Review of Administrative Action", 4th Edition. London: Stevens and Sons Ltd., 1980. –

> " is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem."

84. In the same vein, Keith Hawkins in "The Use of Discretion", Oxford University Press UK (1992, 11, 11) observed as follows:

> " discretionary decisions are those where the Judge has an area of autonomy free from strict legal rules, in which the Judge can exercise his or her Judgment in relation to the particular circumstances of the case. Discretion is the space between legal rules in which legal actors

may exercise a choice in speaking of autonomy and choice, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles or by reference to a list of relevant factors to be considered. While discretion permeates both the Common Law and many, if not most, statutory instruments discretionary powers are never absolute and must also be exercised within a broader legal and social context."

85. We find nothing to suggest that, in exercise of her discretion in the impugned decision, the learned Judge acted in contravention of the DPP's constitutional powers and functions. Neither was she in violation of the *Criminal Procedure Code* as contended by the appellant or at all. To our mind, the learned Judge properly invoked her autonomy and exercised her discretionary powers in discharge of her judicial duty over a matter which neither *the Constitution* nor statute law or the rules of procedure in criminal cases dictate any particular course of action. Accordingly, this ground of appeal fails.

86. Having carefully considered the record as put to us, the grounds of appeal, the rival submissions, the cited authorities and the law, and having found for the appellant on the 1st issue, we reach the inescapable conclusion that the appeal succeeds and is hereby allowed. Consequently, the impugned part of the Ruling and Orders of the High Court of Kenya at Malindi (M. Thande, J.) dated 17th May 2024 directing the DPP to reduce the counts in the charge sheet to no more than 12 is hereby set aside. Orders accordingly.

87. Finally, if it pleases the Hon. the Chief Justice, we humbly recommend that, in view of the public interest surrounding this case, a Judge of the High Court be appointed to hear this case on a day-to-day basis until final determination.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR