IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 370 OF 2014

BETWEEN

COMMUNICATIONS COMMISSION OF KENYA.....APPELLANT

VERSUS

THE OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS.....1ST RESPONDENT

ROYAL MEDIA SERVICES LIMITED.....2ND RESPONDENT

(*Being an appeal from the judgment of the High Court*

of Kenya at Nairobi (Weldon K. Korir, J.) delivered

on 21st February, 2014

in

Misc. Civil Application No. 221 of 2013)

****

JUDGMENT OF THE COURT

INTRODUCTION

1. In this appeal, Communications Commission of Kenya (CCK), the appellant, challenged the decision of the Director of Public Prosecutions (DPP), the 1st respondent, not to prosecute Royal Media Services Limited (Royal Media), the 2nd respondent, for use of unauthorized frequencies.

The High Court found that the DPP acted within his powers as conferred by **Article 157** of the **Constitutional of Kenya, 2010 (the Constitution)** and dismissed the suit.

BACKGROUND

2. CCK is a body corporate established under **section 3** of the **Kenya Information and**

Communications Act. It is mandated by the Act to licence and regulate postal, information and communication services and to facilitate the development of the information and communications sector.

3. On 30th January, 2013 CCK applied and obtained warrants from the Subordinate court to seize the 2nd respondent's broadcasting equipment that it said were being used to make unauthorized broadcast transmissions at Migori, Enchoro Hills in Borabu, Narok, Menengai Hill in Nakuru, Nanyuki, Gatere in Murang'a, Mukuyuni, Mwingi, Karue Hill in Embu, Mambrui in Malindi and Vuria in Taita.

4. The search and seizure warrants became the subject of a suit that was instituted by the 2nd respondent against the **Attorney General, Royal Media Services Limited v The Attorney General, the appellant & Another, H.C. Petition No. 346 of 2012.**

5. On 15th February, 2013 the Director of Criminal Investigations Department wrote to the DPP recommending that the 2nd respondent and its directors be arrested and charged for the use of unauthorized frequencies.

6. After exchange of correspondence, on 27th May, 2013 the DPP wrote to the Director, Criminal Investigations, and made various decisions, that were summarized by the appellant as follows:

> ***"i. I have carefully perused the file and analysed the evidence on record and noted that the evidence gathered cannot establish a prosecutable case against the suspects ….***
>
> ***ii. It is therefore clear that the approval that would have been required for erecting the masts would have been from KCAA, Ministry of State for Defense and NEMA but not that of CCK.***
>
> ***iii. Further, the investigators failed to establish the use of the alleged frequencies for there is not a single independent witness other than the CCK officers that has recorded a statement to confirm that the alleged unauthorized frequencies were active.***
>
> ***iv. In view of the above, the proposed counts cannot stand in law as against the suspects.***
>
> ***v. It is imperative to note that pending the determination of the Petition, it would be idle to proceed and commence proceedings against the suspects against the backdrop of an express Court Order barring CCK from interfering with broadcasting services.***
>
> ***vi. I therefore direct that in view of the above, there is no sufficient evidence to support the charges proposed and to institute the intended proceedings would be tantamount to subverting the rule of law and would by extension undermine the constitutional authority of the High Court.***
>
> ***viii. Do therefore proceed and have the file closed with no further police action".***

7. CCK contended that the impugned decisions as above stated were *ultra vires* the powers conferred on the DPP by **Article 157 of the Constitution;** the **Office of the Director of Public Prosecutions Act, No. 2 of 2013;** and the **National Police Service Act, No. 11A of 2011**.

8. On 3rd July, 2013 CCK filed an application in the High Court of Kenya at Nairobi, Judicial Review Division, seeking an order of certiorari to remove into the court and quash the impugned decisions. The appellant also sought an order of mandamus to compel the DPP **"to institute, maintain, to their logical conclusion, such criminal proceedings against Royal Media Services Limited, whether in terms of the Director of Criminal Investigations Department dated 15th February, 2013 or in terms of any such recommendations for criminal prosecution as may be or may have been made by the Inspector General of police of the Applicant as the regulator contemplated under the Kenya Information and Communications Act, Cap 411A, Laws of Kenya."**

9. The application was opposed. The DPP, through **Terry Kahoro**, a prosecution counsel, set out the history of CCK's complaints; asserted that upon a thorough perusal and evaluation of the inquiry file by a team of counsel appointed by the DPP, it was noted that the investigations as conducted by the office of the Director of Criminal Investigations fell short of the required threshold to institute criminal proceedings against the 2nd respondent; that consequently the DPP, having personally reviewed the file and the brief, directed that further investigations be conducted; that the Director of Criminal Investigations acted as directed and subsequently re-submitted the file to the DPP, who in turn subjected the brief to a fresh and independent analysis as contemplated under **Article 157** of the **Constitution** as read together with the **Office of the Director of Public Prosecutions Act, No. 2 of 2013** and arrived at a decision not to prosecute the 2nd respondent.

10. The aforesaid deponent further denied that the DPP acted *ultra vires;* stated that the decision arrived at was based purely on the law, the evidence available, and with regard to public interest; that the DPP is not bound by the recommendations to prosecute by investigative agencies or any enforcement body or authority; and that the decision did not amount to breach of any legitimate expectation since in law it is not contemplated that all investigations must result in the commencement of criminal proceedings.

11. The 2nd respondent opposed the application through a replying affidavit sworn by **Samuel Kamau Macharia**, the Chairman of its Board of Directors. He stated, *inter alia*, that CCK, as then constituted, lacked the required independence under the Constitution; that CCK was hell bent on shutting down the 2nd respondent's operations or destabilize its business due to ulterior motives; that under **Article 157 (4)** of the **Constitution** the DPP has discretion to either institute or not to institute criminal proceedings and therefore the appellant's application was bad in law; that the relationship between CCK and the 2nd respondent has been acrimonious since 2000 when CCK shut down the 2nd respondent's installations and thereafter its radio and television broadcasting stations; and that therefore the application had been brought in bad faith.

12. In its considered judgment, the trial Court held that the DPP had acted within his constitutional and statutory mandate and dismissed the appellant's application.

APPEAL TO THIS COURT

13. Being aggrieved by the trial court's decision, CCK filed an appeal before this Court. The memorandum of appeal contains 18 grounds of appeal. However, in their written submissions before this Court, the appellant's advocates summed up the issues for determination as follows:

> ***"(a) Whether the Learned Judge of the Superior Court erred in fact and in law in failing to find as follows:***
>
> > ***i. the 1st Respondent acted ultra vires and/or in excess of jurisdiction***
> >
> > ***ii. the 1st Respondent used the test applied by judicial officers in criminal proceedings in making its decision in not instituting criminal proceedings against the 2nd Respondent***
> >
> > ***iii. the 1st Respondent breached the Appellants? legitimate expectation in failing to consider its unique functions as set out in the Kenya Information and Communications Act Cap 411 Laws of Kenya ("KICA")***
> >
> > ***iv. Whether the 1st Respondent?s decision in relation to the prosecution of the 2nd Respondent was:***
> >
> > > ***(a) a fundamental error of law,***
> > >
> > > ***(b) unreasonable, irrational,***

(c) Who should bear the cost of these proceedings."

We shall consider the appellant's submissions on each of the four main issues as framed and weigh them against the respondents' submissions and thereafter make our findings on the appeal.

WHETHER THE DPP ACTED *ULTRA VIRES* HIS JURISDICTION

14. Submitting that the 1st respondent acted *ultra vires* the powers conferred on him in arriving at the decision not to prosecute the 2nd respondent, **Mr. Kilonzo**, learned counsel for the appellant, reiterated the provisions of **Article 157 (11)** of the **Constitution** that provides as follows:

> ***"(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process".***

15. Further, under **Article 157(4)** of the **Constitution,** the 1st respondent is empowered to give directions to the Inspector-General of the National Police Service **"to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction".** However, counsel added, **Article 245(4)** of the Constitution provides that **"no person may give a direction to the Inspector-General with respect to the investigation of any particular offence or offences".**

16. The import of **Article 254(4)** of the **Constitution,** counsel submitted, is to protect the independence of the Inspector-General of Police and safeguard the process of investigation of any particular offence from interference from any quarters. Furthermore, **section 8(1)** of the **National Police Service Act** provides that the service shall be under the overall and independent command of the Inspector-General. It is therefore clear that the Police Act exclusively grants the sole command over the police service, (under which the office of the Director of Criminal Investigations falls), to the Inspector-General of Police. Consequently, the decision by the 1st respondent directing the Office of the Director of Criminal Investigations to close the investigation file amounted to attempt to direct the police on how to investigate an offence, which is *ultra vires* the powers conferred upon the 1st respondent, the appellant's counsel submitted.

17. In response, the 1st respondent, through **Mr. Mule, Senior Assistant Director of Public Prosecutions**, cited **Article 157(4)** of the **Constitution** which, as earlier stated, grants power to the Director of Public Prosecutions to direct the Inspector-General of police to investigate any information or allegation of criminal conduct.

18. Further, counsel cited **Article 157(10)** of the **Constitution** which stipulates that:

> ***"(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."***

19. The 1st respondent's counsel submitted that the impugned decision made on 27th May, 2013 was *intra vires* and consistent with the powers conferred upon the DPP by **Article 157** of the **Constitution**, **Office of the Director of Public Prosecutions Act** and the **National Police Service Act.**

20. He added that the decision not to prosecute cannot be said to have been *ultra vires* the power conferred upon the DPP, where the DPP had reviewed an investigation file and found the evidence to be insufficient. He remarked that it was not for the court to direct the DPP on how to exercise his constitutional powers, though the court could intervene where the power is proved to have been unfairly, improperly or unjustly exercised.

21. Counsel cited the High Court decision in **DOUGLAS MAINA MWANGI v KENYA REVENUE AUTHORITY & ANOTHER, Constitutional Petition No. 528 of 2013**, where the court

held that:

> ***"When dealing with the decision as to whether or not to prosecute the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of process".***

22. The 2nd respondent, through its learned counsel, **Mr. Issa**, supported the 1st respondent's submissions. Counsel reiterated that the decision by the DPP not to commence proceedings was arrived at in exercise of the DPP's discretion and mandate informed by the outcome of investigations undertaken by the Director of Criminal Investigations.

23. We have carefully perused the relevant Articles of the Constitution, the Office of the Director of Public Prosecutions Act as well as the National Police Service Act. It is beyond any dispute that under **Article 157(10)** of the **Constitution** the DPP does not require consent or authority of any person for commencement of any criminal proceedings; but is subject only to the Constitution.

24. The decision whether or not to institute criminal proceedings is purely discretionary. That discretion must however be exercised by the DPP within the Constitutional limits, that is, with regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. See **Article 157(11)** of the **Constitution**. The powers are amplified by **section 5** of the **Director of Public Prosecutions Act, 2013** and **section 5(1)** thereof is explicit that the DPP has power to direct the Inspector-General, under whose office the Director of Criminal Investigations falls, to investigate any information or allegation of criminal conduct.

25. The 1st respondent explained how he arrived at the decision to direct the Director of Criminal Investigations to close the investigation file; having formed an independent opinion that there was no sufficient evidence to sustain a criminal case against the 2nd respondent. In the circumstances, can it be said that the DPP exceeded his power so as to necessitate this Court to quash his decision and compel him to institute criminal proceedings against the 2nd respondent?

26. In **PATRICK GENIUS v THE CORONER?S ACT, Suit No. M.35 of 2002**, the Supreme Court of Jamaica held that a decision to review the exercise of discretion by the Director of Public Prosecutions not to prosecute should be based on one or more of the following grounds:

> ***(a) The DPP in performing his functions did not act in accordance with the Constitution or any other law;***
>
> ***(b) The DPP failed to act in accordance with settled policy;***
>
> ***(c) The decision of the DPP was perverse and unreasonable and was one which no reasonable prosecutor could have arrived at.***

We are not persuaded that the DPP did not act within the Constitution or the settled policy; or was so unreasonable that no reasonable prosecutor could have arrived at such a decision.

27. In our view, the 1st respondent acted within his powers and cannot be said to have acted *ultra vires* in directing the Director of Criminal Investigations to close his file. We must therefore dismiss the first ground of appeal.

TO PROSECUTE OR NOT: THE APPLICABLE TEST

28. We now turn to consider whether the learned judge erred in law in failing to find that the DPP used the test applied by judicial officers in criminal proceedings in making his decision not to institute criminal proceedings against the 2nd respondent.

29. The learned judge held that the applicable test was as laid down in the English case of **R v DPP ex parte MANNING [2001] QB 330** where it was stated that:

> ***"General responsibility for the institution and conduct of prosecutions in England and Wales is entrusted to the Director, subject to the superintendence of the Attorney General, and the responsible staff of the Crown Prosecution Service, although the power to institute a private prosecution is preserved. Section 10 of the Prosecution of Offences Act 1985 requires the Director to issue a code of Crown Prosecutor giving guidance on general principles to be applied by them in determining, in any case, whether proceedings for an offence should be instituted. The Code applicable in this case laid down two tests before a decision to prosecute would be made. The first test was described as the evidential test which had to be satisfied before the second „public interest? test became applicable. The code provided:***
>
> > ***"5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence case may be and how that is likely to effect the prosecution case.***
> >
> > ***5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.***
> >
> > ***5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used or is reliable …."***
>
> ***An explanatory Memorandum emphasized that the evidential test was a "realistic prospect of conviction." This had to be satisfied. If it was not satisfied there should be no prosecution, no matter how great the public interest might seem in having the matter aired in court. It was not the role of the CPS simply to give cases a public hearing, regardless of the strength of the evidence. There had to be an objective assessment of that evidence. The CPS should not look for the same standard of proof that a jury or bench of magistrates before it could convict, which would set too high a standard and tend to usurp the role of the court. The test based on "more likely than not" meant just that."***

30. The learned judge found the holding in **R v DPP ex parte MANNING (supra)** to be in line with the National Prosecution Policy. However, the appellant's counsel submitted that the learned judge failed to appreciate that the evidential test in making a prosecutorial decision is not by considering whether the evidence before the prosecutor is one that will provide a reasonable and probable cause for prosecution as was explained by Rudd, J. in **KAGANE v ATTORNEY-GENERAL [1969] E.A. 643** and as quoted in **JANET ATIENO OTIENO v PHARMACY & POISONS BOARD & ANOTHER [2016] eKLR** that:

> ***"…… to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution…..must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty".***

31. The appellant's counsel submitted that contrary to the DPP's contention that there was insufficient evidence to prosecute, no reasons were advanced to justify that finding; that the DPP applied the test of **"beyond reasonable doubt"** which is that of a judicial officer, rather than that of **"reasonable and probable cause"** of a prosecutor as held in **KAGANE v ATTORNEY-GENERAL (supra).**

32. It was further submitted that the learned judge erred in law in not finding that the consideration of the totality of the evidence was not in line with the provisions contained in the prosecution policy developed by the 1st respondent, which provides, *inter alia*, that where the available evidence at the time may not be sufficient to determine the **"Evidential Test"**, that is, **"realistic prospect of conviction",** prosecutors should apply the **"Threshold Test"** in order to make the decision whether to charge or not.

33. The 1st respondent's response to this ground of appeal was fairly terse and succinct; that public interest/public policy considerations are taken into account in making a decision as to whether or not to prosecute in line with the National Prosecution Policy. However, the decision to prosecute or not cannot be hinged purely on such considerations; the evidential test is the overriding consideration.

34. The 2nd respondent's counsel cited clause 2 of the National Prosecution Policy, 2007, which provides for the **Evidential Test** in the following terms:

> ***"Public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?"***

35. The 2nd respondent's counsel submitted that the learned judge correctly appreciated that the DPP applied the applicable test as provided by the Kenya National Prosecution Policy, 2007 and urged the court to dismiss the second ground of appeal.

36. To determine whether or not the DPP applied the right test in making the impugned decision, the starting point is to consider what the National Prosecution Policy states about the **"Decision to Prosecute"** which is as follows:

> ***"In exercising the prosecution mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.***
>
> ***The decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute.***
>
> ***Each aspect of the test must be separately considered and satisfied before the decision to charge is made The Evidential Test must be satisfied before the Public Interest Test is considered."***

37. We have reproduced the Evidential Test at paragraph 34 above. Clause vii under Evidential Test states as follows:

> ***"(vii) Where the case does not pass the Evidential Test it must not go ahead, no matter how serious it may be. Prosecutors can only apply the public Interest Test when the Evidential Test is satisfied".***

The DPP was satisfied that the threshold in Evidential Test had not been met and consequently he could not proceed to institute criminal charges against the 2nd respondent.

38. Whereas the National Prosecution Policy states that the standard of evidence required under the Evidentiary Test is less than the court's **"beyond reasonable doubt",** where the DPP has reviewed the available evidence and arrived at a considered conclusion that the Evidentiary Test threshold has not been realized, we do not think that he can be accused of applying the standard of proof of a judicial officer. We are satisfied that the DPP applied the right test in declining to prosecute the 2nd respondent.

DID THE DPP COMMIT A FUNDAMENTAL ERROR OF LAW?

39. As to whether the DPP's decision in relation to the prosecution of the said 2nd respondent was a fundamental error in law or whether the decision was unreasonable and irrational, our determination of

first ground of appeal (*ultra vires*) and the applicable test is sufficient to enable us answer the above questions in the negative.

The appellant's contention is that the learned judge failed to appreciate that any public decision making body which makes an error in the discharge of its mandate is amenable to judicial review authority of the court. We do not agree. A keen reading of the judgment demonstrates that the learned judge appreciated that the 1st respondent's decisions were amenable to judicial review if they were not within the laid down constitutional remit.

40. The learned judge delivered himself on the issue as follows:

> ***"The Respondent and the Interested Party submitted that the Respondent is an independent office not subject to the direction and control of anybody else. They also submitted that in deciding whether to prosecute or not to prosecute, the Respondent is exercising discretion and the Respondent cannot therefore be directed on how to exercise the discretion. In support of their arguments they cited the decision of G.V. Odunga, J. in Nairobi High Court Misc. Civil Application No. 249 of 2012, REPUBLIC v THE DIRECTOR OF PUBLIC PROSECUTION EX-PARTE VICTORY WELDING WORKS LIMITED AND ANOTHER.***
>
> **……..**
>
> ***I have perused the cited judgment and I do not get the impression that my brother, G.V. Odunga, J. is of the view that the Director of Public Prosecutions is beyond the reach of this court whenever he exercises the discretion bestowed upon his office by the Constitution. At paragraph 10 of the same judgment, after analyzing several decisions, the learned Judge concluded that:***
>
> > ***"It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to the control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety."***

41. The learned judge concluded that "**the court can intervene where the respondent exercises his mandate unconstitutionally."**

42. The decision by the Supreme Court of Fiji in **MATALULU v DPP [2003] 4 LRC 712** that was cited by the learned judge regarding the grounds for review of the exercise of the DPP's prosecutorial powers is worth restating:

> ***"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP?s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.***
>
> ***The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:***
>
> > ***1. In excess of the DPP?s constitutional or statutory grants of power-such as an attempt to institute proceedings in a court established by disciplinary law (see s96(4) (a)).***

2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion-if the DPP were to act upon a political instruction the decision could be amenable to review.

3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice".

The courts in this jurisdiction will review the decisions of inferior bodies similar grounds.

LEGITIMATE EXPECTATION

43. Did the DPP's impugned decision breach the appellant's legitimate expectation that he would prosecute the 2nd respondent? The appellant's

counsel submitted that the appellant, having undertaken its regulatory role in conjunction with the office of the Director of Criminal Investigations and established that the 2nd respondent had violated various statutory provisions regarding installation of its radio communication equipment, thereby necessitating their confiscation, it had a legitimate expectation that the 1st respondent would take up its constitutional and statutory role and prosecute the 2nd respondent.

44. The DPP's response to that line of submission is that there is no legitimate expectation that all complaints once investigated must lead to prosecution; that the decision as to whether or not to commence criminal proceedings does not lie with a complainant but is within the discretion of the DPP and is dependent upon the evidence available, public interest considerations, as well as the need to prevent and avoid abuse of criminal justice process.

45. The 2nd respondent, in supporting the DPP's submission that there can be no legitimate expectation that all the appellant's complaints would lead to preferment of charges against the 2nd respondent, cited the decision of **ISAAC TUMUNU NJUNGE v DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS [2016] eKLR**, where Odunga, J. held as follows:

"In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the DI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences, must automatically be the subject of prosecution since public interest must, under our constitution, be considered in deciding whether or not to institute prosecution."

46. We endorse and adopt the above interpretation of the law by Odunga, J. We only wish to add that whereas generally speaking a complainant would ordinarily expect the DPP to prosecute a suspected offender based on the evidence availed to or gathered by the police, the DPP, in exercise of the discretion conferred upon him by the Constitution and statute, cannot be accused of having breached a complainant's legitimate expectation if he chooses not to institute criminal proceedings.

47. Having carefully considered the entire record of appeal and counsel's submissions, we find no basis for interfering with the High Court's decision and consequently dismiss this appeal in its entirety.

48. On the issue of costs, we order that each party bears their own costs.

Dated and delivered at Nairobi this 4th day of May, 2018.

W. OUKO (P)

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR