Director of Public Prosecutions v Attorney General & 12 others (Civil Appeal 206 of 2016) [2022] KECA 397 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 397 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 206 OF 2016

MA WARSAME, F SICHALE & HA OMONDI, JJA

MARCH 4, 2022

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

ANNE MUTAHI ..... 2ND RESPONDENT

KAUSHIK SHAH ..... 3RD RESPONDENT

LES BAILIE ..... 4TH RESPONDENT

PATRICK OBATH ..... 5TH RESPONDENT

LAMIN MANJANG ..... 6TH RESPONDENT

KARIUKI NGARI ..... 7TH RESPONDENT

CHEMUTAI MURGOR ..... 8TH RESPONDENT

ROBIN BAIRSTOW ..... 9TH RESPONDENT

SAMWEL KAMAU MACHARIA ..... 10TH RESPONDENT

NANCY OGINDE ..... 11TH RESPONDENT

ROYAL CREDIT LIMITED ..... 12TH RESPONDENT

OFFICIAL RECEIVER ..... 13TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (W. Korir, J.) dated 26th February 2016 in Miscellaneous Civil Application No.381 of 2014)

JUDGMENT

1. On 7th October, 2014 the National Police Service, through its Directorate of Criminal Investigations, served upon Standard Chartered Bank (SCB) nine requisitions to compel attendance dated 6th October, 2014 signed by Chief Inspector Michael Kimilu. The requisitions required the 2nd to 10th respondents to appear before the said police officer at the CID Headquarters on 9th October, 2014 at 10 a.m. The requisitions were issued under Section 52(1) of the *National Police Service Act*, 2011, and indicated that Chief Inspector Michael Kimilu was making inquiries into an alleged offence of stealing by directors contrary to Section 283 of the Penal Code.

2. The requisitions were directed to Anne Mutahi, Kaushik Shah, Les Bailie, Patrick Obath, Lamin Manjang, Kariuki Ngari, Chemutai Murgor, Robin Bairstow and Nancy Oginde the 2nd to 10th respondents. The 2nd to 9th respondents were at the time directors of SCB having been appointed to the board of SCB on diverse dates between 19th February, 2004 and 16th August, 2011. The 10th respondent was at the time the company secretary having been so appointed in 1999.

3. The 2nd to 10th respondents, aggrieved by the said decision, moved the High Court and obtained leave to commence judicial review proceedings. In granting leave, the Court also stayed the requisitions to compel their attendance at the Directorate of Criminal Investigations headquarters. This paved way for the said respondents to institute substantive proceedings seeking judicial review orders vide a Notice of Motion application dated 17th October 2014. They sought orders of certiorari to quash the requisitions; prohibition against the police or any of its agencies or departments from investigating any complaint upon which the said requisitions were issued and a prohibition against the Director of Public Prosecutions, the appellant herein, from prosecuting the 2nd to 10th respondents in respect of any matter arising out the requisitions.

4. Their case was that the offence of stealing by directors is created by Section 282 of the Penal Code and only relates to theft by directors of property belonging to their company. They submitted that at no time did SCB make any complaint to the National Police Service of any theft of its property by any of its directors. They pointed out that section 283 of the Penal Code on the other hand provides for the offence of stealing by agent. In this regard they argued that they were not directors at the time material to the matters which are subject of the intended investigation and without new evidence, the requisitions to compel their attendance were only intended to serve a collateral purpose rather than a lawful one and were thus an abuse of process and power. They asserted further, that the process placed into motion by the requisition to compel their attendance was a violation of their right to fair administrative action, the same being arbitrary and capricious and in so proceeding, the National Police Service acted in excess of its statutory powers in acting upon mistaken premise and facts.

5. The 2nd to 10th respondents averred that by a letter dated 20th May, 2014, the Banking Fraud Investigation Unit of the National Police Service advised the Chief Executive Officer of SCB of its intention to conduct further investigations. SCB responded through a letter dated 18th June, 2014, informing the said Investigation Unit, inter alia, that whereas they wished to co-operate with the investigators in relation to any further enquiries, they were of the view that the issues raised by the investigators did not constitute any new fact, information or circumstances supporting any valid grounds for further investigation. It was their position that instead of addressing the issues raised in their reply, the National Police Service had issued requisitions dated 6th October, 2014 requiring the 2nd to 10th respondents to attend before the investigator on 9th October, 2014.

6. Finally, the 2nd to 10th respondents argued that the appellant would also be acting in excess of his constitutional and statutory powers in initiating criminal prosecution in a matter in which the Attorney General, who at the material time had the prosecutorial powers now bestowed upon the appellant, had previously advised that there was no basis or foundation for criminal prosecution, the Attorney General having determined that the matter was a civil dispute.

7. The 11th and 12th respondents and Madhu Paper International Ltd were included in the judicial review proceedings as interested parties. It is apparent that the Official Receiver, the 13th respondent, has since been appointed in respect of the said Madhu Paper International Limited. For purposes of this judgment, reference to the 13th respondent may also mean Madhu Paper International Limited unless the context stipulates otherwise.

8. The judicial review proceedings were opposed by the appellant, the 1st respondent and the 11th to 13th respondents on various grounds.

9. The 1st respondent's case was that the 2nd to 10th respondents had not made any claim against the Attorney General; that the decision sought to be quashed was not made by the Attorney General; that it would be a breach of the rules of natural justice to issue orders against the police officer who made the requisitions since the said officer had not been made a party to those proceedings; that the jurisdiction of the police officer to issue the requisitions had not been challenged; that the 2nd to 10th respondents will not suffer any prejudice if they comply with the requisitions; and that it is against public interest to prohibit the police from investigating crimes.

10. The appellant took the position that that although Mumbi Ngugi, J. (as she was then) in her decision in Petition No. 244 of 2006 was not directing the DPP to re-open investigations, her observations ought to be accorded consideration by the DPP in exercising his discretion to direct re-opening of investigations as he did in issuing direction to the Director of Criminal Investigations to re-open investigations in the matter as he is entitled to do under the provisions of *the Constitution* and the *Office of the Director of Public Prosecutions Act*, 2013. It was the DPP's case that the decision to re-open the matter was also necessitated by further evidence and documents that the complainants had provided to the Judges and Magistrates Vetting Board (the Board) during the vetting of judges who had handled the appeal in the dispute over the KShs.55 million, the subject of the criminal complaint. According to the DPP, there has never been any doubt whatsoever that SCB received the sum of KShs.55 million on the account of its customers, the complainants therein, but failed to credit the same to their account and instead fraudulently converted the same to its own use thus committing a serious criminal offence.

11. On its part, the 11th to 13th respondents took the additional position that the judicial review proceedings were aimed at reviewing the judgment in Petition No. 244 of 2006 *Samuel Kamau Macharia & 2 Others v Attorney General & Another [2013] eKLR* through the back door. Further, they asserted that the proceedings were aimed at stopping the exercise of constitutional powers by the appellant.

12. To put the matter in perspective, the dispute between the 11th, 12th, Madhu paper International Limited and SCB started in 1990 when the 11th respondent alleged that SCB had received KShs.55 million on their behalf but failed to release the money to them. In a bid to get their money, they also filed Nairobi HCCC No. 1713 of 2001 *Madhupaper International Limited & 2 Others v Standard Chartered Bank Kenya Limited* which case was dismissed on 23rd April, 2010 for want of prosecution. These parties filed Nairobi Civil Appeal No. 58 of 2011 *S. K. Macharia & Another v Standard Chartered Bank Limited & Another [2019] eKLR* which was still pending determination in the Court of Appeal.

13. The 11th respondent also reported an alleged theft of KShs.55 million by SCB to the Banking Fraud Investigation Unit. Several letters were exchanged between the 11th respondent, SCB, the

Banking Fraud Investigation Unit and the Attorney General.The Banking Fraud Investigation Unit recommended the prosecution of SCB. On 9th January, 2003 the Banking Fraud Investigation Unit wrote to the 11th respondent conveying the opinion of the Attorney General advising the parties to resolve the matter amicably. On 8th September 2005, the Banking Fraud Investigation unit again sought the prosecution of SCB upon covering the issues that the Attorney General had raised in his earlier recommendation not to prosecute. Again, through a letter dated 17th October, 2005, the Attorney General responded to the Banking Fraud Investigation Unit maintaining lack of basis for prosecution and stating that the dispute was more of a civil nature and that the file should be closed with no further police action.

14. This opinion formed the basis of the advise by the then holder of the position of Director of Public Prosecutions, which at the time fell under the Attorney General informing the 11th 12th and Madhu Paper International Limited that no criminal proceedings against SCB would be instituted. This prompted them to file Petition No. 244 of 2006 Samwel Kamau Macharia & 2 Others v Attorney General & Another seeking to quash the Attorney General's letter dated 26th October, 2006 and an order of mandamus to compel the Attorney General "to act on the complaint against the said bank and its directors in accordance with *the Constitution* and the law." On 19th December, 2013 Mumbi Ngugi, J., delivered judgement and dismissed the petition in which she also held that the appellant was mandated to review the decision whether to prosecute or not to prosecute SCB. On 28th January, 2014, Counsel for the 11th 12th and Madhu Paper International Limited wrote to the appellant seeking a "review of the decision by the Attorney General not to prosecute" and asking for the re-opening of "investigations with a view to preferring charges in respect of what in our clients' view is a straight forward case of theft of their money by the Bank." On 7th April, 2014, the appellant wrote to the Director of Criminal Investigations directing fresh investigations resulting in the requisitions to attend that were subject of the judicial review proceedings culminating to the present appeal.

15. In its decision, the trial court (Korir, J.) framed four issues for determination: whether the Attorney General was a proper party to these proceedings; whether the applicants were liable for offences alleged to have been committed when they were not directors of SCB; whether the requisitions issued to the applicants are proper; and whether the DPP legitimately exercised his power in reviewing the decision not to prosecute SCB. The Court found merit in the application in the following terms:

> " 106. The requisitions issued to the [2nd to 10 th respondents] by Chief Inspector Michael Kimilu were thus premised on unlawful exercise of power by the DPP. The said requisitions are therefore quashed. Consequently, the Kenya Police and the DPP are prohibited from commencing any investigations or prosecution of the [2nd to 10th respondents] based on the decision made by the DPP through the letter dated 7th April, 2014 to review the decision made by the Attorney General on 26th November, 2005 not to prosecute SCB. There will be no order as to costs."

16. The decision triggered the present appeal. Through its memorandum of appeal dated 8th September 2016, the appellant raised a total of thirty-five grounds of appeal against the whole decision made by the High Court. The appellant faults the learned judge in several respects. The grounds largely revolve around the error by the judge in not affirming the appellant's power to review its decision to prosecute and recommend the re-opening of investigations in instances where the appellant had previously made a decision not to prosecute and the circumstances surrounding the exercise of such powers in the matter at hand.

17. The appellant filed submissions which its counsel, Mr. Solomon Njeru relied on during his oral submissions. Rehashing the facts, counsel pointed this court to the provisions of section 5(4) of the Office of Director of Public Prosecutions (ODPP) Act which clothes the appellant with powers to review the decision to prosecute under certain circumstances. The appellant faults the trial court for treating the appellant's letter as an actual review yet it was merely requesting the police to re-investigate and forward the file to the appellant for his review under the said section 5 of the ODPP Act. Counsel further faults the trial court for quashing the said notices as not having specific particulars thereby dealing with the merits of the notices. Counsel contends that the notices complied with the provisions of section 52(1) of the National Police Service Act, that the 2nd to 10th respondents were merely called upon to provide information and that they were not treated as suspects.

18. The appellant also faults the trial court for sitting on appeal against the judgment of Mumbi Ngugi, J., in Petition No. 244 of 2006. That the trial judge had no jurisdiction to revise the said decision of the court with concurrent jurisdiction. He concluded by submitting that at the time of instituting the judicial review proceedings, no decision to charge or not to charge had been made as investigations were not complete and asked that the appeal be allowed.

19. Dr. Kamau Kuria, SC, appeared for the 11th to 13th respondents. He associated himself with the submissions made on behalf of the appellant. He urged that his clients had a right to be restituted for the sum of Kshs.55 million being victims of crimes as protected under Article 50(9) of *the Constitution*. Further, that the 11th to 13th respondents are victims who have the right to property. Counsel faulted the trial court for usurping the constitutional mandate of the appellant in issuing the orders of certiorari and prohibition when the appellant had not acted in excess and had acted in exercise of constitutional powers. He concurred with the appellant that the trial judge's decision was based on a misapprehension of the law and that judicial review does not lie against the decision of the High Court with concurrent jurisdiction.

20. From the written submissions dated 30th April, 2020, Senior Counsel's position is further expounded. The 11th to 13th respondents reduced the 35 grounds of appeal under six broad headings. First, the grounds under which orders of certiorari and prohibition may be granted. Second, the conception of review. Third, the jurisdiction to review the appellant's decision under Article 157(6)(a) of *the Constitution*. Fourth, the doctrine of separation of powers. Fifth, the facts and finally, an analysis of the judgment of the superior court.

21. Accordingly, they submit that judicial authority is vested in courts and tribunals under Article 159 of *the Constitution*. Once the DPP decides to prosecute a person, the matter goes to the criminal court to determine their guilt or otherwise. The submissions fault the High Court for mixing three different jurisdictions. The first one is under Article 165(6) on judicial review which was exercised correctly by the Mumbi Ngugi, J., and wrongly by the superior court in entering the arena that courts should keep off in reviewing the DPP's decision. In this regard they cite the case of Honourable *Philomena Mbete Mwilu v DPP and Others Constitutional Petition No.295 of 2018*. The second jurisdiction cited is that of the appellant under Article 157(6) to institute or discontinue proceedings. This they argue resembles section 26 of the former Constitution and relying on *Githunguri v Republic (1985 KLR 91)* maintain that the appellant did not act arbitrarily, capriciously or oppressively or contrary to public policy as no oppression could accrue from investigations. The third jurisdiction is that of the criminal court which tries the suspects. That the court misdirected itself as to the applicable law and made an illegal order in the sense that the process which it stopped was yet to be subjected to and would be guided and safeguarded by the criminal court.

22. The 11th and 12th respondents also seek costs for these proceedings as against the 2nd to 10th respondents and relies on the South African case of *National Director of Public Prosecutions v Jacob G. Zuma (9573/08) (2009) ZASCA 1 (12 Jan 2009)* where costs were awarded to the Director of Public Prosecutions for three counsels in a matter involving setting aside of the order quashing review. The 11th and 12th respondents also filed their index and authorities dated 30th April, 2021 in support of the submissions.

23. In opposing the appeal on behalf of the 2nd to 10th respondents, Mr. Oraro, SC started off by indicating that the decision by Mumbi Ngugi, J. had nothing to do with the present matter as the 2nd to 10th respondents were not parties to that case. Senior counsel proceeded to set out the circumstances upon which the complaint for payment of Kshs.55 million by the 11th to 13th respondents emanated and the ensuing investigations and litigation that the 2nd to 10th respondents were never party to. Counsel maintains that the 2nd to 10th respondents were not directors of SCB at the time when circumstances surrounding the complaint by 11th to 13th respondents arose and should therefore not be implicated in any offences that occurred before they assumed the positions in SCB and especially not 14 years after the occurrence subject to the dispute. He argues that DPP's mandate under Article 157 should be exercised as guided by public interest. Relying on Ali Hassan Joho v Inspector General of Police & 3 Others [2017] eKLR counsel castigated the appellant for abusing his powers and allowing the use of criminal process to settle civil disputes.

24. The 2nd to 10th respondents also filed written submissions dated 10th June 2021. The submissions frame two issues for determination - whether the police, on behalf of the appellant, acted unreasonably, unlawfully and illegally in issuing summons to the 2nd to 10th respondents and whether the appellant acted fairly and reasonably in invoking his power for review. Of note is that they fault the superior courts for omitting vital details in its summary and sets out the said facts relating to the background and involvement of the 11th and 12th respondents as well as their related entity Madhupaper International Ltd in relation to the claim for Shs.55 million and the subsequent involvement of the appellant and the surrounding investigations and litigation. The respondents also point out that since their petition before the High Court, their right to participate in criminal cases has been greatly enhanced by the *Victim Protection Act* 2014 with their scope of rights given by the Court in *Joseph Lendrix Waswa v Republic [2019] eKLR* and by the High Court in Nairobi High Court Criminal Division in Petition No.57 of 2016: *Republic v Fredrick Ole Leilman & 4 Others*.

25. They submit that the summons by the police were convoluted in referring to offences of theft by agent or director under section 281 and 283 of the penal code and the response to the judicial review proceedings in which the claim that the inquiry by the police was for the theft of Kshs.55 million well before the appointment of any of the directors demonstrates that the conduct of the police was unreasonable and capricious as was found in *Kagame v Attorney General & Another [1969] EA 6443*. The 2nd to 10th respondent do not dispute the appellant's power to review its decision; what is in issue however to them is whether the said powers were exercised legitimately. The fact that the summons were issued to the whole board including non-executive members only demonstrates that the criminal prosecution was being invoked for collateral purpose as the civil suit is suspended to deceive the bank to submit to the claim. This would have the effect of immeasurable reputational damage to the said respondents and SCB as was held in *Commissioner of Police & The Director of Criminal Investigations Department & Another v Kenya Commercial Bank Limited & 4 Others [2013] eKLR*. The superior court therefore was clothed with jurisdiction to set aside the requisitions/summons.

26. In response to the appellant's and the 11th to 13th respondents' submissions, the 2nd to 10th respondents posit that the power of the courts to review any person, body or authority exercising judicial or

quasi-judicial authority is now unlimited and provided for by Article 165(6) of *the Constitution*. The appellant had violated Articles 157(10) and (11) and in furtherance of the directive by the appellant, the police had unlawfully issued requisitions in violation of section 52 of the *National Police Service Act*. The 2nd to 10th respondents point out that the decision in National Director of Public Prosecutions v Jacob G Zuma is of no assistance as it concerned the right to reviewprosecution in light of new evidence while the present case concerns abuse of process in the decision to reopen investigations and issuance of requisitions. Further, that there has been no claim that the 2nd to 10th respondents were liable for any criminal attribution as submitted by the 11th to 13th respondents. Accordingly, that the appeal should be dismissed with costs.

27. The 1st respondent, Attorney General, represented by Mr. Bitta did not file or make any submissions in this matter.

28. Having carefully analysed and considered the rival submissions, the record and the law, we perceive that the issues that fall for our determination are as follows;

    i. whether the applicants were liable for offences alleged to have been committed when they were not directors of SCB;

    ii. whether the requisitions issued to the 2nd to 10th respondents are proper;

    iii. whether the DPP legitimately exercised his power in reviewing the the decision not to prosecute SCB.

    In doing so we bear in mind our position wherein we affirmed in *Accredo AG & 3 Others v Steffano Uccelli & Another [2019] eKLR* that Rule 86 (1) of the *Court of Appeal Rules* clearly prescribes the format which grounds of appeal should take. They should be concise and should not contain evidence or arguments, as the appeal herein does. The appellant could not really have expected us to make determination on 35 grounds. If anything, we expected the appellant to help the court and considering that is a constitutional office holder to further the course of justice by helping in the framing of issues. It is not surprising that the 2nd to 10th respondents reduced the grounds to two and the 11th to 13th respondents submitted under six broad grounds. Nonetheless the Court can frame issues for the just determination of the matter.

29. The duty of this Court as a first appellate court and as set out in Rule 29 of the Court of Appeal Rules, is to re-evaluate the whole evidence to a fresh and exhaustive scrutiny and make its own independent conclusions. This has been the mantra since the decision of *Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123*) which continues to be instructive. It is this principle that will guide this Court when reconsidering and evaluating the evidence afresh bearing in mind that this court would be reluctant to interfere with the findings of the trial court unless it is clear that the findings are not supported by the evidence or that the learned trial court applied the wrong principles.

30. On the first issue of whether the applicants were liable for offences alleged to have been committed when they were not directors of SCB, it is a cardinal principle of company law that a company in its legal corporate status has perpetual succession and is detached from the individuals operating the company. It is also settled that a company can only operate and undertake actions through its directors. The consequences of the above is that any director who is in office becomes responsible for the acts of the company both the past, the present and the future. Gikonyo, J, in *Agricultural Development*

Corporation of Kenya v Nathaniel K. Tum & Another [2014] eKLR put this issue as succinctly as possible when he stated as follows:

> "I find myself re-stating the celebrated legal innovation in SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L.; that a company is a legal entity distinct from the its shareholders and the directors, in other words, it is a juristic person-a legal person-with corporate legal personality separate from those who compose it. Except, however, a company operates through human agents- the board of directors who are appointed in accordance with the Article of Association and registered with the Registrar of Companies.
>
> Therefore, the directors assume the responsibility of ensuring that the company abides by all legal requirements; all that will preserve its juristic personality and property; and avoiding default that would attract serious legal sanctions, or affect its juristic personality and assets. The legal requirements include; accountability of its business to the shareholders and to the law; operations; directorship; liabilities; assets; payment of taxes, only to mention but a few. Besides liability on the directors, if a company fails to observe the legal responsibilities and obligations set out in law, it will face serious legal penalties and sanctions."

31. Having considered the judgment by the trial court, we note that he was guided by the above principles. The 2nd to 10th respondent have not made any meaningful attempt to persuade us towards departing from the trial judges' finding in this regard. If we were to endorse the approach as suggested by the 2nd to 10th respondent, what recourse would be available to the law enforcement agencies in the event of criminal activities undertaken by companies? The 2nd to 10th respondents, perhaps for obvious reasons, did not opt to address that path. From the above, we think we have said enough and find no plausible reason to disturb the finding of the trial court. This finding in no way imputes any criminal culpability on the 2nd to 10th respondents or makes any inference of guilt or otherwise on SCB as an entity.

32. On the second issue on whether the requisitions issued to the 2nd to 10th respondents are proper, we note that the appellant, 1st respondent and 11th to 13th respondents see nothing wrong with them while the 2nd to 10th respondents are of the contrary position. The trial court agreed with the 2nd to 10th respondents and quashed the requisitions on the grounds that they were based on the unlawful exercise of the powers by the DPP.

    The argument offered in opposition to the decision of the trial court quashing the requisition is that the same were issued in accordance with section 52 of the NPS Act.

33. Section 52 of the NPS Act deals with the power to compel the attendance of witnesses at a police station. Section 52(1) provides:

> "A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is."

34. There is not much argument as to the existence or validity of this power in general. The grievance and point of departure, subject to the appeal is in whether the power was correctly exercised. As noted above, the impugned decision is challenged on several fronts as indicated above - that the jurisdiction of the police officer to issue the requisitions has not been challenged; that the 2nd to 10th respondents will not suffer any prejudice if they comply with the requisitions; and that it is against public interest to prohibit the police from investigating crimes.

35. While it is apparent that the jurisdiction of the police officer to issue requisitions is not being challenged, the trial judge interrogated the basis of the said requisitions before arriving at the conclusion that the requisitions had been instigated by a directive from the appellant, which directive was held to be unlawfully exercised. We therefore discern that the matter in issue turns on the basis upon which the requisitions were issued. As such the argument as to it being against public interest to prohibit the police from investigating crimes does not arise.

36. In order to evaluate the trial court's finding, it is necessary to ask whether the police were acting independently or at the instance of the DPP. Looking at the genesis of this dispute, a letter dated 20th May, 2014 was issued to the Chief Executive Officer of SCB relating to the complaint by the 11th respondent in the following terms:

> " Please refer to previous correspondence and documents regarding the above quoted matter. The Director of Public Prosecutions has directed that a further investigation be conducted on the above subject matter."

A plain reading of the above not only confirms that there had been previous correspondence and documents on the above matter but that the further investigations had been occasioned by the appellant. Needless to state, the appellant has powers under Article 157(4) of *the Constitution* to direct the police to undertake investigations on any information or allegation of criminal conduct. This directive was expressed in the letter dated 7th April, 2014 addressed to the Director of Criminal Investigations. The question before us is whether there was a legal and legitimate exercise of such power.

37. In her decision, Mumbi Ngugi, J. appreciated the prosecutorial powers, independence and discretion granted to the appellant by *the Constitution* and statute.

38. On the other hand, the appellant and those in support of the appeal had argued that the police had reasonable suspicion as to the commission of the crime. The 2nd to 10th respondents faulted this position by pointing out the discrepancy in the offences under section 282 and 283 of the Penal Code. Looking at the requisition, we note that each of the 2nd to 10th respondent was issued with a requisition to compel attendance dated 6th October, 2014. This requisition is indicated to have been issued pursuant to section 52 of the NPS Act. The requisition provides in part:

> " I Michael M. Kimilu a Chief Inspector of Police from DCI and currently attached to BFIU. I am making inquiries into an alleged offence of stealing by directors contrary to section 283 of the Penal Code. And whereas have reasons to believe that you (name) have information which will or may assist me with my investigations."

39. In determining whether the police officer has reason to believe has information which may assist in the investigation of an alleged offence, we must ask ourselves, from that requisition, what was the alleged offence? And did the police officer have sufficient reason to believe that the 2nd to 10th respondents had such information? In answer to the first question, the requisition was particular as to the nature of the offence in issue being 'stealing by director contrary to section 283 of the Penal Code.' As noted by the trial judge, the cited section of the law does not create the offence disclosed.

40. Section 282 of the Penal Code deals with stealing by directors and officers of the company. The cited section 283 on the other hand deals with stealing by agents. The cardinal rule in the criminal justice system is the right to fair trial which comprise the right to be informed of the offence, which offence must be based on law. Consequently, an offence of stealing by director will have to be based on section 282 as indicated which is not the case.

41. Even if it was to be taken that the reference to section 282 was erroneous or inadvertent, it was still clear that the offence in issue related to theft by directors or officers of the company, the 2nd to 10th having been issued with the requisitions in their capacity as officers and/or directors of SCB. Again, for that offence to be sustained, the same must be preceded by a complaint by the SCB against its officers or directors. It is uncontested that this is not the case at present. We therefore find the 2nd to 10th respondents' contention in this regard to have merit in the wake of the absence of a complaint from SCB. Secondly, as the judge noted, the section does not disclose the alleged offence in issue. When confronted with this direct counter to the requisitions, the appellant and the 1st respondent who in one way had a bearing on the activities of the police officer opted not to address the same but instead found refuge in the general powers under the law including section 52 of the NPS Act. This is notwithstanding the clearest indication yet that the best provision to resort to would have been that under section 283 of the Penal Code. Indeed, the judge pointed out that the investigator is at liberty to issue proper requisitions, a suggestion that was not taken up. It therefore behoves us that a similar suggestion by Mumbi Ngugi, J. seems to be the gravamen of the appeal.

42. We note that the complaint from the 11th,12th and Madhu Paper International Limited relating to the KShs.55 million never formed the basis of the requisitions. This complaint only came out in response to queries and by a letter dated 28th May 2014, the 10th respondent communicated to the Directorate of Criminal Investigations indicating that all the information in possession of SCB had already been shared, the Attorney General had dismissed the complaint as being civil in nature and that the current investigations exposed SCB to double jeopardy. It is therefore unclear which other or further information the police had in mind that the recipients of the requisitions still had that would assist in investigations as the response by SCB through the 10th respondent only yielded the requisitions to attend without addressing the queries.

43. In the same breath, the appellant contended that the rights of the 2nd to 10th respondents would nevertheless be safeguarded within the ensuing criminal trial process. While that may be so, we point out that at this stage of the issuance of requisitions, the only evidence of any offence that would have been subject of any criminal charges is an offence under section 282 of the Penal Code. As already noted, in the absence of the basis for the offence having been set out in the first place, it would not serve any purpose awaiting any criminal trial. Besides, a criminal trial sets out to establish the guilt or otherwise of a party while the High Court seeks to interrogate the reasonableness or otherwise of the requisition. This in our view is distinguishable.

44. From the foregoing, we find it very difficult to overturn the trial court's finding as to the validity of the requisitions under the obtaining circumstances. In answer to the second question, the police officer would have to bear in mind the requisite basis for the offence in issue. We agree with the learned trial Judge that the notice did not meet the requirements of Section 52 of the *National Police Service Act* and it is accordingly invalid and unlawful. A clear reading of Section 4(3) (a) of the *Fair Administrative Action Act* requires that there must be adequate notice and there must be a full disclosure of the nature and the reasons for undertaking an inquiry. This is not the case.

45. As for the third issue, this is where the bulk of appeal lies. In addressing whether the appellant legitimately exercised his power in reviewing the decision not to prosecute SCB, it should be borne in mind that the constitutional powers of the appellant are bestowed under Article 157 of *the Constitution*. The Article provides that the powers of the DPP are three-fold; the power to institute and undertake criminal proceedings, the power to take over criminal proceedings instituted by others and the power to discontinue criminal proceedings,

46. *The Constitution* gives us a further guide as to the role the DPP has and the way or manner in which such powers are exercised. It is also clear by virtue of Article 157(10) that in the exercise of the power conferred, the DPP shall not be subject to the direction or control of any other person or authority. The director, who is an independent statutory officer appointed by the executive makes prosecutorial decisions on a professional basis, independent of political influence in relation to the operations of his office.

47. The appellant's powers and functions are expressly set out in the ODPP Act, legislation enacted pursuant to Article 157(12) of *the Constitution*. The powers include the power to review a decision to prosecute, or not to prosecute, any criminal offence; to institute a prosecution on indictment where there has been no committal for trial; to decline to proceed further in a prosecution and bring it to an end; to take over and conduct or discontinue prosecutions instituted by another person; to give to a person an undertaking that specified evidence will not be used against them or that they will not be prosecuted for a specific offence or conduct; to give directions or furnish guidelines to the chief police officer and other persons specified in the Act, including investigations and prosecutions.

48. In prosecuting matters, the Director acts on behalf of the community. Prosecutors have strikingly been called ministers of justice, a phrase which sums up the position of the prosecutor in the criminal justice system. It has been said that the prosecutor must always act with fairness and detachment with the objectives of establishing the whole truth and ensuring a fair trial. In exercise of the powers conferred by Article 157, the appellant shall have regard to the guiding fundamental principles enumerated under Section 4 of the ODPP Act including, the promotion of public confidence in the integrity of the office, the need to discharge the functions of the office on behalf of the people of Kenya and the need to serve the cause of justice, prevent abuse of the legal process and public interest.

49. At the outset, it is common ground that the appeal does not challenge the general powers of the appellant to initiate a review of the decision to prosecute or not to prosecute. The challenges that arise from the impugned judgment for our determination relate to the place of the decision by Mumbi Ngugi, J., whether the High Court had jurisdiction to issue the orders made in the impugned judgment (including the jurisdiction of the criminal court) and whether the letter by the appellant dated 7th April, 2014 constitute the decision by the DPP.

50. By a letter dated 26th October 2005, the appellant on behalf of the A.G, confirmed to the 11th to 13th Respondents that the Hon. A.G after serious consideration of the evidence availed, and all relevant circumstances, decided that the State shall not institute criminal proceedings against SCB. This was because "investigations had not revealed any evidence of value which could support a criminal charge"

51. The 11th Respondent was not satisfied with the said decision and consequently filed High Court Petition, No. 244 of 2008 to quash the decision of the 1st Respondent and compel him to act on the complaint as filed. The trial Judge, Mumbi J. (as she then was) dismissed the petition but made an observation that there was room for the appellant to revisit the issue and carry out further investigations. Investigations which were used by the 11th respondent to lodge further complaints. As a result, the appellant in a letter dated 7th April 2014 directed the Director of Criminal Investigations to conduct yet further investigations in view of the observations made by Mumbi J. and that there was new/ additional evidence availed by the complainant.

52. Starting with the jurisdiction of the High Court, the same arises from *the Constitution* of Kenya 2010 and statute. As the Supreme Court stated in the S. K. Macharia case jurisdiction is everything. The overreaching jurisdiction granted to the High Court under *the Constitution* is the unlimited original civil and criminal jurisdiction under Article 165(3) of *the Constitution*. Further jurisdiction is granted by statute; for this purpose, the judicial review process is governed under the *Law Reform Act* and

Order 53 of the Civil Procedure Rules. We do not think that there is any limitation as to when a party can challenge a process by way of judicial review or otherwise. Judicial review concerns itself with the exercise of powers and functions by any public authority, the appellant being one such body. The proceedings are aimed at vindication of private rights and public interest is a relevant consideration as was aptly held by Majanja, J. in *R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another [2012] eKLR* at paragraph 52.

53. From the record, the trial judge noted that the basis of the directive by the appellant to the Police to conduct the investigation arose from three situations. The views of Mumbi Ngugi, J. in her judgment, the new/material evidence presented to the Vetting Board by the complainants -being the 11th to 13th respondents and the views of the vetting board. These, in the trial Judge's view, did not constitute independent exercise of mind by the appellant as he merely relied on that evidence. Moreover, Mumbi Ngugi, J. when expressly called upon to compel the appellant to charge SCB, declined to grant such orders noting that the appellant had previously exercised discretion not to charge SCB.

54. In rebuttal, the appellant submitted that the impugned decision not only reviewed the decision by Mumbi Ngugi, J. but also proceeded on the erroneous position that the letter directing the DCI constituted the decision to prosecute. The argument is that the orders granted in the impugned decision were thus premature.

55. We have perused the decision by Mumbi Ngugi, J. and the impugned decision. It is not in doubt that the 2nd to 10th respondents were not parties to the said suit before Mumbi Ngugi, J. It is also not in doubt that the petition before Mumbi Ngugi, J. sought to compel the appellant to exercise its power in a certain manner consistent with the wishes of the 11th to 13th respondents who had instigated complaints. Having separately sought to compel the appellant to exercise his power to reopen a prosecution, the 11th to 13th respondent cannot be seen to be faulting the 2nd to 10th respondents for invoking court proceedings seeking to restrain the exercise of the very powers bestowed upon the appellant.

56. An inescapable fact between the two decisions is that they are distinguishable both in foundation and in effect. The decision before Mumbi Ngugi, J. was founded on the letter from the appellant closing the investigations instituted vide a complaint by the 11th to 13th respondents. The decision subject to this appeal is founded on the requisitions issued to the 2nd to 10th respondents following the directive by the appellant to reopen investigations. We do not see how the impugned decision either reviewed or amounted to an appeal of the decision by Mumbi Ngugi, J. To say so would be a stretch and, in any event, the decision by Mumbi Ngugi, J. was brought to the attention of the trial court and it was expected that the decision by Korir, J. would have had to factor in the submissions and facts emanating from the decision by Mumbi Ngugi, J, to put the dispute in perspective.

57. We are informed that an appeal had been filed by the 11th to 13th respondents against the said decision by Mumbi Ngugi, J. The import of that appeal is that, should it succeed, is that the complaint by the 11th to 13th respondents would progress and the appellant would stand compelled to prosecute SCB. We do not see how the impugned judgment went into the merits of either overturning or interfering with this particular decision, what is otherwise being termed as a review or appeal. Needless to state, the two decisions emanate from courts with concurrent jurisdiction and none of them was binding on the other court.

58. We observe and agree that the appellant has powers to review and re-open any criminal matter, provided that the said power is being exercised in the best interest of the public and secondly there is new material or evidence which was not available after due diligence and which is now availed without malice and that the error in availing the said evidence is humanly possible. Thirdly, the new evidence

is not prejudicial to the defence of the accused persons. Finally, under all circumstances, the power of review is not unreasonable, unfairly and capriciously exercised.

59. Addressing our minds to the issues in the matter, it is clear that the 1st Respondent terminated the inquiry giving assurance to the 2nd to 10th respondents that the evidence available after thorough review could not lead to further investigations and prosecutions. We therefore do not understand why without any basis or new evidence, the appellant started the process of review.

60. We agree that the DPP under Article 157(10) shall not require consent or authority for commencement of criminal proceedings and an exercise of his or her powers shall not be under the direction or control of any person or authority. The power of review is meant to avoid and prevent abuse of the court.

61. The DPP's principal task is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and dictates of fairness. In deciding whether to prosecute or not DPP considers the evidence and the law. There is no evidence to show that there was new evidence/material outside his mandate

62. Was the case by the 2nd to 10th respondents before the Court premature? From the spirited argument put forth by the appellant, he was yet to make a decision to prosecute and as such the same could not have been quashed. Was that the issue before court? A careful appraisal of the record demonstrates otherwise. None of the 2nd to 10th respondents had been charged or set to be arraigned in court for prosecution. The issue as to whether the decision to prosecute had been made by the appellant is in our view premature as well.

63.. What we understood the 2nd to 10th respondents' case to be is that they were challenging the appellant's decision to direct the police to reopen investigations. A perusal of the application for leave made to court, the statement and affidavit filed therewith all dated 8th October 2014 readily reveal that the grievance related to the process that had been put in place at the instance of the appellant resulting in the issuance of the requisitions to compel attendance. This was actuated by the appellant's letter dated 7th April 2014 which, in the appellant's view, infringed on their right to fair administrative action, the basis for the judicial review proceedings. The grievance was largely as a result of past conduct by the appellant through the office of the Attorney General as he then was in which the same circumstances had resulted in the appellant's conclusion not to institute criminal proceedings terming the matter as civil in nature. As pointed above, the final disposition prohibited the commencement of investigations on the basis of the letter dated 7th April, 2014, not the prosecution of any party. The trial judge, rightly so in our view was not persuaded that a case for investigation had been made and that any attempts to reopen the investigation were actuated by factors other than the appellant's own independent decision, unlike the previous steps leading to the closure of the investigations.

64. We do not understand the law as limiting the extent of grievance or the nature of actions that can be challenged by any litigant before court. The letter dated 7th April, 2014 in our view is an administrative action capable of being challenged by way of judicial review proceedings as was the case. Had the respondents been challenging their prosecution, then the appellant's submission on giving the criminal court the opportunity to try the case would have had more weight. This is not to say that where a decision to prosecute has been made, a person is precluded from challenging the same other than through the criminal trial court. There exist instances where criminal proceedings have been challenged at different stages. For instance, in Hon. Philomena Mbete Mwilu v DPP (supra) the intended criminal prosecution was successfully challenged before taking plea resulting in quashing intended criminal proceedings. The court nevertheless appreciated the discretion of the appellant in making his decision to prosecute. In *Republic v Director of Public Prosecutions & 2 Others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR* the court, in judicial

review proceedings quashed criminal proceedings instituted against the applicant by the appellant and the Inspector General of Police for reasons inter alia that they were being used to pursue ulterior motives and the issues arising were of a civil nature. As we already expressed ourselves on the place of the criminal trial process, we need not belabour ourselves on the same any further.

65. It is rather unusual that the observation by Mumbi Ngugi, J. led to the reopening of the investigations yet similar remarks by the impugned decision to the effect that the investigator could issue proper requisitions was not taken up by the appellant and/or the investigator.

66. In the end, it is evident that the appellant does not succeed in this appeal.

67. Before concluding, we note that the 11th to 13th respondents sought costs. They relied on the South African cases involving the former president Jacob Zuma. This is opposed by the 2nd to 10th respondents. Our consideration of the cited cases leads us to the conclusion that they are distinguishable to the present facts. While the general principle is that costs follow the event, the award of costs is discretionary and where the trial judge exercises the discretion to award with costs in any other manner, we can only interfere with the same if it is shown that the discretion was exercised capriciously. In the present matter, the trial judge did not award any costs. It has become common that in cases involving public interest and aimed at furthering the rule of law, costs are usually not awarded. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of Rights and *the Constitution* for fear of being condemned to pay costs. (See Kenya Human Rights Commission & Another v Attorney General & 6 Others [2019] eKLR). Moreimportantly, as the appeal is not found to be with merit, it serves no purpose to burden the parties with costs as the only remnant of the dispute that has spanned the court corridors for over seven years. Like the trial court, we find that the appropriate relief is to make no order as to costs.

68. Taking into consideration all the above, we are inclined to make the following disposition:

    i. The appeal is disallowed.

    ii. No order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR