Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment)

Neutral citation: [2023] KESC 6 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

PETITION 39 & 40 OF 2019 (CONSOLIDATED)

MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

JANUARY 27, 2023

BETWEEN

PRAXIDIS NAMONI SAISI ..... 1ST APPELLANT

PETER AYODO OMENDA ..... 2ND APPELLANT

NICHOLAS KARUME WEKE ..... 3RD APPELLANT

CALEB INDIATSI MBAYE ..... 4TH APPELLANT

ABRAHAM KIPCHIRCHIR SAAT ..... 5TH APPELLANT

MICHAEL MAINGI MBEVI ..... 6TH APPELLANT

GODWIN MWAGAE MWAWONGO ..... 7TH APPELLANT

BRUNO MUGAMBI LINYURI ..... 8TH APPELLANT

AND

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

ETHICS & ANTI CORRUPTION COMMISSION ..... 2ND RESPONDENT

CHIEF MAGISTRATES' ANTI-CORRUPTION COURT ..... 3RD RESPONDENT

(Being an appeal from the Judgments of the Court of Appeal at Nairobi (Warsame, Makhandia & Murgor JJ. A) delivered on 20th September 2019, in Civil Appeal No.2 of 2017 as consolidated with Civil Appeal No.184 of 2016 and in Civil Appeal No. 313 of 2017)

Judicial review courts have the power to interrogate both the process and the merit of an impugned decision.

Reported by John Ribia

Administrative Law *– judicial review – character and scope of judicial review – evolution of judicial review pre and post the Constitution of Kenya, 2010 - whether the High Court as a judicial review court could go through the merits and demerits of the decision challenged in judicial review - between the process only approach to judicial review and the merit review approach in appropriate cases, which school of thought was applicable in judicial review in Kenya – Constitution, article 47; Law Reform Act, cap 26, sections 8 and 9; Civil Procedure Rules, cap 21 Sub Leg, order 53.*

Constitutional Law *– Office of the Director of Public Prosecutions – decision to charge - administrative Law – judicial review– review of decision of the Director of Public Prosecutions (DPP)to charge – considerations - what were the circumstances in which a judicial review court could interfere with the decision of the DPP to charge an accused person - whether a challenge on the interpretation of the provisions used to charge an accused was an issue of propriety or otherwise of the decision by the DPP to charge an accused warrant consideration by a judicial review court – Constitution articles 10, 25(c), 27, 28, 29, 41 and 50 ; Law Reform Act, cap 26, sections 8 and 9; Civil Procedure Rules, cap 21 Sub Leg, order 53.*

Words and Phrases *– judicial review – definition – court's power to review the actions of other branches of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional - constitutional doctrine providing for this power - court's review of a lower court's or an administrative body's factual or legal findings- Black's Law Dictionary, 9th Edition' Pg. 924.*

Brief facts

The appellants were employees of Geothermal Development Company (GDC). GDC was fully owned by the Government of the Republic of Kenya as a state corporation carrying on the business of geothermal exploration. GDC issued an advertisement for tender No. REF. GDC/HSQ/086/2011-12 (tender) for the provision of rig move services for the Menengai Geothermal Project. The tender was awarded to Bonafide Clearing and Forwarding Company Limited (hereinafter referred to as the "BCFCL") for Kshs. 42,746,000 per rig move. The appellants were members of GDC's Tender Committee that procured the provision of the rig move services.

The Ethics and Anti-Corruption Commission (EACC/2nd respondent) asserted that it received a complaint regarding the failure of GDC's Tender Committee to comply with procurement law in the procurement of rig move services tender. The complaints were based on the conduct of the appellants in their capacity as members of the GDC Tender Committee for the acquisition of rig moves in tender No. Ref. GDC/HQS/086/2011-2012. More specifically the difference in the procurement of the rig-move services for the year 2011/2012 at a cost of Kshs 42,746,000/= from BCFCL while the previous year the same services were tendered at a cost of Kshs 19,550,000/= to the same company, BCFCL, at a cost of per rig move. The difference in price in the procurement of the rig-move services was considerably higher than comparable similar rig-move services by the same provider, BCFCL, by other government institutions more specifically KenGen for rig-move services at Olkaria and Eburru Geothermal fields vide tender no. KGN-OLK-179-2012 resulted in an agreement dated February 5, 2014, at a cost ranging between Kshs. 13,565,040 and Kshs. 24,429,600.

Due to that, DPP on the recommendation of EACC, elected to charge the appellants with various offences including wilful failure to comply with the law relating to procurement contrary to section 45 (2) (b) as read with section 48 of the Anti-Corruption and Economic Crimes Act and inappropriate influence on evaluation contrary to section 38(1)(b) as read with 38(2)(a) of Public Procurement and Disposal Act and abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act.

Before the said criminal case could be heard and determined, the 1st appellant, pursuant to leave of the court filed judicial review proceedings which *inter alia* sought an order of *certiorari* to quash EACC's decision recommending her prosecution for the aforesaid anti-corruption offences; and DPP's decision directing her prosecution. The High Court granted an order of prohibition barring the DPP from prosecuting. Aggrieved the respondents appealed and the Court of Appeal held that the judicial review application did not merit the

exercise of the High Court's discretion and found that the High Court misdirected itself in deciding to issue orders of *certiorari* and prohibition.

Aggrieved, the appellants filed two appeals which were consolidated. Their grievances were distinctively similar. They both contended that the charges preferred against them were non-existent and that the DPP failed to holistically interpret and understand the repealed Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.

Issues

i. Whether judicial review courts had the power to interrogate both the process and the merit of an impugned decision.

ii. What were the circumstances in which a judicial review court could interfere with the decision of the Office of the Director of Public Prosecutions (DPP) to charge an accused person?

iii. Whether a challenge on the interpretation of the provisions used to charge an accused person was an issue concerning the propriety or otherwise of the decision by the DPP to charge an accused warranty consideration by a judicial review court.

iv. Whether the Court of Appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the Constitution.

Held

1. Judicial review established the court's authority to hold the government as well as the subordinate courts and bodies exercising quasi-judicial authority accountable to the law. Judicial review was the court's way of enforcing the rule of law; ensuring that public authorities functions were undertaken according to the law and that they were accountable to the law.
2. Before the Constitution in 2010, judicial review was governed by the principles of common law largely borrowed from the United Kingdom. The jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The basis of judicial review in Kenya was derived from the Law Reform Act and order 53 of the Civil Procedure Rules, 2010. Sections 8 and 9 of the Law Reform Act provided the substantive basis while Order 53 provided the procedural basis. The remedies in judicial review were *certiorari*, prohibition and *mandamus*. The grounds upon which one could base an application for judicial review were the heads of illegality, irrationality, procedural impropriety and proportionality.
3. Post-2010, judicial review was no longer a common law prerogative but was entrenched in the Constitution to safeguard the constitutional principles, values and purposes. In particular, article 23 (3)(f) provided for the orders of judicial review as one of the available remedies concerning the enforcement of the Bill of Rights. Article 47(1) of the Constitution guaranteed every person the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) granted the High Court supervisory jurisdiction over the subordinate courts and any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court. In 2015, Parliament in adherence to article 47 of the Constitution enacted the Fair Administrative Action Act, cap 7L, Laws of Kenya (FAA Act).
4. Due to the codification of the law on judicial review, two schools of thought emerged. The first believed that since the promulgation of the Constitution, judicial review had shifted from the process-only approach to merit review in appropriate cases. The second school of thought maintained the traditional approach that believed that judicial review proceedings involved a process-only approach limited to the interrogation of the process and not the merits of the decision being challenged.
5. The FAAA provided the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affected the legal rights or interests of an aggrieved person. The judicial review court examined various aspects of an act, omission or decision including whether the body or authority whose decision was being challenged had done something which it had no lawful authority to do. It could have abused or misused

the authority which it had. It could have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it could be found to be perverse, or irrational, or grossly disproportionate to what was required. The parameters were set out extensively in section 7 of the FAAA.

6. The framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engage with public bodies in whatever capacity, or any body, person or authority that exercises quasi-judicial functions. That approach was consistent with realizing the right of access to justice because justice could be obtained in other places besides a courtroom.

7. For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say that the court should embark on merit review of all the evidence. It should be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge.

8. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process, only led to intolerable superficiality. That would be against article 259 of the Constitution which required the courts to interpret it in a manner that *inter alia* advanced the rule of law, permitted the development of the law and contributed to good governance.

9. The intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court.

10. The nature of evidence in judicial review proceedings was based on affidavit evidence. That could not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions were better placed to do so. The courts were limited in the nature of reliefs that they could grant to those set out in section 11(1) and (2) of the FAAA. The court could not substitute the decision it was reviewing with one of its own. The court could not set about forming its own preferred view of the evidence, rather it could only quash an impugned decision(section 11(1)(e) and (h) of the FAAA).

11. The merits of a case were best analysed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. In matters involving the exercise of judgment and discretion, a public officer or public agency could only be directed to take action; it could not be directed in the manner or the particular way the discretion was to be exercised.

12. Article 157(6) of the Constitution empowered the Director of Public Prosecutions (DPP) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) safeguarded that independence by decreeing that the DPP was not to require the consent of any person or authority before the commencement of proceedings, neither was the DPP under the direction or control of any person. That was not to say that that power was absolute. Article 157(11) required the DPP in the exercise of his duties to have regard for public interest, interests of the administration of justice and to prevent or avoid abuse of the legal process.

13. Whenever it seemed that the DPP was utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which was clearly not otherwise prosecutable, then the court could intervene.

14. Although the DPP was not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it was shown that the expectations of

article 157(11) of the Constitution had not been met, then the High Court under article 165(3)(d)(ii) could properly interrogate any question arising and make appropriate orders. The following guidelines read alongside article 157 (11) of the Constitution were a good gauge in the interrogation of alleged abuse of prosecutorial powers:

1. where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
2. where it manifestly appeared that there was a legal bar against the institution or continuance of the said proceedings, eg, want of sanction;
3. where the allegations in the first Information report or the complaint take at their face value and accepted in their entirety, did not constitute the offence alleged;
4. where the allegations constituted an offence but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge.

15. In matters that involved exercise of judgment and discretion, a public officer or public agency could only be directed to take action; it could not be directed in the manner or the particular way the discretion was to be exercised. The only exception where a court could compel a public agency to implement a recommendation was where there was a gross abuse of discretion, manifest injustice or palpable excess of authority equivalent to denial of a settled right which the petitioner was entitled, and there was no other plain, speedy and accurate remedy.
16. Issues on the interpretation or misrepresentation of the provisions one was charged with by the DPP in a criminal court were not issues concerning the propriety or otherwise of the decision by the DPP to charge them. Those were contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. It was not for the High Court as a constitutional court to go through the merits and demerits of the case as that was the duty of the trial court. It was not for a judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.
17. The High Court, whether sitting as a constitutional court or a judicial review, could only interfere where it was shown that under article 157(11) of the Constitution, criminal proceedings had been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process.
18. A distinction of the applicable procurement laws and whether the appellants participated in the tender process hence liable to prosecution was a determination best arrived at upon consideration of *viva voce* evidence and through cross-examination of witnesses. The High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the Constitution.
19. The right to a fair hearing was broad and included the concept of the right to a fair trial as it dealt with any dispute whether it arose in a judicial or an administrative context. By refusing to submit to the jurisdiction of the trial court where their innocence may be upheld or their guilt established, the appellants removed themselves from the protections of article 50(1) of the Constitution. Whatever the case, the criminal justice system was required to protect against the abuses claimed by the appellants, which the trial court was competent to resolve when challenged by an accused person, properly, during the trial.
20. The claim for constitutional rights violations fell by the wayside. It would be pragmatic that the appellants let the trial commence and conclude, during which trial they may raise all the issues they had against the law under which they were charged.

Appeal dismissed.

Orders

i. *The 1st appellant's petition of appeal dated October 25, 2019 and lodged on even date and the 2nd to 8th appellant's petition of appeal dated October 25, 2019, and lodged on October 29, 2019, were dismissed.*

ii. *Anti-Corruption Case No. 20 of 2015 before the Chief Magistrates' Court in Milimani was to proceed and be heard on a priority basis.*

iii. *Each party was to bear its own costs.*

Citations

Cases

Kenya

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2. *Commissioner of Lands v Kunste Hotel Limited* Civil Appeal 234 of 1995; [1997] KECA 335 (KLR) - (Explained)
3. *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others* Civil Appeal 56 of 2012; [2013] KECA 182 (KLR) - (Mentioned)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14 A, 14 B & 14 C of 2014; [2014] eKLR (Consolidated) - (Explained)
5. *Guantai, Joram Mwenda v Chief Magistrate, Nairobi* Civil Appeal 228 of 2003; [2004] eKLR - (Mentioned)
6. *Jirongo v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] KESC 32 (KLR) - (Explained)
7. *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
8. *Judicial Service Commission & another v Njora* Civil Appeal 486 of 2019; [2021] KECA 366 (KLR) - (Applied)
9. *Kenya Commercial Bank & 2 others v Commissioner of Police & another* Petition 218 of 2011; [2011] eKLR - (Mentioned)
10. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* Civil Appeal 266 of 1996; [1997] KECA 58 (KLR) - (Mentioned)
11. *Kenya Revenue Authority & 2 others v Darasa Investments Limited* Civil Appeal 24 of 2018; [2018] KECA 358 (KLR) - (Mentioned)
12. *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* Petition 42 of 2019; [2021] KESC 35 (KLR) - (Explained)
13. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Misc Civ Appli 743 of 2006; [2006] eKLR - (Mentioned)
14. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* PetitionS 18 & 20 of 2014; [2014] KESC 11 (KLR) (Consolidated) - (Mentioned)
15. *Kiplagat, Josephat v Michael Bartenge* Civil Appeal 357 of 2013; [2016] KECA 346 (KLR) - (Mentioned)
16. *Lalji, Diamond Hasham & another v Attorney General & 4 others* Civil Appeal 274 of 2014; [2018] KECA 856 (KLR) - (Explained)
17. *Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohamad & 3 others* Petition 7 of 2018; [2018] KESC 26 (KLR) - (Mentioned)
18. *Masinde, Charles v Augustine Juma & 8 others* Civil Appeal 1 of 2014; [2016] KECA 96 (KLR) - (Mentioned)
19. *Mutua, Joshua Sembei v Attorney General & 2 others* Civil Appeal 93 of 2015; [2019] KECA 227 (KLR) - (Mentioned)
20. *Mwangi, Douglas Maina v Kenya Revenue Authority & another* Constitutional Petition No 528 of 2013; [2013] eKLR - (Mentioned)
21. *Mwangi, Thuita & 2 others v Ethics & Anti-Corruption Commission & 3 others* Petitions 153 & 369 of 2013; [2013] eKLR (Consolidated) - (Mentioned)

22. *Mwilu, Philomena Mbete v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party); International Commission of Jurists Kenya Chapter (amicus curiae)* Petition 295 of 2018; [2018] eKLR - (Explained)
23. *Njuguna, S Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* Civil Appeal 333 of 2014; [2018] KECA 47 (KLR) - (Mentioned)
24. *Nyaga, Paul Ng'ang'a & 2 others v Attorney General & 3 others* Petition 518 of 2012; [2012] eKLR - (Mentioned)
25. *Peter Ayodo Omenda & 6 others v Director of Public Prosecutions & 2 others.* Petition 40 of 2019; [2020] KESC 70 (KLR) - (Mentioned)
26. *Rai & 3 others v Rai & 4 others* [2013] 1 KLR 685 - (Explained)
27. *Ransa Company Ltd v Manca Francesco & 2 others* Civil Appeal 216 of 2009; [2015] KECA 139 (KLR) - (Mentioned)
28. *Republic v Director of Public Prosecutions & 2 others ex parte Praxidis Namoni Saisi* Miscellaneous Civil Application 502 of 2015; [2016] KEHC 5698 (KLR) - (Explained)
29. *Republic v Chairman Amagoro Land Disputes Tribunal & another ex-parte Paul Mafwabi Wanyama* Civil Appeal 41 of 2013; [2014] KECA 190 (KLR) - (Mentioned)
30. *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (interested party); ex parte James M Kahumbura* Judicial Review 298 of 2018; [2019] KEHC 8824 (KLR) - (Mentioned)
31. *SGS Kenya Limited v Energy Regulatory Commission & 2 others* Petition 2 of 2019; [2020] KESC 64 (KLR) - (Explained)
32. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Mentioned)
33. *Super Nova Properties Limited & another v District Land Registrar Mombasa & 5 others* Civil Appeal 98 of 2016; [2018] KECA 17 (KLR) - (Mentioned)
34. *Uwe Meixner & another v Attorney General* [2005] 2 KLR 189 - (Mentioned)

United Kingdom

1. *North Wales Police v Evans* [1982] 1 WLR 1155; [1982] UKHL 10; [1982] 3 All ER 141 - (Explained)
2. *R v Manning* [2000] EWHC J0517-4; [2001] QB 330 - (Explained)
3. *Re Gibson (Deceased)* [1949] All ER 90 - (Explained)

India

Bhagwan Dass Jagdish Chander v Delhi Administration 1975 AIR 1309; 1975 SCR 30 - (Explained)

Jamaica

Patrick Genius v The Coroners Act Suit No M 35 of 2002 - (Mentioned)

Statutes

1. Anti-Corruption and Economic Crimes Act (cap 65) sections 45(2)(b); 46; 48(1)(a) - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53- (Interpreted)
3. Companies Act (cap 86) section 38- (Interpreted)
4. Constitution of Kenya articles 10(1)(2); 19; 20; 21; 22; 23; 25(c); 27(1)(2); 28; 29; 41; 47(1)(2); 50(2)(a)(4); 94(5); 157(6)(10); 159; 165(3)(d)(ii)(iii); 201(d); 227; 249(1)(2); 259 - (Interpreted)
5. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 29(1)- (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 7, 11(1)(2)(e)(h)- (Interpreted)
7. Law Reform Act (cap 26) sections 8, 9 - (Interpreted)
8. Public Procurement and Asset Disposal Act (cap 412C) sections 27(3); 30(3); 38(1)(b)(2)(a); 52; 66(2) - (Interpreted)
9. Public Procurement and Asset Disposal Regulations, 2020 (cap 412C Sub Leg) regulations 7(c); 10(2)(a)(e); 11(1) - (Interpreted)

Texts

1. Fordham, M., (Ed) (2012), *Judicial Review Handbook* London: Hart Publishing, 6th Edn
2. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 924

Advocates

Mr. Cyprian Wekesa and *Mr. Edmond Wesonga* (Instructed by firm of J.A. Guserwa & Company Advocates) for the 1st appellant
Mr. Okweh Achiando (Instructed by the firm of Okweh Achiando & Company Advocates) for the 2nd to 8th appellants
Ms. Fredah Mwanza and *Ms. Magdelene Ngalyuka* (Instructed by the Office of the Director of Public Prosecutions) for the 1st respondent
Mr. Ben Murei (Instructed by the Office of the Ethics & Anti-Corruption Commission) for the 2nd respondent

JUDGMENT

A. Introduction

1. Two appeals were filed before the Supreme Court. The first, Petition 39 of 2019 dated October 25, 2019 filed on even date, is by the 1st appellant. The second, Petition 40 of 2019 dated October 25, 2019 and filed on October 29, 2019, is by the 2nd to 8th appellants. Subsequently, on September 4, 2020, the court consolidated the two appeals.

2. The appellants herein are aggrieved by two judgments of the Court of Appeal (Warsame, Makhandia & Murgor, JJA) which were delivered on September 20, 2019. The appeals are filed as of right pursuant to article 163(4)(a) of the *Constitution*.

B. Background

3. The appellants, at the material time, were employees of Geothermal Development Company (hereinafter referred to as "GDC"), a company incorporated under the *Companies Act*, cap 486, Laws of Kenya (repealed). GDC is fully owned by the Government of the Republic of Kenya as a state corporation carrying on the business of geothermal exploration, assessment, extraction, utilization and development of natural resources including geothermal heat, steam water and other resources commonly or conveniently used by persons carrying on the business of geothermal resource development.

4. On July 2, 2012and July 4, 2012, GDC issued an advertisement for tender No Ref GDC/HSQ/086/2011-12 (hereinafter referred to as the "tender") in the Daily Nation and Standard Newspapers respectively for the provision of rig move services for the Menengai Geothermal Project. The tender was awarded to Bonafide Clearing and Forwarding Company Limited (hereinafter referred to as the "BCFCL") for Kshs. 42,746,000 per rig move. The appellants were members of GDC's Tender Committee that procured the provision of the rig move services. For purposes of contextualising the tender, rig move entails dismantling of drilling rigs into smaller loads for ease of transport, then transporting the loads from one drill site to another and assembling the rig components at the new drill site.

5. The Ethics and Anti-Corruption Commission (hereinafter referred to as "EACC"), the 2nd respondent herein, asserted that it received a complaint regarding the failure of GDC's Tender Committee to comply with procurement law in the procurement of rig move services tender no. GDC/HQS/OT/086/2011- 2012. EACC contended that the allegations were within its mandate to investigate

and resolved to carry out investigations on the alleged procurement anomalies in the tender process. From its investigations, EACC concluded that the offer price by BCFCL for the services in the financial year 2011/2012 was a 100% increase compared to the previous financial year, which was pegged at Kshs 19,550,000/- per move. EACC further concluded that the contract price for the tender was unjustifiably inflated above the normal market rates in comparison to similar rig move services undertaken by other government institutions during the same period by the same provider. EACC in particular cited the examples of KenGen procurement for rig move services at Olkaria and Eburru Geothermal fields vide Tender No KGN-OLK-179-2012 resulted in an agreement dated February 5, 2014 at a cost ranging between Kshs 13,565,040 and Kshs 24,429,600.

6. Consequently, EACC recommended to the Director of Public Prosecutions (hereinafter referred to as "DPP"), the 1st respondent herein, that the then Managing Director of GDC, Silas Masinde Simiyu, the General Manager Michael Maingi Mbevi (6th appellant) and the members of the Tender Committee including Praxidis Namoni Saisi (1st appellant), Dr Peter Ayodo Omenda (2nd appellant), Nicholas Karume Weke (3rd appellant), Caleb Indiatsi Mbaye (4th appellant), Abraham Kipchirchir Saat (5th appellant), Godwin Mwagae Mwawongo (7th appellant) and Bruno Mugambi Linyuri (8th appellant) be charged with various anti-corruption offences. On November 13, 2015, the DPP issued a press statement published on its website stating that it had made decisions on the files submitted by the EACC. The DPP then implemented EACC's recommendation by filing Anti-Corruption Case No 20 of 2015 before the Chief Magistrates' Court in Milimani Law Courts against the appellants herein alongside other suspects. The 1st to 8th appellants were charged as follows:

> "Count I: Wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003.
>
> Particulars
>
> Abraham Kipchirchir, Nicholas Weke, Peter Ayodo Omenda, Godwin Mwagae, Praxidis Namoni Saisi, Caleb Indiatsi Mbayi and Bruno Mugambi Linyiru
>
> On or about August 29, 2012, at Geothermal Development Company Headquarters in Taj Towers in Nairobi County within the Republic of Kenya, being members of the Tender Award Committee, persons whose functions concerned procurement in Geothermal Development Company wilfully failed to comply with the law relating to procurement, to wit, Regulation 10(2)(e) of the Public Procurement and Disposal Regulations, 2006 by confirming an Award of Tender No Ref GDC/HSQ/086/2011- 2012 to Bonafide Clearing and Forwarding Company Ltd without ensuring that the procurement entity did not pay in excess of prevailing market prices.
>
> Count II: Inappropriate influence on evaluation contrary to section 38(1)(b) as read with 38(2)(a) of *Public Procurement and Disposal Act*.
>
> Particulars
>
> Abraham Kipchirchir Saat, Godwin Mwagae Mwawongo, Bruno Mugambi Linyiru, Silas Masinde Simiyu, Michael Maingi Mbevi
>
> On or about August 28, 2012 at Geothermal Development Company offices in Taj Towers in Nairobi County within the Republic of Kenya, being persons whose functions concerned the management of the said company and

who were not entrusted with evaluation and comparison of Tender No Ref GDC/HQS/086/2011-12 in the said company, jointly and inappropriately influenced the Geothermal Development Company evaluation committee members in their evaluation and comparison of the Tender No Ref GDC/HQS/086/2011-2012.

Count III: Wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with ssection 48(1)(a) of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003.

Particulars

Praxidis Namoni Saisi

On or about October 2, 2012, within the Republic of Kenya, being the Company Secretary and therefore an employee of Geothermal Development Company failed to comply with the law relating to procurement, to wit, section 27(3) of the Public Procurement and Disposal Regulations, 2006 by signing a contract of Tender No REF GDC/HSQ/086/2011-12 with Bonafide Clearing and Forwarding Company Ltd, a contract which contained a price of Kshs 42,746,000 per rig move which was in excess of prevailing market prices.

Count IV: Abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003

Particulars

Praxidis Namoni Saisi

On or about October 2, 2012, within the Republic of Kenya, being the Company Secretary, whose functions concerned corporate governance, legal and regulatory matters of Geothermal Development Company, used your office to improperly confer benefit to Bonafide Clearing and Forwarding Company Ltd to wit a contract Agreement for Tender No Ref GDC/HSQ/086/2011-2012 to in respect of rig move services at a cost of Kshs 42,746,000 per Rig Move, a price that was in excess of prevailing market prices."

C. Litigation History

(i) Judicial review in the High Court

7. Before the said criminal case could be heard and determined, the 1st appellant, pursuant to leave of the court filed Judicial Review proceedings Miscellaneous Civil Application No 502 of 2015,Republic v Director of Public Prosecutions & 2 others ex-parte Praxidis Namoni Saisishe sought, inter alia, for an order of certiorari to quash EACC's decision recommending her prosecution for the aforesaid anti-corruption offences; and DPP's decision directing her prosecution as was contained in the press statement dated November 13, 2015 and in the Charge Sheet in Anti-corruption case No 20 of 2015. She also sought an order of prohibition to bar the DPP from prosecuting and proceeding with the charges in Anti-Corruption Case No 20 of 2015 or instituting other charges against her over the award of the tender and the resulting contract between GDC and BCFCL.

8. She contended inter alia that the DPP's decision to prefer charges against her was reached without proper direction or logical connection to the relevant law; that the charges against her did not entitle her to know the case against her or have an opportunity to defend herself; and that the decision to charge her was incomprehensible, irrational and without basis. Naturally, the application was opposed by the 1st and 2nd respondents.

9. On April 19, 2016, the learned judge, Odunga J (as he then was), having considered the application, concluded that the charges levelled against the 1st appellant as contained in Counts I, III and IV, were far-fetched and proceeded to grant the orders sought.

10. Similarly, the 2nd to 8th appellants filed Miscellaneous Civil Application No 198 of 2016, *Peter Ayodo Omenda & 6 others v Director of Public Prosecutions & 2 others*. They sought inter alia an order ofcertiorarito quash the decision of EACC recommending their prosecution for various anti-corruption offences to the DPP; to quash the decision of the DPP to direct their prosecution; and an order prohibiting the DPP from prosecuting and proceeding with the charges in Anti-corruption Case No 20 of 2015 or instituting other charges against them over the award of the tender and the resulting contract between GDC and BCFCL.

11. On the strength of the earlier Judgment in the 1st appellant's case, on December 20, 2016, the learned judge, Odunga, J (as he then was) partially allowed the 2nd to 8th appellants' application to the extent that he found that the consideration used as a basis for the criminal charges under count I was not a criterion provided for in the tender document. Consequently, he granted an order of prohibition barring the DPP from prosecuting Anti- Corruption Case No 20 of 2015 as far as it related to the 2nd to 8th appellants in count I.

(ii) Proceedings at the Court of Appeal

12. Aggrieved by the High Court's decisions, three separate appeals were preferred to the Court of Appeal as follows: pertaining Miscellaneous Civil Application No 502 of 2016 by the 1st Appellant, the DPP filed Civil Appeal No 2 of 2016; EACC filed Civil Appeal No 184 of 2016 wherein the DPP filed a cross-appeal. As against Miscellaneous Civil Application No 198 of 2016 by the 2nd to 8th appellants, EACC filed Civil Appeal No 313 of 2017.

13. Subsequently, Civil Appeals Nos 2 of 2016 and No 184 of 2016 were consolidated and heard as one alongside Civil Appeal No 313 of 2017.

(a) Civil Appeal No 2 of 2016 as consolidated with Civil Appeal No 184 of 2016

14. At the Court of Appeal, the DPP's main contention was that the learned judge of the High Court erred in interrogating, interfering with and quashing its decision to prosecute the 1st appellant by delving into evidence and the examination of facts.

15. EACC's case on the other hand was that the intended prosecution had a proper factual foundation and could not be said to have been unreasonable. In its opinion, there was no justification for the large sum awarded in the tender. It was contended that the absence of a Market Price Index by the Public Procurement Oversight Authority (PPOA) did not discharge the Tender Committee from its duty under regulation 10(2)(e) of the *Public Procurement and Disposal Regulations, 2006* to ensure that the procuring entity does not pay in excess of prevailing market prices. It also submitted that the Committee could have obtained outside advise or directed the procurement unit to carry out a market survey. They concluded that a prerogative order should only be granted where there is an abuse of the process of the law, which has the effect of stopping the prosecution already commenced. As far as the

EACC was concerned, the 1st appellant had not adduced any evidence of malice or abuse of the court process.

16. The 1st appellant on her part, opposed the appeal and invited the court to review the Market Price Index and the contract document which she stated were the most crucial documents in the appeal. She maintained that the High Court did not make any error of law and that the DPP's appeal was predicated on a complete misapprehension of the matters framed for determination as well as the findings of the High Court. She also submitted that the High Court's decision was arrived at upon a correct interpretation and application of judicial review principles. Further, that her case at the appellate court was also misconstrued by the Respondents who purported to elevate regulation 10(2)(e) of the *Public Procurement and Disposal Regulations, 2006* above the provisions of sections 66(2), 30(3) and 52 of the repealed Public Procurement and Disposal Act, 2005 (PPDA).

17. The Court of Appeal framed a single issue for determination, that is, whether or not the learned Judge was entitled to grant the orders sought. The Court of Appeal overturned the decision of the High Court on several grounds beginning with the finding that the function of the High Court sitting in judicial review proceedings is not to consider the merits of the decision by a public body but rather undertake a consideration of how the decision was made. The superior court found that the 1st appellant's application did not merit the exercise of the court's discretion and it was not necessary for the learned Judge to delve into such an elaborate analysis at that stage. The superior court also found that the High court Judge misdirected himself in deciding to issue orders of certiorari and prohibition.

(b) Civil Appeal No 313 of 2017

18. In this appeal, the DPP and EACC reiterated their position in the consolidated appeals. The 2nd to 8th appellants logically opposed the appeal.

19. The Court of Appeal similarly found that there was only one issue for determination, that is, whether the High Court in exercise of its discretion ought to have granted the judicial review order of prohibition as sought? In this regard, the Court of Appeal disagreed with the finding of the learned Judge that the decision to prefer anti-corruption charges captured in count I was irrational and an express violation of the law. In the appellate judges' view, the analysis and finding of the learned Judge was aimed at investigating the correctness of the decision of the EACC and DPP which is not the essence of judicial review; that in this manner, the Judge delved into matters which he ought not to have looked into; and further, that it was not within the powers of the learned Judge to quash count I of the charge sheet while sustaining other counts relating to the same transaction. Ultimately, the Court of Appeal held that the learned judge improperly exercised his discretion and allowed the appeal.

(iii) Proceedings at the Supreme Court

i. Petition 39 of 2019

20. The 1st appellant, aggrieved by the decision of the Court of Appeal in Civil Appeal No 2 of 2017 as consolidated with Civil Appeal No 184 of 2016 preferred this appeal. Her Petition of Appeal was anchored on articles 25(c), 27(1) & (2), 28, 29, 41 and 157(6) of the *Constitution*. She set out 12 grounds of appeal summarized as the learned Judges of the Court of Appeal erred:

    (a) By failing to interpret the central question of whether or not the decision of the DPP to prosecute the 1st appellant on offences that are non-existent in law was predicated on irrationality and procedural impropriety;

(b) By underpinning their interpretation of the conceptual framework of the function of the High Court in Judicial Review proceedings on the common law and jurisprudence before the *Constitution of Kenya 2010* rather than deriving the conceptual framework from the *Constitution 2010* itself and its trajectory;

(c) By presaging their appellate consideration of the appeal with the primer that "if this rule was not limited in this way, there would be a floodgate of applications before the High Court by every person accused of an offence seeking to put a stop to further proceedings as often as they desire in the course of the trial" thereby predetermining the trajectory of the outcome of the appeal and violating the letter and spirit of the *Constitution* on access to courts;

(d) In their interpretation of the analysis made by the High Court as having being predicated on the Judge delving into sufficiency and quality of evidence gathered by the DPP and EACC while the Judge addressed the question of legality, rationality and propriety in the decision making of the DPP in arriving at the charges;

(e) By failing to determine the issue on the legality, rationality and propriety of the charges preferred against her and delegating that task to the trial court that does not have the jurisdiction invoked when she moved the High Court under articles 22, 23 and 165(3)(d)(ii) & (iii) of the *Constitution*;

(f) In finding that the question of legality of criminal charges against the 1st appellant was not a matter for judicial review but for the trial court, which vitiated and negated the provisions of article 165(3)(a),(d)(ii),

(e) and 23 of the *Constitution* and was a claw back on the progressive outlook of articles 19, 20, 21, 22, 23, 159 and 259 of the *Constitution*;

(g) In their interpretation and application of the rationality test to the case pleaded by the 1st appellant and the admissions made on oath by the DPP in setting aside the Judgment of the High Court;

(h) By failing to find that the DPP through the replying affidavit of Ruby Okoth sworn on March 9, 2016had admitted on oath that the 1st appellant was not a signatory of the material contract as purported in the charge sheet and that the 1st appellant was an attester;

(i) By failing to re-consider and re-evaluate the entire case as presented by the 1st appellant before the High Court so as to arrive at independent findings and conclusions as enjoined by rule 29(1) of the *Court of Appeal Rules*;

(j) In finding that the question of whether or not a person could be prosecuted, subjected to a trial on charges whose legality, rationality, propriety are contested should be resolved by the High Court "making a bare reading of the statement of facts of the case and charge sheet without elaborate argument" thereby negating the constitutional premises of judicial review and lowering the supremacy of the *Constitution* in safeguarding the fundamental rights and freedoms in the Bill of Rights;

(k) By improperly exercising their jurisdiction resulting in the violation of the 1st appellant's right to equal protection and benefit of the law and a fair hearing; and

(l) By interfering with the decision of the High Court from the shackles of the common law strictures of judicial review rather than a constitutional interpretation predicated on the *Constitution 2010*.

21. The 1st appellant sought the following reliefs:

(a) That the judgment and order of the Court of Appeal (Warsame, Makhandia & Murgor, JJA) allowing Civil Appeal No 2 of 2017 as consolidated with Civil Appeal No 184 of 2016 be set aside and the Judgment and Decree of the High Court (Odunga, J) in Miscellaneous Application No 502 of 2015 delivered on April 19, 2016 be reinstated and affirmed;

(b) The costs of this appeal and the costs of proceedings in the Court of Appeal and High Court be awarded to her; and

(c) Such consequential and appropriate relief, as this Honourable Court may deem fit to grant.

ii. Petition 40 of 2019

22. The 2nd to 8th appellants aggrieved by the decision of the Court of Appeal in Civil Appeal No 313 of 2017 preferred this appeal. It was anchored on the interpretation and application of articles 10(1) & (2), 19(2) & (3), 22(1), 25(c), 27(1) & (2), 47 (1) & (2), 50(2)(a), 50(4), 94(5), 157(11), 227, 249(1) and 249 (2) of the *Constitution*. Their appeal was premised on the following four grounds of appeal, that the learned judges of the Court of Appeal erred:

(a) By failing to consider the fact that the DPP had abused its prosecutorial discretion with the decision to charge the appellants being tainted with irrationality and unreasonableness;

(b) In considering but not applying its previous decision in the case of Prof *Njuguna S Ndungu v EACC & 3 others*, Civil Appeal No 333 of 2014 (2018) eKLR, in which the court held that the basic criterion for allowing a prosecution to proceed is the existence of "sufficient evidence to prove a realistic prospect of conviction" and further that there would be a clear and apparent error on record in which there is a disclosed "failing to scrutinize the charges and the relevant documents ... [to] reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction".

(c) By failing to appreciate and uphold that the 2nd to 8th appellants had established a clear and intended infringement of their constitutional rights by the respondents in breach of articles 10, 27, 28, 48, 50 and 157 of the *Constitution*; and

(d) By failing to apply constitutional standards of justice, fairness, equity and/or dignity of the 2nd to 8th appellants to address what was clearly a threatened violation of their rights.

23. The 2nd to 8th appellants sought the following reliefs:

(a) That the judgment of the Court of Appeal delivered on September 20, 2019 in Civil Appeal No 313 of 2017 be set aside and the Judgment and orders of the High Court (Odunga, J) in Miscellaneous Application No 198 of 2016 delivered on 20th December 2016 be reaffirmed;

(b) The costs of this appeal and costs of the proceedings in the Court of Appeal and in the High Court be awarded to the 2nd to 8th appellants herein; and

(c) Any other orders that this court may deem fit in the circumstances.

C. Parties' Respective Cases

24. When the matter came up before us for hearing learned counsel Mr Cyprian Wekesa together with Mr Edmond Wesonga appeared for the 1st appellant, Mr Okweh Achiando appeared for the 2nd to 8th

appellants. While Ms Fredah Mwanza together Ms Magdalene Ngalyuka appeared for the DPP and Mr Ben Murei appeared for EACC.

i. 1st Appellant's submissions

25. The 1st appellant's submissions dated December 2, 2021 were lodged on June 8, 2022. She abridged her twelve (12) grounds of appeal into four (4) and submitted on them as hereinbelow.

26. On whether the decision to charge the 1st appellant was illegal, irrational and an abuse of prosecutorial powers and in violation of her constitutional rights, she submitted in the affirmative and heavily relied on the guidelines of prosecutorial powers set by this court in the case of *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others*, SC Petition No 38 of 2019; [2021] eKLR. It was her position that count i constituted a non- existent offence; that in crafting the charge under count I, the DPP failed to consider that the tender document did not provide for a criteria of comparison of market prices as the rig move services are not standard services and works within known market price; that counts III and IV were grounded on the execution of the contract whereas she merely witnessed the signature of the accounting officer; and by merely attesting the signature she did not confer a benefit to anyone. To buttress this proposition, she relied on the English case of *Re Gibson (deceased)* (1949) All ER 90. For those reasons, she maintained that the criminal trial was grounded on non-existent offences and was therefore an egregious violation of her right to equal protection and benefit of law under article 27(1) and right to a fair trial under article 50 as read with 25(c) of the *Constitution*.

27. On whether the issues raised were for judicial review application, she posited that the prosecutorial powers of the DPP are not absolute, rather they are limited by article 157(11) of the *Constitution*; that the Court of Appeal interpreted her case from the shackles of common law doctrines rather than constitutional imperatives; and that the judicial review application not only required a consideration of the decision making process of the DPP but also an application and interpretation of the *Constitution* especially the equilibrium between her rights to fair hearing and the DPP's prosecutorial power under article 157(6) and (11) of the *Constitution*. She submitted that this court in the case of *Communication Commission of Kenya v Royal Media Services & 5 others*; SC Petition 14 consolidated with Nos 14A, 14B & 14C of 2014; [2014] eKLR recognized the elevation of judicial review to a pedestal that transcends the technicalities of common law. As such, it was her view that judicial review is entrenched in article 23 of the *Constitution* and is no longer under the common law prerogative jurisprudence and strictures. She therefore urged the court to find that her case before the High Court was abundantly within the confines of the judicial review jurisdiction under the Constitution}}.

28. She observed that the Court of Appeal set aside the High Court judgment on the basis that the latter had delved into the question of sufficiency of evidence. In this regard, she submitted that she only enclosed the charge sheet and the Market Price Index published by the PPOA forming the particulars of count I and that she did not exhibit any evidence, let alone a single witness statement; that the Court of Appeal did not point out which evidence was analysed; and that a bare reading of the charge sheet and the applicable provisions of the PPDA and the regulations therein cannot be considered as delving into the evidence. She faulted the Court of Appeal for failing to apply the dicta in the case of *Prof Njuguna S Ndungu v EACC & 3 other* [*supra*] where the appellate court found that the High Court erred in failing to scrutinize the relevant documents including the decisions of the Evaluation Committee, Tender Committee and Review Board to reach a conclusive and objective decision on whether the charges had any legal foundation.

29. Lastly, on whether the Court of Appeal failed to undertake its judicial function, she faulted the appellate court for failing to re-evaluate her case. She contended that had the appellate court re-appraised itself on the factual foundation of her case, it would have addressed the nexus between section

30(3) of the PPDA and Regulation 10(2)(e); and the admission by the DPP that she was not a signatory but a witness to the procurement contract and found the irrationality of the DPP in charging her as a signatory.

ii. 2nd to 8th appellant's submissions

30. The 2nd to 8th appellants relied on their submissions dated September 6, 2021 and filed on September 4, 2021. Therein they addressed three issues as framed in their petition.

31. The first was whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP contrary to the *Constitution*. On this issue, the appellants contended that this court in the case of *Cyrus Shakhalanga Khwa Jirongo v. Soy Developers Ltd & 9 others*, SC Petition No 38 of 2019 [supra] pronounced itself on the ingredients to be satisfied in interfering with the prosecutorial mandate of the DPP. Citing the cases of,Republic v Director of Public Prosecutions & 2 others ex- parte Praxidis Namoni SaisiMiscellaneous Civil Application No 502 of 2015; *Joram Mwenda Guantai v. The Chief Magistrate, Nairobi*, Civil Appeal 228 of 2003; [2007] eKLR; *Uwe Meixner & another v. Attorney General* [2005] 2 KLR 189 and *Prof Njuguna S Ndungu v EACC & 3 others*, Civil Appeal 333 of 2014 [*supra*] eKLR they submitted that the Court of Appeal erred in holding that the High Court looked into matters that it ought not to have looked into by embarking on analysing the sufficiency and quality of evidence gathered by the Respondents.

32. In their view, the charges against them were largely dependent on documentary evidence and most of the facts were not in controversy as the charges were based on a non- existent provision of the law. It was their position that the High Court was called upon to find out whether or not the omissions allegedly committed, prima facie constituted the alleged criminal offences under the procurement law, which decision could not have been made without scrutinizing the documents. As such, they maintained that the learned Judge of the High Court was well within his mandate under article 165(3)(d) as read with article 157(11) of the *Constitution* to curtail their prosecution.

33. On whether the respondents' abused their prosecutorial discretion in their decision to charge the 2nd to 8th appellants, relying on the case of *Diamond Hasham Lalji & Another v Attorney General & 4 others*, Civil Appeal No 274 of 2014 [2018] eKLR, the appellants posited that the exercise of the prosecutorial discretion by the DPP enjoys some measure of judicial deference. In that regard, they maintained that the consideration used by the DPP for the commencement of criminal charges under count I of the charge sheet was predicated on illegality, irrationality and procedural impropriety; and the DPP had without jurisdiction, faulted them for failing in their duty to comply with a non- existent provision of law related to procurement.

34. Elaborating on their position, they submitted that the procurement process of the tender was undertaken pursuant to the PPDA and the *Public Procurement and Disposal Regulations, 2006*. They asserted that section 30(3) of the PPDA stipulated that standard goods, services and works with known market prices shall be procured at the prevailing real market price. They urged that although the Public Procurement Oversight Authority (PPOA) publishes a Market Price Index, the procurement by GDC was not for a service that is published in the PPOA Market Price Index. Consequently, they argued that it could not be said that the Tender Committee had failed to comply with regulation 10(2)(e) to ensure that the procuring entity did not pay in excess of prevailing market prices. They further submit that no pricing criterion was provided for in the tender document. As such, the Tender Committee could not be expected to make a comparison for market prices not contemplated under section 30(3) of the PPDA. Such a comparison, in their opinion, would have been ultra vires.

35. The appellants faulted the Court of Appeal for holding that the High Court was not within its powers to quash count I of the charge sheet while sustaining the other counts which relate to the same transaction. Relying on the Indian Supreme Court decision of *Bhagwan Dass Jagdish Chander v Delhi Administration* 1975 AIR 1309, SCR 309 they submitted that in *Bhagwan Dass* [*supra*] the court in defining the same transaction noted that. "... it is however, not necessary that every one of these elements should co- exist for a transaction to be regarded as the same." On that basis, they asserted that this was not a case of the same transaction for the reason that in procurement, there are different processes, and as such, do not form part of the same transaction.

36. Citing the case of *Republic v. DPP & 2 others; Evanson Muriuki Kariuki (interested party); Ex parte James M Kahumbura* Judicial Review Division Case No 298 of 2018 [2019] eKLR they contended that the charges preferred against them were an abuse of the court process, and therefore the Court of Appeal's decision should be set aside.

37. Lastly, on whether their rights were violated, they urged that the Court of Appeal failed to appreciate that their prosecution was vitiated by numerous illegalities in terms of the PPDA which were administratively arbitrary, flawed, procedurally unfair, unreasonable and violated their rights to fair trial under article 50 of the *Constitution*. They added that the provisions of the *Constitution* conferring powers upon the High Court to grant such remedies as certiorari, prohibition,mandamusor permanent stay of proceedings are a device to advance justice and not to frustrate it. Consequently, they urged that in the exercise of this wholesome power, the High Court was entitled to quash a proceeding when it concluded that allowing the process to continue would be an abuse of the court process.

38. They posited that the Court of Appeal did not consider whether setting aside of the High Court's decision would adversely affect their constitutional rights. They submitted that they had established aprima faciecase of violation of their constitutional rights by the respondents based on the findings of the High Court. However, they submit, the Court of Appeal had failed to appreciate that, they would suffer irreparable loss if their freedoms as guaranteed by the *Constitution* were not protected through the orders sought.

39. Finally, they contended that the Court of Appeal ought to have applied constitutional standards of justice, fairness, equity and dignity to address what was clearly a violation of their rights as guaranteed by articles 27, 28, 47 and 50(1) of the *Constitution*. In view of the foregoing, they urged this court to allow their appeal.

iii. DPP's submissions

40. The DPP relied on their submission dated November 11, 2021 and filed on November 2, 2021 in response to Petition 40 of 2019.

41. Counsel addressed the issue of whether the learned Judges of Appeal erred in failing to consider that the DPP had abused its prosecutorial discretion with the decision to charge the Appellants which was tainted with irrationality and unreasonableness. It was submitted that the High Court failed to appreciate that judicial review is about the decision-making processes and not the decision itself. Further, that an order of prohibition cannot quash a decision that has already been made, it can only prevent the making of a contemplated decision. For this proposition, the DPP relied on the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others*, Civil Appeal 266 of 1996 [1997] eKLR.

42. The DPP submitted that he acted well within his powers under article 157(10) and (11) of *the Constitution* and that in making the decision to charge the Appellants, he was guided by the sufficiency

of evidence only. Further, that there was nothing to demonstrate that the decision so made was *ultra vires*, unreasonable or illegal. To buttress this point, he cited the cases of *Douglas Maina Mwangi v. Kenya Revenue Authority & another*, HC Constitutional Petition No 528 of 2013; (2013) eKLR and; the decision of the Supreme Court of Jamaica in *Patrick Genius v. The Coroners Act*, Suit No M 35 of 2002. He affirmed that the issue of whether the tender was pursuant to the PPDA and the *Public Procurement and Disposal Regulations 2006* was a matter of evidence which was not within the mandate of the High Court in judicial review proceedings.

43. On whether the Court of Appeal erred in considering but not applying its own decision in *Prof Njuguna S. Ndungu v. EACC & 3 other* [supra] where it was held that the basic criterion for allowing a prosecution is the existence of "sufficient evidence to prove a realistic prospect of conviction", the DPP posited that the applicable test was laid down in the English case of *R v Manning* [2001] QB 330 where it was stated that 'a real prospect of conviction' is an objective test to consider whether the evidence can be used or is reliable. Therefore, it was his submission that whereas the test of sufficiency of evidence must be employed by the prosecutor before deciding to charge an accused person, the standard is not the same as how a court faced with the same set of facts would scrutinize them during trial before a conviction. Hence the need for the facts to be weighed by a trial court and not otherwise.

44. The DPP maintained that there were no reasonable grounds laid to warrant the grant of judicial review orders by the High Court and the same should only have been done if there were reasonable grounds to do so as was enunciated in the case of *Philomena Mbete Mwilu v DPP & 3 others; Stanley Muluvi Kiima (interested party); International Commission of Jurists Kenya Chapter (amicus curiae)*, HC Petition No 295 of 2018 [2019].

45. On whether the appellants' rights were violated, relying on the decisions in *Kenya Commercial Bank & 2 others v. Commissioner of Police & anor*, HC Petition No 2018 of 2011; [2013] eKLR; *Paul Nganga Nyaga v AG & 3 others*, HC No 518 of 2012; [2013] eKLR and *Philomena Mbete Mwilu v DPP & 3 others* [supra] the DPP submitted that the Appellants failed to demonstrate with precision the alleged breach of their right to fair hearing and neither had they demonstrated the manner in which the courts or the DPP were in breach. Counsel argued that the right to fair hearing enshrined in article 50 of the *Constitution* does not involve the decision of the DPP, but rather exists to safeguard the entire trial process. He urged that the courts are equipped to ensure that the right to fair trial is guaranteed to every accused person. It was therefore his argument that the right to fair trial remained intact, notwithstanding the impugned charges, as the criminal trial had not taken off. For these reasons the DPP urged that the appeal be dismissed with costs

iv. EACC's submissions

46. EACC relied on its submissions dated December 21, 2021 and filed on even date which were in response to Petition 39 of 2019 and addressed two issues.

47. On whether section 66(2) of the PPDA, bound the Tender Committee to award a contract even if it was in excess of the market price, EACC submitted that whereas that Section guides the technical evaluation process undertaken by the Technical Evaluation Committee, it does not fetter the discretion of the Tender Committee to reject a recommendation by the former.

48. It pointed out that the appellants were not charged for any offence relating to the technical evaluation as they did not undertake such exercise, their charges emanated from failure to ensure that GDC did not pay in excess of prevailing market prices for rig move services by BCFCL; that in accepting or rejecting a recommendation to award a tender, a Tender Committee is not undertaking a technical evaluation function, but exercising its powers under the *Constitution*, the PPDA and regulations.

49. EACC highlighted the powers of the Tender Committee under the regulations as follows: to approve or reject a submission by the evaluation committee (regulation 11(1)); to ensure that the process had been carried out in accordance with the PPDA and regulations therein (regulation 10(2)) as read with section 27(3) of the PPDA); and to ensure that the procuring entity does not pay in excess of prevailing market rates (regulation 10(2)(e)). Over and above the Act and Regulations, EACC asserted that the *Constitution* under article 227(1) provides the minimum threshold that any public procurement must meet; including the fact that the process must be fair, equitable, transparent and cost- effective. Further, that article 201(d) of the *Constitution* requires that all aspects of public finance shall be guided by the principle inter alia that public money shall be used prudently and responsibly.

50. Guided by those principles, EACC posited that the Tender Committee has the power to reject a recommendation to award a contract, even if the evaluation was undertaken regularly and in accordance with the law, if the price is above the prevailing market value or beyond the budget of the procuring entity or for some other lawful reason. It is further submitted that the role of the Tender Committee, was not to merely rubber stamp the recommendation of the Evaluation Committee. In EACC's view, it was for this reason, that a procuring entity has the authority, to terminate a procurement without incurring any liability at any time before a contract is entered into.

51. It contended that the absence of a Market Price Index by the PPOA did not discharge the Tender Committee from its duty under regulation 10(2)(a) and (e) and regulation 11(1); that in any event, the Tender Committee did not require a market survey to establish comparable costs for similar services since it already had tentative costing from the previous contracts awarded by the same Tender Committee to BCFCL; that the appellants knew that the cost of the service in 2011 was Kshs 19,550,000 per rig move, therefore they knew or ought to have known that to award a contract for the same services at Kshs 42,746,000 which is more than double the 2011 price, was grossly exaggerated as such they had a case to answer in the criminal court.

52. EACC urged the court to take judicial notice of the fact that over pricing is at the heart of procurement scandals that have caused uproar and consternation in the country, such as the recent Covid -19 related procurements. Thus, to limit liability only to those cases in which a Market Price Index had been undertaken by the PPOA as argued by the appellants, was to fail to give effect to articles 227(1) and 201(d) of the *Constitution*, which would have resultant damage against public interest.

53. EACC submitted that the duty of comparison of the prices and contracts should have been left to the trial magistrate to determine. According to EACC, there is no way a Judge sitting in a judicial review court can look at the affidavit and submissions by the ex parte applicant (appellants herein) and conclusively resolve the evidentiary issues in contention, namely, whether the contract was overpriced. Consequently, there was a reasonable basis for preferring charges against the 1st appellant, the Chief Executive Officer and other members of the Tender Committee. Relying on the decisions in *Thuita Mwangi v EACC & 6 others*, Civil Appeal No 285 of 2014 and *Uwe Meixner & another v AG* Civil Appeal No 131 of 2002 [supra], EACC maintained that evaluating the sufficiency of evidence is a function of a trial court and not a judicial review court.

54. On whether the 1st appellant being the Company Secretary of GDC was a mere witness to the contract, and therefore ought not to have been charged with failing to follow applicable laws and conferring benefit to BCFCL, EACC submitted that apart from the Directors, a Company Secretary is a key officer recognized under the *Companies Act*. It was added that section 38 of the *Companies Act* provides that a document requiring authentication may be signed by the Director, Company Secretary or any other authorized officer and; that as the General Manager, Legal Services and Company Secretary the 1st appellant was the Chief Legal Adviser of the GDC responsible for inter alia, drafting contracts. It

was therefore logical to presume that in the ordinary course of business, her office drafted or reviewed the contract in question.

55. In view of the foregoing, EACC submitted that the 1st appellant was not a mere witness, since she had an obligation to ensure that the *Constitution* and applicable laws were followed; the fact that she was a member of the Tender Committee that approved the award, brought her squarely into the bracket of those to be charged for acting contrary to section 45(2)(b), and conferring a benefit contrary to section 46 of ACECA.

56. In conclusion, it was submitted that the DPP preferred charges upon the recommendation of the EACC; that the respondents have demonstrated that there was good cause for the action taken; that whether or not the appellants were guilty of the offences charged was for the criminal court to determine; and that no dishonesty, bad faith, abuse of process or some other ulterior motive had been demonstrated against the respondents to justify termination of the criminal case. In the premises, they urged that the Petitions of Appeal be dismissed with costs.

D. Issues for Determination

57. EACC and DPP each raised preliminary objections both dated December 3, 2009contending that the petitions of appeal were not rightly before this court. More specifically, DPP sought the striking out of the appeal on two grounds namely: that the matter does not concern the interpretation or application of the *Constitution* and that no leave was obtained prior to instituting the appeal. EACC equally sought striking out of the appeal based on similar grounds.

58. This court in its two rulings delivered on April 30, 2020 and September 4, 2020 respectively, dismissed the objections finding that it has jurisdiction to hear and determine the appeals.

59. The following issues cross-cutting in the consolidated appeals emerge for this court's determination:

    i. Whether the character and scope of judicial review has evolved/changed post Constitution 2010? And if so, in what way?

    ii. Whether the Court of appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the *Constitution*

    iii. Whether the DPP violated the appellants' rights and fundamental freedoms under articles 10, 25(c), 27, 28, 29, 41 and 50 of the *Constitution* in preferring the charges contested by the appellant?

    iv. Who shall bear the costs of the appeal?

C. Analysis and Determination

i. Whether the character and scope of the judicial review has evolved/changed post Constitution 2010? And if so, in what way?

60. The 1st appellant submitted that the Court of Appeal interpreted her case from the shackles of common law doctrine rather than constitutional imperatives. She contended that the judicial review application not only required a consideration of the decision-making process of the DPP but also an application and interpretation of the *Constitution* especially the equilibrium between her rights to fair hearing and the DPP's prosecutorial power under article 157(6) and (11) of the *Constitution*. She submitted that this court in the case of *Communication Commission of Kenya v Royal Media Services & 5 others;* SC Petition 14 consolidated with Nos. 14A, 14B & 14C of 2014; [supra] recognized the elevation of judicial review to a pedestal that transcends the technicalities of common law. As such, it was her

view that judicial review is entrenched in article 23 of the *Constitution* and is no longer under the common law prerogative jurisprudence and strictures. She therefore urged the court to find that her case before the High Court was squarely within the confines of the judicial review jurisdiction under the *Constitution*.

61. The 2nd to 8th appellants submitted that the Court of Appeal erred in holding that the High Court looked into matters that it ought not to have looked into by embarking on analysing the sufficiency and quality of evidence gathered by the respondents. In their view, the charges against them were largely dependent on documentary evidence and most of the facts were not in controversy as the charges were based on a non- existent provision of the law. It was their position that the High Court was called upon to find out whether or not the omissions allegedly committed, prima facie constituted the alleged criminal offences under the procurement law, which decision could not have been made without embarking on a scrutiny of the documents. As such, they maintained that the learned Judge of the High Court was well within his mandate under article 165(3)(d) as read with article 157(11) of the *Constitution* to curtail their prosecution.

62. DPP submitted that the High Court failed to appreciate that judicial review is about the decision-making processes and not the decision itself. Further, that an order of prohibition cannot quash a decision that has already been made, it can only prevent the making of a contemplated decision.

63. Judicial review establishes the court's authority to hold the government as well as the subordinate courts and bodies exercising quasi-judicial authority accountable to the law. Michael Fordham in his book *Judicial Review Handbook, 6th edition, Hart Publishing,* 2012, defines judicial review as "…. The court's way of enforcing the rule of law: ensuring that public authorities functions are undertaken according to law and that they are accountable to law. Ensuring, in other words that public bodies are not 'above the law'"

Black's Law Dictionary, 9th Edition, pg 924 defines judicial review as; 1. A court's power to review the actions of other branches of government; esp, the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power 3. A court's review of a lower court's or an administrative body's factual or legal findings".

64. Before the promulgation of the *Constitution* 2010, judicial review was governed by the principles of common law largely borrowed from the United Kingdom. The jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The basis of judicial review in Kenya was derived from the *Law Reform Act* (cap 26) Laws of Kenya and order 53 of the *Civil Procedure Rules*, 2010 as better developed by case law on the area. Section 8 and 9 of the *Law Reform Act* provided the substantive basis while order 53 provided the procedural basis. The remedies in judicial review were three, namely; certiorari, prohibition and mandamus. The grounds upon which one could base an application for judicial review were under the heads of illegality, irrationality, procedural impropriety and proportionality.

65. The law in this regard was fairly settled as the High Court in *Keroche Industries Limited v Kenya Revenue Authority & 5 others*, Misc Civ Appli 743 of 2006; (2007) eKLR had set out what a party needed to demonstrate in order to prove illegality, irrationality, procedural impropriety and proportionality. The Court of Appeal in the case of *Commissioner of Lands v Kunste Hotel Limited, Civil Appeal No 234 of 1995*; [1997] eKLR had settled that judicial review was only concerned with

the decision-making process. In doing so, the court was paying homage to the words of Lord Hailsham of St Marylebone in Chief Constable of the North Wales Police v. Evans (1982) 1WLR 1155:

> " The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

66. All appeared to be in order until the Kenyan Constitution arrived. Judicial Review was no longer a common law prerogative, but was now entrenched in the *Constitution* to safeguard the constitutional principles, values and purposes. In particular, article 23 (3)(f) provides for the orders of judicial review as one of the available remedies concerning the enforcement of the bill of rights. Article 47(1) of the *Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) grants the High Court 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. In 2015, Parliament in adherence to article 47 of the *Constitution* enacted the *Fair Administrative Action Act*, No 4 of 2014, Laws of Kenya (FAA Act).

67. Also instructive to the application of judicial review, is that article 10 of the *Constitution* sets out the national values and principles of governance, key among them being the rule of law. These values and principles bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

68. Due to this codification of the law on judicial review, two schools of thought have emerged. The first believes that since the promulgation of the *Constitution 2010* 2010, judicial review has shifted from the "process only approach" to merit review in appropriate cases. This is evident in decisions from the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR; *Child Welfare Society of Kenya v Republic & 2 others ex-parte Child in Family Focus Kenya*, Civil Appeal 20 of 2015; [2017] eKLR; *Joshua Sembei Mutua v Attorney General & 2 others*, Civil Appeal 93 of 2015; [2019] eKLR, *Super Nova Properties Limited & another v District Land Registrar Mombasa & 5 others*, Civil Appeal No 98 of 2016; [2018] eKLR; *Josephat Kiplagat v Michael Bartenge*, Civil Appeal 357 of 2013; [2016] eKLR to name a few.

69. The second school of thought has maintained the traditional approach that believes that judicial review proceedings involve a "process only approach" limited to the interrogation of the process and not the merits of the decision being challenged. This is evident in the case by the Court of Appeal in *Kenya Revenue Authority & 2 others v Darasa Investments Limited*, Civil Appeal No 24 of 2018; [2018] eKLR; C*aptain (Rtd) Charles Masinde v Augustine Juma & 8 others*, Civil Appeal No 1 of 2014; [2016] eKLR; *Ransa Company Ltd v Manca Francesco & 2 others* [2015] eKLR; and *Republic v Chairman Amagoro Land Disputes Tribunal & another ex-parte Paul Mafwabi Wanyama*, Civil Appeal No 41 of 2013 [2014] eKLR.

70. This court in its previous decisions has touched on judicial review. The ones pertinent to the issue before the court are as follows. In the case of *Communication Commission of Kenya v. Royal Media Services & 5 others*; SC Petition 14 consolidated with Nos 14A, 14B & 14C of 2014; [supra] the Court observed that following the promulgation of *the Constitution* and upon the enactment of the *Fair Administrative Action Act*, there has been a shift from the traditional approach to the scope of judicial review. The court however did not say more on the shift. It held as follows:

> " [355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the *Constitution of*

2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law...."

71. In *SGS Kenya Limited v Energy Regulatory Commission & 2 others*, SC Petition No 2 of 2019; [2020] eKLR this court held that judicial review is limited to the interrogation of the process and not the merits of the decision being challenged. The court held as follows:

> " [45] ...We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of Mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner." [Emphasis Added]

72. In *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others*, SC Petition 17 of 2015; [2021] eKLR in rendering a determination pertaining tores judicata, the court compared the scope of determination of judicial review juxtaposed against constitutional petitions. However, while analyzing the case of *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [supra] this court made a determination on the considerations to be made in judicial review when it held as follows;

> " 102. Despite the shift from common law to codification in the *Constitution* and the Fair Administrative Actions Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision." [Emphasis added].

73. The present case offers the court an opportunity to render itself on the issue more authoritatively. The *Fair Administrative Actions* Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. These parameters are better set out extensively in section 7 of the *Fair Administrative Actions Act* (FAAA). We quote it verbatim as follows:

> " (2) A court or tribunal under subsection (1) may review an administrative action or decision, if–
>
> a. the person who made the decision–
>
> i. was not authorized to do so by the empowering provision;

ii. acted in excess of jurisdiction or power conferred under any written law;

iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. was biased or may reasonably be suspected of bias; or

v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c. the action or decision was procedurally unfair;

d. the action or decision was materially influenced by an error of law;

e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

f. the administrator failed to take into account relevant considerations;

g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

h. the administrative action or decision was made in bad faith;

i. the administrative action or decision is not rationally connected to–

i. the purpose for which it was taken;

ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k. the administrative action or decision is unreasonable;

l. the administrative action or decision is not proportionate to the interests or rights affected;

m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n. the administrative action or decision is unfair; or

o. the administrative action or decision is taken or made in abuse of power.

74. It is our considered opinion that the framers of the *Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom.

75. In order for the court to get through this extensive examination ofsection 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of the *Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah,* SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

77. For the avoidance of doubt, we see no reason to depart from our findings in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* [supra] and *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [supra].

ii. Whether the Court of appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in *the Constitution*.

78. The appellants' grievances are distinctively similar. They both contended that the charges preferred against them were non-existent and that the DPP failed to holistically interpret and understand the *Public Procurement and Disposal Act* (2005) and the Public Procurement and Disposal Regulation 2006. They also argued that the DPP's prosecutorial discretion is not absolute, but rather it is limited by article 157(11) of the *Constitution* which specifies the mandatory considerations that underlie the exercise of its discretion. The Appellants particularly fault the Court of Appeal's finding that the High Court only needed to have a bare reading of the charge sheet without analysing the factual foundation presented before him.

79. The learned judge in his Judgement in Misc Civil Application No 502 of 2015 and Miscellaneous Civil Application No 198 of 2016 found that the charges facing the appellants were untenable. The learned Judge held that the DPP owes the court a duty of placing before it material upon which the court can feel that the DPP justified in mounting the prosecution; that based on the admitted factual scenario the charges leveled against the appellants were far- fetched it would not be permissible for the court to permit the Appellants face the charges simply because they would have had an opportunity of defending themselves.

80. The Court of Appeal in finding that the learned Judge misdirected himself in arriving at the decisions to issue the orders of certiorari and prohibition held that the trial court must be accorded an opportunity to thoroughly interrogate the material before it through viva voce evidence and through cross-examination of witnesses so as to determine issues such as which procurement laws, as argued by the parties, supersede the other; the interpretation and consequence of the phrase 'market price' where the Market Price Index does not provide for specific goods or services; and on the general and specific obligations of the tendering committee but in relation to Tender No Ref GDC/HSQ/086/2011-12.

81. Article 157(6) of the *Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) of the *Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings, neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157(11) requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process.

82. Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene. These decisions include *Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya Commercial Bank Ltd & 4 others*, Civil Appeal No 56 of 2012 (2013) e KLR by the Court of Appeal. It also includes the case of *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 other*s, SC Petition No 38 of 2019; (2021) eKLR where this court held that although the DPP is not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising and make appropriate orders. The court found the following guidelines read alongside article 157(11) of the *Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:

i. Where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction;

iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or

iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

83. We are also minded of this court's decision in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others,* SC Petition No 42 of 2019; (2021) eKLR where the court upheld the High Court's position to the effect that in matters involving exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised. Further that the only exception where a court can compel a public agency to implement a recommendation is where "there is gross abuse of discretion, manifest injustice or palpable excess of authority" equivalent to denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy.

84. The following facts of the present Appeals are not contested. The appellants charges are hinged on their conduct in their capacity as members of the GDC Tender Committee for the acquisition of rig moves in tender No Ref GDC/HQS/086/2011-2012. More specifically the difference in the procurement of the rig-move services for the year 2011/2012 at a cost of Kshs 42,746,000/= from BCFCL while the previous year the same services were tendered at a cost of Kshs 19,550,000/= to the same company, BCFCL, at a cost of per rig move. It is also not controverted that the price was considered higher than comparable similar rig move services by the same provider, BCFCL, by other government institutions more specifically KenGen for rig move services at Olkaria and Eburru Geothermal fields vide tender no. KGN-OLK-179-2012 resulted in an agreement dated 5th February 2014 at a cost ranging between Kshs 13,565,040 and Kshs 24,429,600.

85. Due to this, DPP on the recommendation of EACC, elected to charge the appellants with various offences including wilful failure to comply with the law relating to procurement contrary tosection 45(2)(b) as read withsection 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003 and Inappropriate influence on evaluation contrary to section 38(1)(b) as read with 38(2)(a) of *Public Procurement and Disposal Act* and Abuse of office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No 3 of 2003.

86. The 1st appellant's defence against the charges preferred against her in count III and IV consists of contentions that she merely witnessed the signature of the accounting officer on whom section 27(3) of the *Public Procurement and disposal Act* 2005 and regulation 7(c) of the *Public Procurement and Regulations* 2006 places the duty to sign the contract.

87. The 2nd to 8th appellants contend that count II was premised on a non- existent law. It is a well-known tenet of the *Constitution* pursuant to article 50 (2)(n) of the *Constitution*, that a person cannot be convicted of an offence unless it is an offence in Kenya. However, that is not the case here. For clarity, their contention is not that the offence does not exist in statute, but rather it is an issue of interpretation. They argue that the respondents wrongly interpreted the provisions related to an open tender specifically section 30(3) of the *Public Procurement and Disposal Act* and regulation 10(2)(e) which they submit would not apply to an open tender. That from a reading of section 52(3)(i) of

the Public Procurement and Disposal Act, 2005 (repealed) the tender set out the procedures and the evaluation criteria. They also argue that by section 66(2) of the Act the evaluation and comparison shall be done using the procedures and criteria set out in the tender document and no other criteria shall be used. They submit that the rig-moving services are not standard services and works within the known market prices. It was not a function of the Tender Committee to make comparisons for a service not contemplated by section 30(3) of the Public Procurement and Disposal Act 2005 (repealed). It is on this ambit that they submitted that Count I was premised on a non-existent law.

88. It is our considered opinion that these are not issues concerning the propriety or otherwise of the decision by the DPP to charge them. These appear to be serious contentions of fact, evidence and interpretation of the law better suited to be examined by a trial court. Certainly, not for the High Court while exercising its judicial review jurisdiction. InHussein Khalid and 16 others v Attorney General & 2 others, SC Petition No 21 of 2017; [2019] eKLR this court held that it was not for the High Court as a constitutional court to go through the merits and demerits of the case as that is the duty of the trial court. Similarly, and as we have held hereinabove, it not for the judicial review court to undertake the merits and demerits of a matter based on controverted evidence and contested interpretations of the law.

89. We are emphatic that the High Court, whether sitting as a constitutional court or a judicial review, may only interfere where it is shown that under article 157(11) of the *Constitution*, criminal proceedings have been instituted for reasons other than enforcement of criminal law or otherwise abuse of the court process. We reproduce the words of this court inHussein Khalid and 16 others v Attorney General & 2 others[supra] as follows;

> " [105] It is not in dispute that every statutory definition of an offence comprises ingredients or elements of the offence proof of which against the accused leads to conviction for the offence. Inevitably, proof or otherwise of elements of an offence is a question of fact and that largely depends on the evidence first adduced by the prosecution and where the accused is placed on his defence, the accused evidence in rebuttal. This in our view is an issue best left to the trial court as it will not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. It is not automatic that once a person is charged with an offence (s) he must be convicted. Every trial is specific to the parties involved and a blanket condemnation of the statutory provisions is in our view overreaching. The presumption of innocence remains paramount." [Emphasis added]

90. From the circumstances of this case, we agree with the determination of the Court of Appeal that a distinction of the applicable procurement laws and whether the appellants participated in the tender process hence liable to prosecution is a determination best arrived at upon consideration of viva voce evidence and through cross examination of witnesses. We therefore come to the conclusion that the Court of Appeal did not err in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in *the Constitution*.

iii. Whether the DPP violated the Appellant's rights and fundamental freedoms under Articles 10, 25(c), 27, 28, 29, 41 and 50 of *the Constitution* in preferring the charges contested by the Appellant.

91. Article 10 of the *Constitution* relates to national values and principles. article 27 is on equality and freedom from discrimination. Article 25(c) and 50 related to the right to fair trial, article 29 is on

freedom and security of the person while article 41 relates to labour relations. The appellants submit that a criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would open a door to an unfair trial.

92. The right to fair hearing is broad and includes the concept of the right to fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. See; *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR, *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others*, SC Petition 7 of 2018 consolidated with Petition 9 of 2018; [2018] eKLR; *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others*, SC Petition 17 of 2015; [supra].

93. As we have found hereinabove, judicial review looks at the decision-making process. The court in judicial review cannot adequately canvass issues of controverted facts and whether those facts satisfy the ingredients of offences under which the accused are charged. More so, before a trial has taken off. As we stated in the case ofHussein Khalid and 16 others v Attorney General & 2 others[supra] theappellants put the wagon before the horse by asserting that their right to a fair trial was violated at the time of their arraignment in court. By refusing to submit to the jurisdiction of the trial court where their innocence may be upheld or their guilt established, the appellants removed themselves from the protections of article 50(1). Whatever the case, the criminal justice system is required to protect against the abuses claimed by the appellants, which the trial court is competent to resolve when challenged by an accused person, properly, during the trial.

94. This court having already demonstrated that there was nothing untoward in relation to the charges levelled against the appellants; the allegations of malice and discrimination having not being properly canvassed/demonstrated by the appellant, it follows that the claim for constitutional rights violations equally falls by the wayside. It is our considered opinion that it would be pragmatic that the appellants let the trial commence and conclude, during which trial they may raise all the issues they have as against the law under which they are charged. If successful, it is only then that they will pursue their rights on appeal.

95. For the foretasted reasons we find no merit in the consolidated appeals and dismiss the same.

iv. Who shall bear the costs of the appeal?

96. This court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, made the following determination on the award of costs;

> " It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation." [Emphasis added]

97. We have taken into account the industry of the parties, the purpose and intent of the appellants and the issues canvassed in the appeal. We have also considered that the issues raised by the appellant are issues that had to be seriously interrogated by the superior courts in their interpretation. We are cognizant

of the fact that, the criminal charges have been in abeyance since institution of these proceedings. It is also not lost on us that various stay orders have been issued by this court and the superior courts in relation to these proceedings.

98. We find it just in the circumstances that each party bears its own costs.

Orders

99. Consequent upon our conclusion above, we finally order that;

a. The 1st appellant's petition of appeal dated October 25, 2019 and lodged on even date and the 2nd to 8th appellants' petition of appeal dated October 25, 2019 and lodged on October 29, 2019 are hereby dismissed.

b. Anti-Corruption Case No 20 of 2015 before the Chief Magistrates' Court in Milimani to proceed and be heard on priority basis.

c. Each party to bear its own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2023.

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

.....

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA