



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 5 OF 2016

BETWEEN

CHRYSANTHUS BARNABUS OKEMO.....APPELLANT

VERSUS

THE ATTORNEY GENERAL..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE’S COURT.....3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

CONSOLIDATED WITH CIVIL APEPAL NO. 23 OF 2016

SAMUEL KIMUNCHU GICHURUAPPELLANT

VERSUS

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

THE ATTORNEY GENERAL2ND RESPONDENT

CHIEF MAGISTRATE’S COURT.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Isaac Lenaola, J.**) dated 18th December, 2015 in **Constitutional Application No. 111 of 2013**)

Consolidated with

Petition Nos. 320 and 231 of 2011

JUDGMENT OF THE COURT

CHRONOLOGY

[1] The consolidated appeals are against the judgment and decree of the High Court, (**Lenaola, J** – as he then was) dismissing **Constitutional Application No. 111 of 2013** as consolidated with **Constitutional Petitions Nos. 320 of 2011** and **321 of 2011**. The constitutional applications and the two petitions impugned the extradition proceedings filed by the Director of Public Prosecutions (DPP) against the two appellants in Chief Magistrates’ Court, **Miscellaneous Application**

It is necessary to state at the outset that the 1st respondent, (**Attorney General**) (AG) supports the appeal only to the extent that it questions the validity of the “Authority to Proceed” issued by the 2nd respondent, **Director of Public Prosecutions** (DPP). The 3rd respondent, **Ethics & Anti-corruption Commission** (EACC) has taken a neutral position in the appeal. It is only the DPP who has vehemently opposed the appeal in its entirety.

[2] The two appellants are citizens of Kenya and are resident in Kenya. On 6th June, 2011, the Attorney General of the Republic of Kenya received, on behalf of the Government of Kenya through the British High Commission, Nairobi a request of the extradition of the appellants from the United Kingdom on behalf of the

Attorney General of Jersey, vide a verbal note number 452/11. The request for extradition was transmitted pursuant to the provisions of section 7(1) of the **Extradition (Commonwealth Countries) Act Chapter 77** of the Laws of Kenya (Extradition Act). The request was accompanied by thirteen bundles of documents (extradition documents). The AG handed over the extradition request to the office of the DPP which was then a department in the office of the AG. The DPP after due consideration issued an “**Authority to Proceed**” dated 6th July 2011 to the Chief Magistrate pursuant to section 7(1) of the Extradition Act read together with section 7 of the Sixth Schedule to the Constitution of Kenya, 2010, and in addition filed extradition proceedings – Misc. Application No. 9 of 2011.

[3] The extradition documents included the indictments filed before the Royal Court of Jersey against the two appellants and the summary of the evidence. Prior to the request for extradition, the Royal Court of Jersey had issued warrants for the arrest of the appellants on 8th April, 2010 and 20th April, 2011. The summary of evidence alleged that **Chrysanthus Barnabas Okemo (Okemo)** was the Minister for Energy in the Kenya Government between 1999 and 2001 and **Samuel Kimunchu Gichuru (Gichuru)** the Managing Director of Kenya Power & Lighting Company between November 1984 and February 2013 which was under the Ministry of Energy.

It is alleged that both Okemo and Gichuru accepted bribes from foreign businesses that contracted with KPLC and hid the money in Jersey by causing the foreign contractors to make payments into the bank accounts of a Jersey company called Windward Trading Limited. It is also alleged that Gichuru was the beneficial owner of the Jersey company which he controlled by using agents and that the money paid to the bank account of the company was distributed according to the instructions given by Gichuru’s agents including to personal accounts of Okemo and Gichuru in Jersey.

Okemo is charged in the Royal Court of Jersey with thirteen counts relating to the transactions in the accounts committed in the Island of Jersey under Jersey law between 1st July, 1999 and 2001. On the other hand, Gichuru is charged in the same court with forty counts for offences allegedly committed under Jersey law in the Island of Jersey between 1991 and 28th June, 2002.

[4] The institution of extradition proceedings received substantial media coverage and the appellants voluntarily presented themselves to the Chief Magistrate. They were informed of the application and served with extradition request and thereafter released on cash bail pending the hearing and determination of the proceedings.

[5] Before the extradition proceedings commenced, Okemo and Gichuru lodged constitutional petitions Nos. 91 of 2011 – later serialized as No. 321/2011 and 90/2011 later serialized as No. 320/2011 respectively through the firm of Ngatia & Associates, Advocates. The appellants averred, *inter alia*, that it would be unconstitutional to extradite them to Jersey for various reasons, including that the dual criminality principle had not been satisfied; that there was prejudicial delay; the legal system of Jersey does not guarantee a fair trial; and that Kenya was the proper forum for conducting a trial. Several reliefs were sought but the ultimate objective was to prohibit the commencement of the extradition proceedings and the arrest of the appellants. In addition, the appellants filed a notice of preliminary objection, in the extradition proceedings. By the preliminary objection, the appellants asked the extradition court to refer issues of fair trial in Jersey, violation of constitutional rights and unreasonable delay to the constitutional court to be determined in the petitions. The appellants also asked the court to order six witnesses to be called. The extradition court made a finding that most of the issues raised did not either relate to the interpretation of the Constitution or raise substantial questions of law fit for reference to the High Court. Further, the court made a finding that the issues, including the issue of delay were raised prematurely as the appropriate time to raise them was at the hearing of the extradition proceedings. The appellants raised a further important constitutional issue. They contended that in the absence of “**Authority to proceed**” under the hand of the AG, a statutory requirement, the extradition proceedings are invalid in law. On the other hand, the DPP contended that since the extradition proceedings were criminal in nature, the AG had no role to play. The extradition court agreed with DPP, and on 5th February, 2013, overruled the preliminary objection and ordered the extradition proceedings to proceed to hearing.

[6] That did not happen for a week, later the appellants filed an originating motion under Article 165(6), 165(7) of the Constitution and Rule 2 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** asking the High Court to call for the record of the extradition proceedings and to set aside, vacate or discharge the orders of the extradition magistrate. The appellants also framed twelve “constitutional” issues for determination by the High Court pointing out that there is no right of appeal against the decision of the extradition magistrate. The issues framed are similar to the issues raised in the petitions and before the extradition magistrates.

Article 165(6) and 7 provide respectively;

“(6) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. For purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of Justice.”

By consent of parties the petitions were consolidated with the originating motion; the Ethics and Anti-Corruption Commission (EACC) was

joined as an interested party, the AG was served with the consolidated petitions and both the EACC and the AG were allowed to file responses.

[7] After considering the respective submissions and the pleadings, the High Court framed eight issues for determination. The first issue was whether the extradition proceedings were a nullity having been instituted by the DPP.

After an exhaustive examination of the submissions and the law, the High Court said;

“I have said enough to show that although extradition proceedings have elements of international law, they are not sui generis proceedings but are criminal proceedings”

The court went on to find that under the Constitution of Kenya, 2010, read with necessary adaptations, it is the DPP who has the legal authority to issue the “Authority to proceed” and thus the extradition proceedings were valid.

The other issues were as follows:

- ii. Whether the alleged offences meet the dual criminality test.
- iii. Whether the Constitutional rights and freedoms of the applicant have been violated or will be violated in the event that they are extradited to Jersey.
- iv. Whether there has been delay in the extradition proceedings and whether delay has been proved.
- v. The legitimacy of the Jersey legal system.
- vi. Whether the magistrate’s court erred in failing to order the attendance of five other people as required by the applicants.
- vii. The effect of the alleged prior publicity to the extradition proceedings.
- viii. Whether the extradition proceedings are an abuse of the court process.

The High Court did not finally determine issues Nos. (ii), (iv), (v) and (viii) above. The High Court reasoned that the court conferred with jurisdiction to conduct extradition proceedings is the magistrates court and not the High Court; that the determination of those issues was within the competence of the extradition magistrate who is bound to protect and defend the Constitution; that the magistrate had not decided yet that the appellant will be definitely extradited and that the court would not usurp the jurisdiction of the magistrate.

However, regarding the issue of the legal system of Jersey, the court stated that it does not fall within the jurisdiction of the municipal court to question and put on trial the legal system of another sovereign State but that the magistrate’s court would ultimately make its own decision.

Nevertheless, the High Court determined issues Nos. (iii), (vi) and (vii) conclusively. On issue No. (iii) – on the breach of constitutional right to fair hearing by describing the appellants as “fugitives”, the court held that “fugitive” is a legal term used in the Extradition Act and that Parliament did not intend the word to be derogatory or affect the presumption of innocence. On issue No. (vi) – unfair and discriminative proceedings by failure to order five witnesses to be called, the court held that discrimination under Article 27 could not be invoked in circumstances where criminal liability is attributable to the individual and that the court cannot properly purport to determine criminal liability of person other than those before the court. Lastly, on issue No. (vii) - adverse prior publicity, the court agreed with the finding of the trial magistrate that the appellants would be tried by qualified, competent and independent judicial officers who are not easily influenced by publicity and that media publicity *per se* does not constitute of itself a violation of right to fair hearing.

[8] By the grounds of appeal, the appellants essentially assail the decision of the High Court partly for making erroneous findings on the issues that it determined and partly for failing to determine some of the issues that it identified and enumerated. It is averred that the undetermined issues should have been determined in favour of the appellants particularly the issues relating to delay, dual criminality, fair trial, abuse of process and appropriate forum.

STATUTORY LAW

[9] An all embracing meaning of “extradition” is provided in **Halsbury’s Laws of England, 4th Edition Vol. 18 at page 74 paragraph 201** thus.

“Extradition is the formal surrender by one country to another, based on reciprocal arrangements partly judicial and partly administrative, of an individual accused or convicted of a serious offence committed outside the territory of the extraditing county and within the jurisdiction of the requesting country which being competent by its own law to try and punish him, demands the fugitive’s surrender.”

There are two systems of extradition in Kenya. The first one relates to extradition to non Commonwealth countries. This system of law is governed by the **Extradition (Contiguous and Foreign Countries) Act (Chapter 76 of the Laws of Kenya)**. The second relates to extradition to **Commonwealth countries** and is governed by the **Extradition (Commonwealth Countries) Act – Chapter 77** of the Laws

of Kenya. This appeal concerns extradition to UK – a Commonwealth country which is governed by the statutory provisions of the latter Act (Extradition Act). The provisions of the Commonwealth Act are based on the extradition treaties that Kenya has entered into with various Commonwealth countries as amended by **THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH, 2002**.

Kenya has also enacted a kindred legislation - the Mutual Legal Assistance Act which applies to requests for legal assistance from requesting States or international entities based on legal assistance agreements. But as section 51 of that Act provides, the Act does not apply to extradition or to arrest and detention with a view to extradition of any person. However, the Act obviously applies to requests for legal assistance during investigations stage and before a request for extradition is made.

[10] The Extradition Act authorises extradition only for an extradition offence as defined in section 4. That is;

“(a) It is an offence against the law of the requesting country which, however described in that law, falls within any of the descriptions contained in the schedule to this Act and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; and

b. the Act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Kenya if it took place within Kenya or, in the case of extra-territorial offence, in corresponding circumstances outside Kenya.”

The said schedule contains a list of 32 extradition offences including any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009. By section 17, the Attorney General may, by order, amend the schedule by adding to it any other offence or by deleting any offence from it. Section 5 of the Act provides that a fugitive is liable to surrender;

“...whether the offence in respect of which the surrender is sought is alleged to have been committed, or was committed, before or after the commencement of this Act or the application of this Act to the requesting country.”

Section 6 stipulates the restrictions on surrender of a fugitive and provides that if those restrictions obtain, the fugitive shall not be surrendered or committed to or kept in custody for purposes of surrender.

[11] The extradition process comprises of five stages viz;

i. Request for extradition by the requesting country, made to the AG in the manner prescribed by the Act (Section 7).

ii. Evaluation of the request by the AG and if satisfied that the request should be honoured, the issuance of authority to proceed to a magistrate (S. 7(3))

iii. Issuance of a warrant of arrest by the magistrate and commencement of committal proceedings. By Section 9(3) for purposes of committal proceedings the magistrate’s court:

“shall have the like jurisdiction and powers as nearly as may be, as it has in a trial.”

Further, section 9(5) provides:

“where the court has received an authority to proceed in respect of a fugitive arrested, and it is satisfied, after hearing any evidence tendered in support of the request for the surrender or on behalf of the fugitive, that the offence to which authority to proceed relates is an extradition offence, and if further satisfied –

a. Where the fugitive is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence, if it had been committed in Kenya; or

b.the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his surrender but if the court is not so satisfied, or if the committal is prohibited, the court shall discharge him from custody.”

iv. On application to the High Court for *habeas corpus* against order of committal, Section 10(3) provides:

“on an application for habeas corpus, the High Court may without prejudice to any other jurisdiction vested in it, order the fugitive to be discharged from custody if it appears to the High Court that –

a. by reason of the trivial nature of the offence of which he is charged or was convicted; or

b. by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or

c. because the accusation made against him is not made in good faith in the interest of justice, it would, having regard

to all the circumstances, be unjust or oppressive to surrender him.”

Section 10(4) provides:

“On application for *habeas corpus*, the High Court may receive additional evidence relevant to the exercise of its jurisdiction under section 6 or under sub-section (3).”

The London Scheme has in clause 13(b) added “any sufficient cause” as a ground of discharge in s.10(3).

v. Issuance of warrant of surrender by the AG where the High Court has not discharged the fugitive (s.11). The AG is prohibited from issuing a warrant of surrender if grounds in section 10(3) exist or if the surrender is prohibited (s.11(1)(a) and s.11(3)). Where there is no statutory impediment to the grant of warrant of surrender, the AG has discretionary power not to issue the warrant (s. 11(1)(b) or he may in his discretion decide not to issue a warrant of surrender on the grounds stipulated in section 11(4).

Further, Clause 15(1) of the London Scheme authorises any Commonwealth country to adopt the entire provisions of Clause 15 of the London Scheme. Clause 15(3)(a) of the London Scheme allows a country to refuse request for extradition on the basis that the person sought is a national or permanent resident of the requested country. If a country adopts that clause, then Clause 16(1) requires that the country refusing to extradite on that ground should take domestic measures to facilitate the trial or punishment of a person whose extradition is refused on the ground of being a national or permanent resident of the requested country.

[12] An extraditee has statutory rights under the Extradition Act which includes, a right to bail upon being brought before a magistrate (s.9(2)); right to have his evidence heard by an extradition court (s. 9(5)); right to be informed of the right to apply for *habeas corpus* and the right to make such an application (s. 10(1); 10(3)); where there is delay in surrendering him, a right to apply to the High Court for discharge (s.12) and, a right to notice by AG of the issuance of a warrant of surrender (s.11(6)). In addition, since the Constitution is the supreme law and binds all persons and state organs, an extraditee is entitled to the rights under the Bill of Rights where applicable in the extradition process including right to human dignity (Article 28); right to freedom and security of a person (Article 29); and where applicable, right to fair administrative action (Article 47(1)); rights of detained persons and people held in custody (Article 51) and right to a fair hearing before the extradition court (Article 51(1))

[13] It is noteworthy that section 72(1)(i) of the repealed Constitution provided that a person could be deprived of his personal liberty if authorized by law:

“for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition, or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another”

The Constitution of Kenya, 2010 has not changed the law since the right to freedom and security of a person protected by Article 29 is not included in Article 25 as one of the rights which cannot be limited by law. However, as Article 24 provides, the rights under Article 29 can only be limited by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on principles and circumstances stipulated therein.

It is not necessary to discuss the rights to personal liberty and security of a person any further since it has not been alleged that the Extradition Act is unconstitutional.

DETERMINATION

[14] It is convenient to deal with the issues raised in the appeal in the order of priority followed both by the Magistrate and by the High Court. Thus, the issue of legality of the “Authority to proceed” and thus the legality of the extradition proceedings will be determined first, followed by other issues raised as a bar to surrender.

LEGALITY OF THE AUTHORITY TO PROCEED

[15] Both appellants state in the respective memorandum of appeal that the High Court erred in law and in fact in upholding the legality of the proceedings commenced by the DPP. The issue was first raised by the appellants by way of preliminary objection before the magistrate. It was framed thus:

“in the absence of a written authority under the hand of the Attorney-General as statutorily required, the proceedings are invalid in law.”

The AG was not a party to the committal proceedings and did not therefore participate at the hearing of the preliminary objection. The magistrate, after hearing the respective submissions, held that the extradition proceedings were a criminal matter and that it is only the DPP who could have signed the ‘**authority to proceed**’ the power having been taken away by the Constitution from the AG. The AG was made a party in the petitions filed in the High Court but not in the constitutional application brought by originating motion (High Court Constitutional Application No. 111 of 2013). As already stated, the originating motion was brought under the supervisory jurisdiction of the High Court conferred by Article 165 of the Constitution. The issue of the legality of the ‘**authority to proceed**’ was raised in the application and in the supporting affidavit.

The two petitions were consolidated with the application and the AG and EACC were given leave to file responses.

[16] The AG filed a replying affidavit to the petitions and the application but only responded to the issue of “authority to proceed”, contending that extradition proceedings have been placed under the conduct of the institution of the office of the AG and not that of the DPP. He stated in the affidavit that criminal proceedings which fall under the office of DPP are distinguishable from extradition proceedings in the following manner;

- “(a) extradition proceedings are special international legal proceedings of a sui generis nature;**
- b. the prosecutions by the DPP’s office refer to the conduct of the same within national courts and not other countries;**
- c. The DPP’s Act does not explicitly provide for extradition proceedings being placed under the office of the DPP;**
- d. Mutual Legal Assistance to which extradition is part, recognizes the centrality of the Attorney General’s office; and**
- e. Public international legal processes only recognizes the office of the Attorney General.”**

[17] The DPP filed a replying affidavit and in paragraph 16 stated:

“Extradition being criminal in nature and by virtue of provisions of Article 156 and 157 of the Constitution fall squarely within the mandate of the Director of Public Prosecutions. Further, under Article 156 of the Constitution, the Attorney General has no powers in relation to criminal proceedings which include extradition proceedings.”

[18] The following facts emerge from the two affidavits. Section 26(1) of the repealed Constitution established the office of the Attorney General. Section 26(2) provided that the AG shall be the principal legal adviser to the Government of Kenya and section 26(3) conferred power on the AG to;

- “(a) institute and undertake criminal proceedings against any person before any court (other than a court-martial in respect of any offence alleged to have been committed by that person;**
- b. take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and**
- c. to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or another person in authority”**

Section 26(5) provided, *inter alia*, that the powers of the AG under S.26(3) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions. One of the offices through which AG exercised his powers on matters of a criminal nature was the Department of Public Prosecutions which was headed by the Director of Public Prosecutions initially, but eventually by the Chief Public Prosecutor.

[19] The Constitution of Kenya 2010, which came into effect on 27th August 2010, established the office of the Attorney General by Article 156(1) and the office of the Director of Public Prosecutions by Article 157(1). By Article 156(4) the Attorney General;

- “(a) is the principal legal adviser to the Government;**
- b. Shall represent national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and**
- c. shall perform any other functions conferred on the office by an Act of Parliament or by the President.”**

On the other hand, Article 157(6) confers State powers of prosecution on the DPP and further confers on him the powers to institute and undertake criminal proceedings; take over and continue criminal proceedings and to discontinue criminal proceedings. Thus, the powers which were conferred on the AG under S. 26(3) of the repealed Constitution including the power to delegate the powers to subordinates have been assigned to the DPP. In addition, Article 157(10) provides that the DPP shall not require the consent of any person or authority for commencement of criminal proceedings and that the DPP shall not be under the direction or control of any authority in exercise of his powers or functions. By Clause 31(5) of the Transitional and Consequent Provisions of the Sixth Schedule to the 2010 Constitution, the functions of the DPP were to be performed by the AG until the DPP was appointed under the Constitution, and by Clause 31(7) of the same Schedule, the sitting AG was to continue in office for a maximum period of twelve months, and thereafter the AG was to be appointed under the Constitution.

[20] The request for extradition was received by the then AG on 6th June 2011 who forwarded it to Chief Public Prosecutor for processing and recommendation. The Chief Public Prosecutor was subsequently appointed as DPP under the Constitution on 16th June 2011. Upon appointment, the DPP reviewed the extradition request and issued the impugned “Authority to Proceed” dated 6th July 2011.

[21] The extradition magistrate and the High Court interpreted the extradition proceedings to be criminal proceedings which were within the

powers of the DPP and applying Clause 7(1) of the transitional provisions in the Sixth Schedule, read the word “Attorney General” in s.7(1) of the Extradition Act as referring to the DPP as the person authorised to issue the “Authority to Proceed”. Clause 7(1) aforesaid provides:

“All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution”.

In applying that provision the High Court said:

“While the Act provides that the Attorney General is the one to issue the authority to proceed, the onus now falls on Parliament and the Kenya Law Reform Commission to amend the Act and bring it into conformity with the Constitution. Before that is done the pragmatic approach is the one adopted by the magistrate’s court when it read section 7(1) of the Act with adaptations envisaged in section 7 of the Sixth Schedule of the Constitution so as to bring it into conformity with the Constitution. I adopt the same approach for reasons that I have given.”

[22] **Mr. Ngatia** learned counsel for 1st appellant (Okemo) submitted that the DPP has no power to institute extradition proceedings since they are not criminal but *sui generis* proceedings; the extradition proceedings are special international legal proceedings, and public international legal processes only recognise the office of the AG as the authority to undertake such proceedings; that extradition proceedings are matters dealing with international relations between States and raise issues of ministerial responsibility and that extradition is a process and not a prosecution. He relied on three authorities which state that extradition proceedings are not criminal proceedings but *sui generis* – viz; **Government of The United States of America v Hon. Guillermo Purganan [2002] PHSC 573**, **Kirby v Kirby [1997] USCA 603**; **Secretary of Justice v Hon. Ralph C. Lantion [2000] PHSC 13**.

[23] **Mr. Otachi** for the 2nd appellant (**Gichuru**) submitted that extradition is *sui generis* and merely administrative in character; that it is a matter of foreign relations conducted by the executive arm of the Government and that DPP is not part of the Executive but an independent office whose mandate is limited to prosecutions within the territory. He relied on **Government of Hong Kong v. Felixberto T. Olalia JR Phillipines Supreme Court GR No. 153675** for the proposition that extradition is not a criminal proceeding but *sui generis* proceedings, tracing its existence wholly to the treaty obligations between nations.

[24] **Mr. Waigi Kamau**, Senior Principal Litigation Counsel for 1st and 3rd respondents submitted, amongst other things, that extradition proceedings are matters of foreign relations; that they create international obligations between countries and require the exercise of ministerial responsibility; that the competent authority under the Mutual Legal Assistance Act is the Attorney General; public international process only recognizes the office of the Attorney General; that Article 132(5) of the Constitution enjoins the President to ensure that international obligations are fulfilled through the relevant Cabinet Secretary; that by Article 152(1)(c), the AG is a member of Cabinet performing special ministerial responsibilities in addition to roles listed under Article 156; and that the DPP is not a Cabinet Secretary but has a restrictive role to conduct domestic prosecutions. In the submissions made in the High Court which were adopted, the AG submitted *inter alia*, that section 5 of the Office of the Attorney General Act mandates the AG to advise the Government on all matters relating, *inter alia*, to the Constitution and international law. The AG relied on several foreign decisions including **President of the Republic of South Africa v Quaglini [2009] 2SA 466 (CC)** for the proposition that extradition involves international relations and acts of sovereignty on the part of two States; **Minister of Justice v Additional Magistrate Cape Town [2001] 2 SACR 49 (C)** for the proposition that extradition proceedings are *sui generis* in nature and cannot be described as criminal proceedings; **Government of the United States of America v. Hon. Guillermo G. Purganan GR 148 571**; **In the Matter of Requested Extradition of Kirby v Kirby 106 F 3d 855**, both for the submission that extradition proceedings are *sui generis* and neither Civil or Criminal and **Geuking v President of the Republic of South Africa 2001 2 SACR 490 (C)** for the submission that the exercise by a Minister whether or not to surrender a person is political in nature.

[25] **Dorcias Oduor**, Deputy DPP and **Victor Mule** both for the DPP submitted, amongst other things, that, “Authority to Proceed” was duly issued by DPP pursuant to section 7 of the Extradition Act; that in extradition proceedings a magistrate has the same jurisdiction and powers, as nearly as may be, as in a trial before a subordinate court; that by section 2 of the Office of the Director of Prosecutions Act, 2013 “prosecution” means, *inter alia*, proceedings and includes extradition proceedings; that the appellants abandoned the issue of “Authority to Proceed” but the AG revived the issue for unknown reasons; that extradition proceedings are criminal in nature; and that other ministries and departments of Government, including the Ministry of Foreign Affairs have continued to refer extradition requests to the office of the DPP and acknowledge the office of the DPP as competent authority in such matters. The DPP relied on **Dorothy Manju**

Henry and Another v. The Republic – High Court Criminal Application No. 917 of 2002 and **R. v Governor of Brixton Prison Exp. Levin [1997] 3 All ER 289** for the proposition that extradition proceedings are criminal proceedings.

[26] **Mr. Kagucia** for the 4th respondent did not submit on the legality of the “Authority to Proceed”.

[27] The High Court’s finding that the appellant had legitimately invoked the High Court’s supervisory jurisdiction under Article 165 of the Constitution has not been questioned. We agree with that finding. We also find that the legality of the ‘Authority to Proceed’ and therefore the legality of the committal proceedings before the magistrate was properly raised as a preliminary objection. The preliminary objection raised a constitutional issue, namely, the exercise of constitutional and statutory functions and powers by the AG and the DPP in the extradition process. As Article 2(1) provides, no person may claim or exercise State authority except as authorized under the Constitution.

[28] Further, as Clause 7(2) of the transitional provisions in the Sixth Schedule provides, if there is a conflict on assignment of responsibility to a particular State organ, or public officer between an existing law and the Constitution, the provisions of the Constitution prevails to the extent of the conflict.

The legality of the committal proceedings; the jurisdiction of the magistrate to entertain the proceedings and the decision of the magistrate on the issue, were matters which were properly within the supervisory jurisdiction of the High Court and the High Court had power to inquire

into the legality or regularity of those proceedings.

[29] The High Court stated that extradition has elements of international law. The correct position in law is that international extradition falls wholly within the realm of international law. Its validity is founded in a treaty, agreement or other arrangement between two or more nations governed by international law and effected by reciprocal statutory provisions. It involves international relations and international co-operation in the prosecution of serious crimes. International extradition is governed by international instruments such as the **Vienna Convention on Law of Treaties** which provides in **Article 26**:

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Other such like instruments include, “The United Nations Model Treaty on Extradition”, “The United Nations International Covenant on Civil and Political Rights” and relevant to this appeal, “The London Scheme for Extradition Within the Commonwealth”.

Article 2(6) of the Constitution provides:

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

Thus, the extradition treaty between the UK and Kenya and the International conventions governing extradition are part of the laws of Kenya. It follows that international extradition being international law is part of the Laws of Kenya. However, although the framework of extradition law is near universal, the substance and procedure varies depending on the agreement of the parties in their peculiar circumstances. In this respect, while foreign jurisprudence is useful in illuminating the interpretation of the relevant statutory provisions, it should not be treated as having statutory force and the court must apply the provisions of the statute. That was the advice of **Mr. Justice Llyod Jones** in **Roy Wenting v High Court of Valenciennes [2009] EWHC 3528** at paragraph 22. In the same case, Lord Justice Maurice Kay agreed with the submission of counsel that extradition must be determined on a case-by-case basis. In determining the question of the legality of the “Authority to proceed” therefore, the Court will be primarily guided by the provisions of the Constitution and the Extradition Act.

[30] Extradition is a national act conducted by a competent executive authority.

As **Kirby, J.** said in the **Peter Clarence Foster vs. Minister for Customs and Justice [2000] HCA 38** at page 18 paragraph 47, extradition involves the partial release of an attribute of its sovereignty by one State in favour of another.

The President of Kenya is the Head of State and Government. By Article 131(1)(a) and (b) of the Constitution, the President exercises the executive authority of the Republic with the assistance of the Deputy President and Cabinet Secretaries. By Article 131(2) (b), the President safeguards the sovereignty of the Republic.

By Article 130(1), the National Executive of the Republic comprises of the President, the Deputy President and the rest of the Cabinet. By Article 132(5), the President is required to ensure that international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries and by Article 132(1) (c) (iii), the President is required, amongst other things, to submit a report to National Assembly on the progress made in fulfilling international obligations of the State.

By Article 152(1), the Attorney General is a member of Cabinet. All cabinet Secretaries who are part of the Cabinet and the Attorney-General are nominated by the President for appointment and if approved by the national assembly, appointed by the President. Under the Constitution, the President has power to dismiss the Cabinet Secretaries and the Attorney-General (Article 132(2)). The High Commissioners, Ambassadors and diplomatic and Consular representatives are also appointed by the President (Article 132(e)). Lastly, by Article 132(3) (b), it is the responsibility of the President to direct and co-ordinate the functions of ministries and government departments. All Cabinet Secretaries are individually and collectively accountable to the President in the exercise of the powers and performances of their functions (Article 153(2)). Under the repealed Constitution which was in existence when the Extradition Act was enacted in 1968, the President was the Head of State (section 4) and the executive authority of the Government was vested in him (s.23(1)) and had power to allocate portfolios to Ministers (s.18).

The DPP is nominated by a selection panel and not by the President for appointment but if the nomination process is successful and with approval of National Assembly is appointed by the President (Article 157(2)). The DPP serves for a non renewable term of eight years. Although the office of DPP is not one of the two Independent Offices established by the Constitution under Article 248(3) a. and (b) and who are directly nominated by the President, he enjoys constitutional decisional independence in exercise of power of prosecution and also security of tenure (Article 157(10); 158(1)). However, there cannot be any doubt that in performing the functions of the office, the DPP exercises executive but discretionary powers.

[31] From the above examination of the provisions of the repealed and current Constitution, it is self-evident that the executive authority of the Republic which includes the protection of sovereignty of the Republic and the performance of the international obligations and relations is vested in the President which is exercised with the assistance of the National Executive through allocation of functions to the members of the National Executive. It is also clear that the AG being a Cabinet level member of national executive performs executive functions either conferred by the Constitution and statutes or as directed by the President.

Furthermore, by the **ORGANIZATION OF GOVERNMENT OF THE REPUBLIC OF KENYA – Executive Order No. 2/2013**, the President assigned the responsibility of the Department of Justice to the AG which means that the AG is a Cabinet level political appointee responsible for justice under which treaties and constitutional affairs fall.

In contrast, although the DPP performs executive functions, he is not nominated directly by the President, has security of tenure and is

insulated from acting on the directions of the President or the National Executive. The DPP is nominated by a selection panel – (S. 8 of the Office of the Director of Public Prosecutions Act) and is not a political appointee.

[32] The submission by the AG that public international process only recognizes the office of the AG as the competent authority in extradition is not determinative.

The requesting States are not concerned with which organ of the requested State performs extradition so long as it is a competent authority under Kenya Law. Extradition could be performed by Cabinet Secretary for Foreign Affairs or by the AG or by the DPP or any other organ authorized by Kenya Law. The dispute whether the AG or DPP is the competent executive authority inasmuch as it does not impugn the validity of the underlying treaty, is a domestic dispute which has to be determined in accordance with domestic law. Had the DPP been a member of the National Executive, the dispute would have been resolved simply by giving effect to the constitutional power of the President to allocate portfolios to ministries and government departments. However, it is the finding of the High Court and the DPP's case that, it is the Constitution which has taken away the responsibility of extradition from the AG and conferred it on the DPP.

EXTRADITION: CRIMINAL OR SUI GENERIS

[33] In arriving at a finding that extradition proceedings are criminal proceedings the High Court considered the object of the Extradition Act in the preamble which states in part:

“An Act of Parliament to make provision for the surrender by Kenya to other commonwealth countries of persons accused or convicted of offences in those countries...”

The court reasoned that the words “accused” and “convicted” used in the preamble fall within the realm of criminal law and that such persons must have been accused or convicted in criminal proceedings before a court exercising criminal jurisdiction in the requesting country and that the criminal element in the initial criminal proceedings is not broken in the subsequent extradition proceedings in the requested State.

The court further considered the provisions of section 9(3) of the Extradition Act which provides that:

“For the purpose of proceedings under this section, the court shall have the like jurisdiction and powers, as nearly as may be, as it has in a trial”

That section deals with committal proceedings. The court observed:

“This reference to jurisdiction and powers, as nearby as may be, in a trial can only be pragmatically interpreted to be in reference to criminal proceedings within which a trial is conducted.”

In addition, the court relied on **R. v. Governor of Brixton Prison, Exp. Levin** (supra) where **Lord Hoffmann** in the leading judgment with which other

Law Lords agreed said in part at p. 293 para j;

“Finally, I think extradition proceedings are criminal proceedings. They are of course criminal proceedings of a very special kind, but criminal proceedings nevertheless.”

And in **Dorothy Manju Henry & Another v Republic Nairobi High Court**, Criminal application No. 917 of 2002 (unreported) where the High Court said;

“I hold that extradition proceedings are criminal in character even though no formal charges are laid before the extraditing court”.

Referring to **Dragan Vasiljkovic v Commonwealth of Australia [2006]**

HCA 40 and **Goodyes & Gomes, Government of Trinidad and Tobago [2007]**

EWHC 2012 (Admin), the court said:

“those decisions only confirm the international law element in extradition proceedings but they do not say that they are also not criminal proceedings”

Regarding the interrelationship between the office of the AG and the DPP the court finally said:

“...while the DPP will have the mandate to institute and authorize extradition proceedings the two offices must work together. The international element in extradition proceedings means that countries may continue to send requests through the Attorney General and the Attorney General is under a duty to respect the Constitution by forwarding such requests for

action by DPP as he has in fact been doing.”

[34] The finding of the court that extradition proceedings are criminal proceedings is inconsistent with several foreign decisions interpreting similar extradition law. Those decisions, some of which have already been mentioned in paragraphs 22, 23 and 24 above, characterize extradition proceedings as *sui generis* and not criminal proceedings.

Various reasons are given to show that extradition proceedings are *sui generis* including that extradition contemplates a trial in a requesting State in accordance with the laws of that country, there is no accused; or determination of guilt or innocence, the quality and quantum of evidence is different from a criminal trial, the standard of proof is not beyond reasonable doubt and that the nature of an extradition decision is different from a judicial decision as it is not binding.

In Government of Hong Kong Special Administrative Region (supra), the

Philippine Supreme Court said:

“Extradition has thus been characterized as a right of a foreign power, created by a treaty, to demand the surrender of one accused or convicted of a crime within its territorial jurisdiction and the correlative duty of the other state to surrender him to the demanding State. It is not a criminal proceeding. Even if the potential extraditee is a criminal, an extradition proceeding is not by its nature criminal for it is not punishment for a crime, even though such punishment may flow from the extradition, it is *sui generis*, tracing its existence wholly to treaty obligations between different nations. It is not a trial to determine the guilt or innocence of the potential extraditee. Nor is it a full blown civil action, but one that is administrative in character. Its object is to prevent the escape of a person accused or convicted of a crime and to secure his return to the State from which he fled, for purpose of trial or punishment.”

In Vasiljkovic v Commonwealth of Australia (supra) Gummow and Haynes said in part at p. 23 para 58;

“It is settled by authorities that, in determining eligibility to surrender and in making consequential orders, the magistrate exercises administrative functions not the judicial power of the Commonwealth.”

In the same case, Gleeson CJ said at page 14 para 33:

“Extradition is not part of the Australian criminal justice system” and P.16 para 38:

“The separation of powers inherent in the structure of the constitution does not mandate that the decision to surrender a person be regarded as an exercise of judicial power and given to the judicial branch of the government. It does not mandate that the process of extradition to be treated (if that were otherwise possible) as part of the system of administration of criminal justice.”

In Kirby v Kirby (supra), Noonan, J in dissenting from assumption of jurisdiction by court to grant bail in extradition cases said at para 57 that an extradition judge does not exercise any part of the judicial power of the United States and:-

“consequently his order is the order of a federal judge acting as an auxiliary to the executive branch but it is not a final decision of a district court...”

The learned judge added in part in paragraph 59.

“Third, there is no provision in the rules governing appeals for bail in extradition matter because these rules are addressed either to criminal or to civil cases. Extradition proceedings are not criminal proceedings as it is agreed by all parties; no guilt or innocence is determined in them nor are extradition proceedings civil as the term is used in our rules... Extradition proceedings are *sui generis*.... They are ‘essentially administrative in character’.”

[35] The Black’s Law Dictionary defines a “proceeding” *inter alia*, as;

“The business conducted by court or other official body; a hearing”. The same Dictionary defines criminal proceeding as;

“a proceeding instituted to determine a person’s guilt or innocence or to set a convicted person’s punishment; a criminal hearing or trial”.

A “prosecution” as defined in the same dictionary has two meanings one of them being;

“A criminal proceeding in which an accused person is tried.”

The DPP relied on the definition of prosecution in section 2 of The Office of the Director of Prosecutions Act, 2013 (ODPP) where it is defined to mean;

“a prosecution under the jurisdiction of the Director, a proceeding respecting any offence the prosecution or prospective prosecution which is under the jurisdiction of a Director and related to such a prosecution or proceedings and includes extradition proceeding and any appeal, revision or other proceedings related thereto.” (*emphasis added*).

The AG responded that section 33 and 34 in part III of the Bill which proposed to give the DPP power in extradition and to provide mutual legal assistance were deleted by the National Assembly and that the definition of the “prosecution” in the Act has no statutory backing. It is true that the 2013 ODPP Act does not give the DPP power to conduct extradition or provide mutual legal assistance. Indeed, section 5(1) of the Mutual Legal Assistance Act, 2011 and revised in 2012 established a Central Authority and s.5(2) designates the office of the AG as the Central Authority to perform the functions of providing Mutual Legal Assistance. We hold that the definition in ODPP alone, which was apparently retained through drafting error, without express statutory power cannot confer power on the ODPP to perform extradition proceedings and provide Legal Mutual Assistance.

[36] The State powers of prosecution conferred on the DPP by Article 157(6) include power to institute and undertake criminal proceedings in respect of any offence alleged to have been committed by any person. Article 157(10) requires the DPP in exercising his powers to have regard to public interest, the interest of administration of justice and the need to prevent an abuse of legal process. Section 5 of ODPP Act which gives effect to Article 157 prescribes the powers and functions of the DPP which include formulating public prosecution policy.

The National Prosecution Policy formulated by DPP, *inter alia*, defines the roles of prosecutors in the criminal justice system, the manner in which prosecutorial decision making is undertaken specifically the application of the evidential test and public interest test and also how prosecutorial discretion is exercised.

The powers of the DPP include the power to discontinue any criminal proceeding at any stage before judgment is delivered. In exercising his prosecutorial decision, the DPP relies on the evidence gathered by investigative agents either at his direction or otherwise and prosecutes a person alleged to have committed an offence against the laws of Kenya for the protection of people of Kenya.

In contrast, an extradition proceedings are concerned with persons convicted or accused of commission of extradition offence, i.e. an offence against the laws of the requesting country. If the person is accused of an offence, the evidence presented in extradition proceedings is the evidence gathered by investigative agencies of the requesting State. If such a person is ultimately surrendered to the requesting country, he is prosecuted by the prosecution authority of and in accordance with the laws of that country. Moreover, the role of a magistrate in domestic criminal proceedings is different from his role in extradition proceedings. In domestic criminal proceedings, the magistrate exercises the full judicial authority conferred by Article 159 of the Constitution, the Criminal Procedure Code and other laws. Needless to say, in the exercise of judicial authority, the magistrate has power to convict or acquit and to pass any appropriate sentence authorized by domestic law for that offence. The magistrate’s decision is binding and can only be overturned by a higher court. In extradition proceedings, the magistrate’s power is prescribed and restricted by section 6 and 9(5) of the Extradition Act – the role being confined to determining eligibility for surrender and bail.

After the magistrate is satisfied that the request for extradition is valid, the only authority the magistrate has under section 9(5) is to commit the fugitive to custody to await his surrender. The magistrate has no power to order extradition. The ultimate decision to surrender or not to surrender is vested on the AG by S.11 of the Extradition Act. The Extradition Act relating to extradition in Commonwealth countries is a means by which Parliament (now National Assembly) gave effect to the treaties and other arrangements between Kenya and each of the commonwealth counties. The right of each country to determine the eligibility for surrender and assignment of that function to a magistrate must be seen as terms and conditions agreed upon. In that context, the role of a magistrate and indeed of the High Court on the application of *habeas corpus* is not an exercise of ordinary judicial power but treaty related and intended to foster international cooperation in the reduction of serious crimes.

[37] The DPP and the judiciary are the major actors in the domestic criminal justice system. From the above analysis of the constitutional and statutory roles of the DPP and the extradition magistrate, we respectfully agree with, and adopt the remarks of **Gleeson CJ** in **Vasiljkovic’s** case (*supra*) and hold that extradition is not part of Kenya’s criminal justice system and that the process of extradition is not part of the system of administration of criminal justice. The requirement that the normal rules of criminal evidence and procedures should be applied and the fact that the magistrate has like jurisdiction and powers in conduct of committal proceedings as in a criminal trial does not change the fundamental character of extradition as an aspect of international co-operation based on reciprocity and originating from treaties. Further, from the preceding analysis of the provisions of the Extradition Act, the ODPP Act, and the preponderance of authority, we hold that extradition proceedings or proceedings for committal as described in the Extradition Act are not criminal proceedings but rather *sui generis* having been brought into being by Extradition Act which is itself a *sui generis* legislation.

[38] Lastly, it is noteworthy that in issuing the “Authority to Proceed”, the DPP did not invoke Article 157 (6) of the Constitution as the source of his authority. The “Authority to proceed” states in part:

“In exercise of the powers conferred on the Director of Public Prosecutions with regard to requests for surrender of fugitives under Section 7(1) of the Extradition (Commonwealth countries) Act Chapter 77 Laws of Kenya as read together with Section 7 of the Sixth Schedule to the Constitution of Kenya HEREBY signify that...”

Section 7(1) of the Extradition Act provides:

“Subject to the provisions of this Act relating to provisional warrants, a fugitive shall not be dealt with in any manner under this Act except in pursuance of the written authority of the Attorney-General issued in pursuance of a request made to the Attorney General by or on behalf of the government of the designated Commonwealth country in which such a person is accused or was convicted”.

As stated before, the Extradition Act assigns responsibility to the AG to amend the schedule of extradition offences and to ultimately, in his

discretion, decide in each case whether a warrant for surrender should be issued and if so, to issue such warrant. The DPP does not contend that those other roles have been assigned to his office.

The “Authority to Proceed” should be understood in its international law context. It is not a consent by a State to prosecute any person. It expresses the consent of the requested State to be bound by the treaty or other extradition arrangement entered by Kenya and other Commonwealth countries. Since it is the National Executive which conducts Kenya’s foreign relations, and the AG is a member of the National Executive, and is in charge of Justice Department by the Executive Order, section 7(1) of the Extradition Act has in conformity with international law properly assigned the responsibility to conduct extradition to the AG.

[39] However, the High Court invoked section 7(1) of the transitional provisions in the Sixth Schedule to the Constitution to find, in essence that, the law in section 7(1) of the Extradition Act is inconsistent with the Constitution. In our view, the problem is not with the substantive law. Rather, the problem is with assignment of responsibility to the AG and not to the DPP. The proper provision which should have been considered is s.7(2) of the transitional provisions which expressly deals with assignment of responsibilities. Nevertheless, from the reasoning of the High Court it would have reached the same conclusion if it had applied section 7(2). However, neither provision is applicable for the following reasons.

Firstly, neither the Constitution nor ODPP Act expressly confers on the DPP the responsibility to conduct extradition or foreign relations on behalf of Kenya. The High Court inferred, erroneously, as we have already found, that since extradition proceedings are criminal proceedings, it is the DPP’s constitutional responsibility to conduct extradition proceedings.

Secondly, the High Court failed to appreciate that the Extradition Act which confers responsibility on the AG had been revised up to 2012. The presumption is that the National Assembly was aware of the provisions of Article 157(6) of the Constitution when it revised the Extradition Act and retained the office of AG as the competent authority. In addition, the High Court failed to appreciate other relevant laws; to wit, Extradition (Contiguous and Foreign Countries) Act which has been revised up to 2014 and the Mutual Legal Assistance Act which was enacted after the Constitution had conferred on the AG the responsibility to deal with extradition and provision of Mutual Legal Assistance respectively.

In addition, under the Witness Protection (Amendment) Act 2016, any reciprocal protection arrangement of witnesses between Kenya and foreign countries on the basis of any treaty or convention has to be made in consultation with the AG.

Thirdly, it would be anomalous and quite inconsistent with international law relating to extradition for DPP who is not a member of the National Executive nor a political appointee, a professional who is independent of the executive in his decisions and enjoys a security of tenure to conduct part of Kenya’s foreign relations involving as it does sovereignty, political, economic and other national interest considerations.

Fourthly, the High Court failed to appreciate that the Extradition Act confers several functions on the AG relating to extradition which form a coherent scheme of the Act, and removing one function from the AG and retaining others may render the Act unworkable or wholly inoperative.

For those reasons, we hold that, with respect to responsibility of the AG to issue “Authority to Proceed”, section 7(1) of the Extradition Act is not inconsistent or in conflict with Article 157(6) of the Constitution. The request for extradition was forwarded to the DPP when the DPP was a department in the AG’s office for advice and recommendation. In the new constitutional order, it should have been returned to the AG for action.

[40] It follows from all the foregoing and we hold that the High Court erred in law in holding that it is the DPP who has the mandate to issue “Authority to Proceed” and that the extradition proceedings instituted in the magistrate’s court were invalid. On the contrary, we hold that in terms of section 7(1) of the Extradition Act and the constitutional structure, and other related laws, the AG expressly has the sole responsibility to issue the “Authority to Proceed”. Further, the extradition proceedings instituted against the appellants without written authority to proceed issued by the AG are a nullity in law, including any act done by the magistrate against the appellants in pursuance of such proceedings.

OTHER DETERMINED AND UNDETERMINED ISSUES

[41] We have indicated in paragraph 7 of the judgment the issue which the High Court determined and how they were determined and the issues which were left for determination. By the preliminary objection, the appellant had asked the extradition magistrate to refer some framed issues for determination by the High Court.

By section 84 of the repealed Constitution, the Constitution gave the High Court original jurisdiction to determine applications for enforcement of fundamental rights and section 84(3) provided that if a question of contravention of fundamental rights arose in proceedings in a subordinate court such question may be referred to the High Court unless the raising of the question was frivolous and vexatious. Section 84(3) required the High Court to give its decision upon the question and that the subordinate court should dispose of the case in accordance with the decision of the High Court. Similarly, Article 23(1) of the current Constitution gives original jurisdiction to the High Court to determine applications for enforcement of rights and fundamental freedoms in the Bill of Rights.

However, Article 23(2) requires Parliament to enact legislation to give original jurisdiction in appropriate cases to determine such applications. Accordingly, section 8(2) of the Magistrates Courts Act, 2015 gives magistrate’s court power to hear and determine applications for enforcement of rights and fundamental freedoms in the Bill of Rights limited to:

“rights guaranteed in Article 25(9) and (b) of the Constitution.”

Article 25 stipulates the rights and freedoms that may not be limited including;

- a. Freedom from torture, and cruel, inhuman or degrading treatment or punishment
- b. Freedom from slavery or servitude.

Those rights are contained partly in Article 29 and partly in Article 30. It does not appear that section 8(2) of the Magistrates Courts Act is a model of drafting skill. In addition, by Article 159(2) (e) courts and tribunals exercising judicial authority are required to be guided by the principle that;

“the purpose and principles of this Constitution shall be protected and promoted.”

It is clear that neither the current Constitution nor the Extradition Act gives jurisdiction to the extradition magistrate to refer issues that were raised by the appellants to the High Court for determination.

Nonetheless, that is a non issue because the same issues were separately raised in the High Court by constitutional petitions and the High Court entertained the petitions.

[42] The extradition documents comprised of thirteen bundles of documents which were filed in the magistrate’s court. The petitions in the High Court were supported by the respective affidavits and annexed the appellants’ documents. In addition, the appellants relied on the affidavits of Gary Summers and Jonathan Young and the voluminous documents attached thereto. On the other hand, the DPP relied mainly on the lengthy affidavit of Howard Sharp, the Solicitor General of Jersey and the many documents attached to that affidavit. The respective advocates also made lengthy written and oral submissions in the High Court. It is sufficient to say that the factual matrix, the legality of the charges filed in the Royal Court of Jersey, the propriety of actions taken by law officers in Jersey; the state of Jersey law, the quantum and effect of delay, and the other grounds on which the petitions were based were seriously contested as particularly shown in the affidavit of Howard Sharp.

[43] The High Court recognized that the appellants had raised legitimate grounds but emphasized that it is the magistrate who had jurisdiction to deal with issues raised which it could not usurp. With respect to some issues, the High Court made a finding that they had been brought to court prematurely as there was no determination that the appellants would be extradited. This Court, like the High Court, has been addressed on substantive law supported by numerous foreign decisions in support of the grounds on which the extradition is resisted.

[44] The jurisdiction of this Court should be properly understood. Its jurisdiction is to correct appealable errors particularly of law, made by the High Court or courts of equal status with the High Court. In its determination, it has power to confirm, reverse, or vary the decision, or remit the proceedings to the High Court with appropriate direction (see Rule 31 of Court of Appeal Rules). If the High Court has failed to determine a matter, the normal course is to remit the matter to the High Court for proper determination. So, if we find that the High Court without any justification declined jurisdiction, the proper course would be to remit the matters in issue to the High Court for determination.

That is the nature of the order which was made in the English High Court in **R. (Kashamu v. Governor of Brixton Prison (DC) [2002] 2 WLR 907** where, at committal proceedings, a District Judge declined to hear a submission that the second committal proceedings were an abuse of process on the ground that the appropriate jurisdiction was that of the High Court on an application for *habeas corpus*. The High Court after finding that the district judge had jurisdiction to determine such a question remitted the case for consideration of the lawfulness of detention.

[45] Regarding the three issues which were finally determined, that is to say, breach of appellants’ right to presumption of innocence, and thus the likelihood of denial of a fair trial by describing appellants as “fugitives”, breach of Article 27 on right to equality before the law by failure by the extradition magistrate to order attendance of five witnesses, and breach of fair trial by adverse publicity, we would respectively agree with the findings of the High Court. Moreover, the extradition proceedings had not commenced. The issues were raised outside the committal proceedings. If they relate to fairness of the committal proceedings, they could still be raised at an appropriate time. The fear of prejudice based on the contention that the magistrate has already made preemptory remarks on the appropriate forum would be resolved by an order requiring committal proceedings to start *de novo* before a different magistrate. However, the issues appear to be related to a domestic trial and not to trial in Jersey. If that be the case, they are misconceived as the extradition in question envisages a trial in Jersey. It has not been shown, for instance, how adverse publicity in Kenya will be prejudicial to the appellants’ trial in Jersey.

[46] As regards the grounds of dual criminality, abuse of process, Jersey legal system and delay which are the substantial grounds on which the constitutional petitions were based, the High Court in essence avoided their determination and made a finding that they can competently be dealt with by the extradition magistrate.

The High Court said in part regarding concerns raised about the legal system of Jersey,

“Outrightly, it emerges that the applicants are making their case against their extradition before this court - the High Court. I have already stated that the court with jurisdiction in extradition matters is the magistrate’s court...”

That is the reason why the High Court declined jurisdiction. The respective counsel for the appellants did not exhaustively deal with the issue of the jurisdiction of the extradition magistrate or indeed the jurisdiction of the High Court in an application for *habeas corpus* in the context of our law.

The jurisdiction of an extradition magistrate or judge, particularly to deal with constitutional issues such as abuse of process, and unjust and

oppressive proceedings in extradition proceedings have been discussed in many foreign authorities, some of which have been cited before us, for instance, **United States of America v Cobb** [2001] SCC 19, **R (Kashamu) v Governor of Brixton Prison (DC)** [2002] 2 WLR 907, **Rhett Fuller v The Attorney General of Belize** [2011] UKPC 23. In the latter case (**Rhett Fuller**), the Privy Council usefully reviewed previous decisions on jurisdiction and decided the issue of jurisdiction on the basis of the law of Belize. It is not necessary for our decision to interpret the amplitude of the extradition magistrate's jurisdiction. We prefer to consider whether the issues raised can be considered and determined within the extradition spectrum or through procedural mechanism.

[47] The extradition magistrate is expressly invested with jurisdiction to determine whether the offence or offence for which surrender is sought is an extradition offence as defined in section 4 of the Extradition Act which includes the element of dual criminality. The extradition magistrate has also jurisdiction to determine whether the evidence relied on is sufficient, had the offence been committed in Kenya. That gives room to the extradition magistrate to rule on the credibility of such evidence. If the evidence is discredited by bad faith as alleged by the appellants, the extradition magistrate has jurisdiction to reject it.

In the next stage of judicial process, the High Court in an application of *habeas corpus* has jurisdiction to review the decision of the magistrate and may discharge the fugitive if, *inter alia*, by reason of bad faith or delay, it would, having regard to the circumstances, unjust or oppressive to surrender him.

In the administrative stage, the AG in the exercise of statutory discretion or discretion reserved by the treaty may decline to issue a warrant of surrender. If the AG decides to issue a warrant of surrender, his decision is subject to judicial review on the application of the fugitive under Article 47(1) of the Constitution and under the Fair Administrative Action Act (**R. v Secretary of State for Home Affairs - Exparte Launder** [1996] 2 LRC, 377)

[48] In **Dragan Vasiljkovic v Minister for Justice and Customs and Ors** [2006] ECA 1346, the applicant, Dragan applied for a writ of *habeas corpus* in the Federal Court of New South Wales and an order to restrain the respondents including the minister for Justice and Custom and the magistrate from taking any steps which would facilitate his surrender to Croatia on ground of the concept of dual criminality. The application was made before his eligibility for surrender was made by the magistrate. The Minister moved the court for an order that the proceedings be adjourned until the magistrate had determined his eligibility for surrender. The court allowed the application on the ground that the hearing of the issues prior to the magistrate's decision would offend the anti-fragmentation of extradition proceedings principle. The court said in part:

“The issues cannot be determined in this court as questions of law without agreement in respect of the scope and application of Geneva conventions relied upon by Dragan. The Minister disagrees with several facts upon which the issues rely. Accordingly, there is no ‘discrete point of law on uncontested facts’ ... the resolution of which would determine all issues between the parties.”

[49] In the same vein, in **Canada v Schmidt** [1987] 1 SCR 500, **Dickson CJ** while agreeing with the majority decision of the Court that Canadian extradition proceedings must conform to the requirements of the Canadian Charter of Rights and Freedoms said at p.503.1;

“In a word, judicial intervention must be limited to cases of real substance. Finally, barring obvious or urgent circumstances, the courts should not ordinarily intervene before the executive has made an order of surrender.”

[50] However, in **Cobb v United States of America** [2001] 1 RSC 587, the Supreme Court of Canada upheld the decision of the extradition Judge refusing to order committal and staying extradition proceedings as an abuse of process before the Minister had made an order of surrender.

Incidentally, under the 1992 amendment of the Canadian Extradition Act, an extradition judge has the same powers as he possesses by virtue of being a judge of a superior court or county court. In that case, the appellant had resisted extradition from Canada to the United States of America to face some charges, while the co-accused had submitted to jurisdiction. In sentencing those who had submitted to jurisdiction, the trial judge in USA stated that those who did not surrender to court and co-operate, if extradited and convicted, would get absolute maximum jail sentence. The prosecuting attorney had also made statements implying that such people would be subjected to homosexual rape in jail. The extradition was opposed on the basis that to extradite them would be unjustified violation of their Charter rights in light of those statements. The Supreme Court interpreted the statements as an attempt to influence the unfolding of Canadian judicial proceeding by putting undue pressure on the appellants to desist from their objections to the extradition request.

The Supreme Court held in part:

“As a result of the 1992 amendments to the Extradition Act, the extradition judge is competent to grant Charter, remedies including a stay of proceedings on the basis of a charter violation but only insofar as the Charter breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process.”

The circumstances in Cobb's case are very different from the circumstances in the instant case. The trial court in Jersey has not put pressure on the appellants to accede to the extradition request and the grounds of the constitutional petitions were different.

In **McGonnell v United Kingdom** [2000] 30 EHRR, the European Court of Human Rights (Third Section) considered the judicial system of Guernsey which is similar to that of Jersey in relation to independence and impartiality of the court, in the absence of lack of separation of powers. The court said in paragraph 51 thus:

“The court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with many theoretical constitutional concepts as such. The question is always, whether, in a given case, the

requirements of a Convention are met.”

The issue of impartiality was decided in that case on the basis of the Bailiff’s prior personal involvement with the subject matter of the dispute and not on the theoretical concept of separation of powers raised by the appellants in this appeal.

Lastly, in the **Communications Commission of Kenya & 5 v Royal Media Services Limited & 5 Ors [2014] eKLR**, the Supreme Court of Kenya in paragraph 256 invoked the doctrine of constitutional avoidance which deters a court from determining a constitutional question which is properly before it, if the matter may be properly decided on any other basis.

Furthermore, in nearly all cases relied on by the appellants, the issues raised in the constitutional petitions were raised in the appropriate fora, subsequent to determination of extradition proceedings by the extradition magistrate. Otherwise, it is not competent for the High Court or this Court to take over extradition proceedings from the extradition magistrate and exercise original jurisdiction and discretion statutorily reserved for the extradition magistrate.

In **Schtraks v Government of Israel and Others [1964] AC 556** the House of Lords held in part pp. 558-559;

“(1) That in habeas corpus proceedings which arose out of a committal order under the Extradition Act, 1870, the Court did not rehear the case that was before the magistrate or hear an appeal from his order, but its function, apart from considering any issue raised as to the offence charged being a political one, was to see that the prisoner was lawfully detained by his gaoler. Further, that the House of Lords has in this respect no wider powers than that of the lower courts. Thus, the court and on appeal therefrom, the House of Lords, could and must consider whether on the material before the magistrate a reasonable magistrate would have been entitled to commit the prisoner but neither a court nor the House of Lords could retry the case so as to substitute its discretion for that of the magistrate.”

The above extract supports the finding of the High Court that the court with jurisdiction in extradition matters is the magistrate’s court and further illustrates that higher courts assume only limited jurisdiction after the determination by the magistrate.

[51] The above analysis shows that the Extradition Act has in-built mechanisms for addressing the questions raised in the constitutional petitions. Those mechanisms are anchored on the extradition treaty or other extradition arrangements agreed upon by the Commonwealth countries as modified by the

London Scheme as a means of facilitating and effectuating the treaty or other extradition arrangements.

The primary facts on which the grounds of the petitions were based have not been agreed upon nor ascertained by the extradition magistrate. The fact of delay and the effect of delay in extradition proceedings is a matter of mixed fact and law. Similarly, insofar as the legal system of Jersey is in question the foreign law has to be proved as a matter of fact at the committal stage. To determine the issue of dual criminality, the substance of the charges have to be closely scrutinized in relation to Kenya Law. As the authorities show, any other institution or court other than the ones conferred with jurisdiction under the Extradition Act would be reluctant to intervene at the intermediate stage of the extradition process until the prescribed mechanisms are exhausted in the absence of an exceptional situation.

[52] We hold therefore that since the Extradition Act provides adequate mechanisms for resolution of the question raised in the constitutional petitions, it was inappropriate in the circumstances of the case for the appellants to invoke the constitutional procedure and the High Court sitting as a constitutional court justifiably applied the doctrine of constitutional avoidance. Further, had we faulted the High Court, we would have remitted the case to the High Court for determination of the questions raised.

[53] As regards the costs of the appeal, the High Court in its discretion did not give costs to any party for the reasons that the matter contributed to the public interest litigation and in essence expounded on the law on extradition. The appeal has succeeded in part and failed in part. The appeal involved the interpretation and application of the somewhat complex extradition law as well as the determination of the constitutional role of the AG and the DPP in extradition. This decision has, in our view, contributed at least to the clarification of the law in public interest. In the premises, it is just that costs should not be awarded.

[54] In conclusion, pursuant to our holdings in terms of paragraphs 40, 52, and 53 of the judgment;

1. The appeal succeeds in part and is allowed on the ground that; the

“Authority to Proceed” dated 6th July 2011 issued by the DPP is a nullity together with the committal proceedings in Misc. Application No. 9 of 2011 instituted against the appellants pursuant to such authority and to any act done by the magistrate in pursuance of the proceedings.

For avoidance of doubt the burden remains with the Attorney General to deal with the Request for extradition in accordance with the law.

2. The order of the High Court dated 18th December, 2015 declaring the committal proceedings to be valid and the order of the extradition magistrate dated 5th February, 2013 requiring the committal proceedings to commence are set aside and in lieu thereof the committal proceedings are declared invalid and are hereby struck out.

3. The other substantive grounds of appeal are dismissed.

4. There shall be no orders of costs in this appeal.

Orders accordingly.

Dated and Delivered at Nairobi this 2nd day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR