

## **Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective**

**By: Prof. Tom Ojienda, SC\* and Lydia Mwalimu Adude\*\***

### **Abstract**

*Corporate crime are criminal acts and omissions committed by a corporate entity through individuals acting on its behalf where the said acts and omissions are for the benefit of the corporate entity. Corporate crime gives rise to corporate criminal liability as opposed to individual criminal liability, which occurs whenever a natural person is found culpable of committing a crime(s) on his or her own account. Corporate crime is on the rise, especially in Kenya, and uncovering and prosecuting it is marred with challenges including advancements in technology. In addition, the distinct legal personality of a corporate entity from the natural personality of its owners and directors somehow does provide its owners and directors with cover from the criminal liability of the corporate entity. A candid examination of the issue of corporate criminal liability is therefore imperative, in terms of the trial, conviction and sentencing of a corporate entity for its criminal acts and omissions.*

*This article interrogates the criminal liability of corporate entities in light of the trial, conviction, and sentencing of a corporate entity and its directors in the case of **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited, Anti-Corruption Case No. 31 of 2018** (hereinafter “the **Waluke Case**”). The article seeks to shade light on the criminal liability of a corporate entity, especially as concerns the trial, conviction and sentencing for corporate crime. Who is to be tried, convicted, and sentenced for the criminal acts and omissions of the corporate entity—the corporate entity itself, its directors, or both? In addition, John Koyi Waluke, the 2<sup>nd</sup> accused in the **Waluke Case**, is the current Member of the National Assembly for Sirisia Constituency, in Bungoma County. Therefore, in the same breath, the article looks at the indifferent, cold, and inconsistent treatment of public officers by the criminal justice system in Kenya, especially as concerns their prosecution for corruption and economic crimes.*

*The article thus endeavours to propose possible reforms to the anti-corruption regime in Kenya, with the possibility of ushering in a new anti-corruption dispensation aligned with the Constitution of Kenya, 2010, and which focuses more on restorative justice rather than merely punishing those accused of and convicted on charges of*

*corruption and economic crimes. The article equally calls for clarity in the functions of the Kenyan State agencies involved in the investigation and prosecution of corruption and economic crimes; that is, the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), and the Office of the Director of Public Prosecutions (ODPP).*

## **1. Introduction**

Corporate crime refers to criminal acts and omissions committed by a corporate entity through individuals acting on its behalf, where the said acts and omissions are for the benefit of the corporate entity.<sup>1</sup> Thus, corporate

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published by *Law Africa*, 2013; “*Professional Ethics, A Kenyan Perspective*” published by *Law Africa* 2012; “*Anti-Corruption and Good Governance in East Africa*” published by *Law Africa*, 2007; and “*Conveyancing Theory and Practice*” published by *Law Africa*, 2002.

Prof. Ojienda, SC’s published articles include: “*Sustainability and The Ivory Trade. Whither the African Elephant?*” published in the 2002 issue of the *East African Law Review*; “*Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?*” in “*Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform*” by T. O. Ojienda (eds) pages 95 – 131; “*Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law*” published in “*The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya*”; and “*An Inventory of Kenya’s Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights*” the *East African Journal of Human Rights and Democracy* Vol. 1, Issue No. 1, September 2003 at page 91-104; “*Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project*”, published in various journals including the *Advocate*, the *Lawyer*, and the *Newcastle Law Bulletin*; “*Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective*”; “*Polygamous Marriages and Succession in Kenya: Whither “the other woman?”*”; “*Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya*” published in the *International Journal of Clinical Education* Edition No. 2, June 2002 at page 49-63; “*Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity*” published in *Law society of Kenya Publication* (2003); “*Terrorism: Justifying Terror in Kenya?*” published in *The East African Lawyer*, Issue No. 5 at pages 18-22; “*Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights*”; “*A Commentary on Understanding the East African Court of Justice*” published in the *East African Lawyer*, Issue No. 6 at pages 52-56; “*Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003*” published in *The Advocate* at page 36-40; “*The Advocates Disciplinary Process-Rethinking the Role of the Law Society*” published in *The Lawyer*, Issue No. 78 at pages 15-16; “*Ramifications of a Customs Union for East Africa*” published in *The East African Lawyer*, Issue No. 4 at pages 17-25; “*Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution*” published in the *Moi University Journal* Vol. 1 2006 No.1, pages 82–92; “*Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas*” published in the *Moi University Journal* Vol. 1 2006 No. 1, pages 105 – 131; “*Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions*” published in *The East African Lawyer*, Issue No. 12 at pages 19-24; “*Implementing the New Partnership for Africa’s Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism*” published in the *Kenya Law Review*, 2007 Vol. 1, pages 81-119; “*Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya.*” (with R. A. Ogwang and R.

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*Aura* 90 Pages, ISSN:1812-1276; “*Legal and Institutional Framework of the TJRC - Way Forward*” published in the *Law Society of Kenya Journal* Vol. 6 2010 No. 1, pages 61 – 95; “*A Critical Look at the Land Question in the New Constitution*” published in *Nairobi Law Monthly*, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; and a Book Chapter entitled “*Land Law in the New Dispensation*” in a book edited by P.L.O. Lumumba and Dr. Mbondenyi Maurice.

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crime gives rise to corporate criminal liability as opposed to individual criminal liability—individual criminal liability occurs whenever a natural person is found culpable of committing a crime(s) on their own account. Now, corporate crime is on the rise. What is more, the advancement of technology has aggravated the complexity of corporate crime, in terms of uncovering it. Besides, it seems that the legal personality of a corporate entity being distinct from the natural personality of its owners and directors, does provide its owners and directors with cover from the criminal liability (and civil liability) of the corporate entity. A candid examination of the issue of corporate criminal

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*Previously, Lydia has also worked as a Legal Trainee at the European Center for Constitutional and Human Rights (Berlin, Germany) and as a Legal Intern at both the Special Tribunal for Lebanon (Leidschendam, The Netherlands) and the International Criminal Court (The Hague, The Netherlands). Currently, she is a member of the Young International Council for Commercial Arbitration (Young ICCA) because of her added interest in International Investment Law and International Commercial Arbitration issues and practice. She is also a member of the Harvard Club of Kenya where she has previously served as Secretary to the Board of Directors. Her recent publication is a book chapter on 'Sovereign and Diplomatic Immunity vis-a-vis International Criminal Justice' published in Joseph O. Wasonga and James Nyawo (eds.) (2019), 'International Criminal Justice in Africa Since the Rome Statute' (Nairobi: LawAfrica Publishing Ltd).*

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<sup>1</sup> See, e.g., Brian K. Payne and Susannah Tapp 'Corporate Crime' (2015) <<https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0185.xml>> (Accessed July 13, 2020).

liability is therefore imperative, in terms of the trial, conviction and sentencing of a corporate entity for its criminal acts and omissions.

This article interrogates the criminal liability of corporate entities in light of the trial, conviction, and sentencing of a corporate entity and its directors in the case of **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited**<sup>2</sup> (hereinafter “**the Waluke Case**”). The article seeks to shade light on the criminal liability of a corporate entity, especially as concerns the trial, conviction and sentencing for corporate crimes. Who is to be tried, convicted, and sentenced for the criminal acts and omissions of the corporate entity—the corporate entity itself, its directors, or both? In addition, John Koyi Waluke, the 2<sup>nd</sup> accused in the **Waluke Case**, is the current Member of the National Assembly for Sirisia Constituency, in Bungoma County. Therefore, in the same breath, the article looks at the indifferent, cold, and inconsistent treatment of public officers by the criminal justice system in Kenya, especially as concerns their prosecution for corruption and economic crimes.

The article thus endeavours to propose possible reforms to the anti-corruption regime in Kenya, with the possibility of ushering in a new anti-corruption dispensation aligned with the Constitution of Kenya, 2010 and which focuses more on restorative justice, rather than merely punishing those accused of and convicted on charges of corruption and economic crimes. The article equally calls for clarity in the functions of the State agencies involved in the investigation and prosecution of corruption and economic crimes; that is, the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), and the Office of the Director of Public Prosecutions (ODPP).

## **1 The Waluke Case; The Trial, Conviction, and Sentencing of a Corporate Entity and its Directors**

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<sup>2</sup> Anti-Corruption Case No. 31 of 2018.

## **1.1 Brief Background**

The corporate entity or company in question in the case at hand is **Erad Supplies & General Contractors Ltd** (hereinafter “**Erad**”), the 3<sup>rd</sup> accused. Erad was incorporated in 1998 to buy and sell cement, sand, and cereals. The co-accused, the co-directors of the company, are **Grace Sarapay Wakhungu** (hereinafter “**Wakhungu**”), the 1<sup>st</sup> accused, and **John Koyi Waluke** (hereinafter “**Waluke**”), the 2<sup>nd</sup> accused. Wakhungu is the Managing Director, thus in charge of the day-to-day running of the affairs of Erad.

In **August 2004**, Erad bid for and was lawfully awarded a tender to supply 40,000 metric tonnes of white maize to the National Cereals and Produce Board (hereinafter “**NCPB**”). On **August 26, 2004**, a supply contract was therefore executed between Erad and NCPB, for the maize to be supplied within four weeks from the date of the contract. Erad was to be paid USD 229 (approximately KES 19,465 at the time) per metric tonne of white maize supplied (**KES 778,600,000.00** in total). NCPB was bound to issue the tenderers with a letter of credit to guarantee payment, once the supply contracts were signed. However, Erad was never issued with a letter of credit hence could not proceed with the importation of the maize.

Erad was dissatisfied with NCPB’s failure to issue it with a letter of credit, hence filed an arbitration case against NCPB pursuant to clause 12.0 of the contract. Erad claimed that NCPB had frustrated its performance of the contract and was therefore in breach of contract. Erad alleged that it had already procured the white maize from Ethiopia and that it was being stored in Djibouti by Chelsea Freight, a South African firm. Erad claimed that Chelsea Freight charged it USD 1,146,000.00 as storage charges for the maize. Erad also claimed that its expected profit from the supply of the maize amounted to USD 1,960,000.00. As a result, Erad demanded from NCPB a total of USD 3,106,000.00 as compensation for loss of profit and storage charges. Ultimately, Erad was awarded a total sum of **USD 3,106,000.00**, together with interest at 12% per annum from **October 27, 2004** (when Erad expected to have performed the contract) until payment in full, and the cost of the arbitration. NCPB’s counterclaim against Erad’s alleged storage charges was dismissed.

NCPB's efforts to set aside the arbitration award and the execution of the subsequent decree at the High Court were unsuccessful. As a result, Erad moved to execute the decree. NCPB's bank accounts were frozen, and NCPB's assets, including office equipment and motor vehicles, were attached through auctioneers. In particular, on **March 19, 2013**, NCPB received a letter from its bank, Kenya Commercial Bank, on a garnishee order attaching **KES 297,086,505.00** payable to Erad; which was eventually paid out to Erad's advocates. Similarly, on **June 28, 2013**, NCPB received another letter from its other bank, National Bank of Kenya, on a garnishee order attaching KES 264,864,285.00 in NCPB's account payable to Erad's advocates; only the available balance of **KES 13,363,671.40** was attached and paid out, the amount having been paid out accordingly on **June 24, 2020**. A further garnishee order was issued to Cooperative Bank of Kenya attaching **USD 24,032.50** in NCPB's USD bank account and which was paid out to Erad's advocates accordingly, on **July 2, 2013**.

Nonetheless, as the execution of the decree against NCPB was ongoing, EACC commenced investigations against Erad, to dispel any suspicions of fraud in relation to the arbitration award to Erad. The EACC later forwarded the file to the DPP to consider preferring criminal charges against Erad. This led to the **August 2018** arrest and arraignment in court of the co-directors of Erad, Wakhungu and Waluke.

It is notable that though the tender by Erad was valued at USD 9,000,000, NCPB never issued any monies to Erad under the cancelled contract for the supply of maize—the monies at the centre of the charges preferred against Wakhungu, Waluke, and Erad were those paid out of NCPB's bank accounts to Erad and its advocates through garnishee orders issued pursuant to the arbitration award. The central allegation was that the whole arbitration process was flawed because it was based on a fraudulent invoice in relation to the storage charges claimed by Erad; that the said invoice was a false document made in support of a false claim for storage charges.<sup>3</sup> Only Wakhungu testified on behalf of Erad during the arbitration proceedings, but both directors benefited from pay-outs made pursuant to the arbitration award.

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<sup>3</sup> Judgment of June 22, 2020, pp 64-66.



## 1.2 The Trial, Conviction, and Sentencing

What transpired in **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited**<sup>4</sup> (“the Waluke Case”)? This case came before the Chief Magistrate’s Court at Milimani Law Courts in **August 2018** where the three accused (Wakhungu, Waluke, and Erad) were charged on five counts of the offences of uttering a false document, perjury, and fraudulent acquisition of public property. The three were charged under both the **Anti-Corruption and Economic Crimes Act, 2003 (ACECA)**<sup>5</sup> (the special statute on corruption and economic crimes) and the **Penal Code**<sup>6</sup> (the general statute on criminal offences), as follows:<sup>7</sup>

**(i) Count1: Uttering a false document contrary to section 353 as read with Section 349 of the Penal Code.**<sup>8</sup> The particulars of the charge were that Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, on or about **February 24, 2009**, being the directors of Erad Supplies & General Contractors Limited, together with Erad Supplies & General Contractors Limited, within Nairobi City County in Kenya, knowingly and fraudulently uttered a false **invoice No.12215-CF-ERAD for the sum of USDs 1,146,000** as evidence in the arbitration dispute

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<sup>4</sup> Anti-Corruption Case No. 31 of 2018.

<sup>5</sup> Act No. 3 of 2003, Laws of Kenya.

<sup>6</sup> Chapter 63, Laws of Kenya.

<sup>7</sup> Judgment of June 22, 2020, pp 1-3.

<sup>8</sup> Chapter 63, Laws of Kenya. **Section 353 of the Penal Code** prescribes the offence of uttering false documents and states that: “*Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.*” On the other hand, **Section 349 of the Penal Code** provides for the general punishment for forgery and states that: “*Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.*”

between Erad Supplies & General Contractors Limited and National Cereals and Produce Board (NCPB), purporting it to be an invoice to support a claim for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight;

**(ii) Count 2: Perjury contrary to Section 108(1) as read with Section 110 of the Penal Code.**<sup>9</sup> The particulars of the charge were that Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, on or about February 24, 2009, being a director of Erad Supplies & General Contractors Limited, within Nairobi City County in Kenya, while giving testimony in an arbitration dispute between Erad Supplies & General Contractors Limited and NCPB knowingly gave false evidence for decisions for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight;

**(iii) Count 3: Fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of ACECA.**<sup>10</sup> The

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<sup>9</sup> **Section 108(1) of the Penal Code** prescribes the offences of perjury and subornation of perjury and states that: “(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury. (b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law. (c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used. (d) It is immaterial whether the false testimony is given orally or in writing. (e) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given. (f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.” **Section 110 of the Penal Code** provides the punishment for the offences of perjury and subornation of perjury and states that: “Any person who commits perjury or suborns perjury is liable to **imprisonment for seven years.**”

<sup>10</sup> Act No. 3 of 2003, Laws of Kenya. **Section 45(1) of ACECA** aims to protect *inter alia* public property and revenue and states that: “(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully— (a) acquires public property or a public service or benefit; (b) mortgages, charges or disposes of any public property; (c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or (d) fails to pay any

particulars of the charge were that Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, on or about **March 19, 2013**, in Nairobi City County in Kenya, being the directors of Erad Supplies & General Contractors Limited together with Erad Supplies and General Contractors Limited, jointly and fraudulently acquired public property to wit **KES 297,086,505.00** purporting it to be the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

**(iv) Count 4: Fraudulent acquisition of public property contrary to section 45(1) as read with Section 48(1) of ACECA.**<sup>11</sup> The particulars of the charge were that Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, on or about **June 27, 2013** in Nairobi City County in Kenya, being the directors of Erad Supplies & General Contractors Limited together with Erad Supplies & General Contractors Limited jointly and fraudulently acquired public property to wit **KES 13,364,671.40** purporting it to be cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight loss of profit and interest.

**(v) Count 5: Fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA, 2003.**<sup>12</sup> The particulars of the charge are that Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, on

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*taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*” **Section 48(1) of ACECA** provides the penalty for the offence and states that: “(1) A person convicted (...) shall be liable to—(a) **a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both;** and (b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.”

<sup>11</sup> Id.

<sup>12</sup> Id.

or about **July 27, 2013**, in Nairobi City County in Kenya, being the directors of Erad Supplies & General Contractors Limited, jointly and fraudulently acquired public property to wit **USDs 24,032.00** purporting it to be the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight and loss of profit and interest.

The whole prosecution and the establishment of the criminal liability of the three accused was hinged on the genuineness of an invoice produced by the 1<sup>st</sup> accused, Wakhungu, to support the claim for storage charges by Erad during the arbitration proceedings. The Chief Magistrate, Honourable Elizabeth Juma, found the said invoice to be a fraudulent document which was knowingly used to further a fraudulent claim. She addressed the issue as follows:

*(...) This honourable court is certain and satisfied that PEX43, the invoice in question was a false document made in support of a false claim for storage charges.*

*The court having determined that PEX 43 was not genuine the next is whether the prosecution has proved beyond reasonable doubt that the 1st accused person knowingly gave false testimony on the matter with regards to PEX 43. The document was tailored in support of the false claim and the 1st accused being the managing director of the 3rd accused and in charge of the day to day running of its affairs and from her evidence [n] the follow up she made on the matter there is no doubt whatsoever that she produced pex43 to arbitration with full knowledge that it was false and lied on oath on the false of storage claim.*

*The failure by NCPB to open a letter of credit in favour of the 3rd accused may have infringed the contractual terms, the 3rd accused is probably entitled to some civil remedy, however this is an issue that can at best be addressed [in] a civil court, the accused persons crossed the civil line by adducing a false document in support of their claim and out of the false document NCPB lost a huge amount of money to the accused persons and their advocates.<sup>13</sup>*

On June 22, 2020, Honourable Elizabeth Juma passed judgment on the three accused in respect of the anti-corruption and criminal charges, as follows:<sup>14</sup>

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<sup>13</sup> Judgment of June 22, 2020, pp 66-67.

<sup>14</sup> Id. at pp 67-68.

(i)**Count 1:** Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, was found guilty and convicted accordingly; John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, were both found not guilty and were both acquitted under **Section 215 of the Criminal Procedure Code (CPC)**;<sup>15</sup>

(ii)**Count 2:** Grace Sarapay Wakhungu, the 1<sup>st</sup> accused was found guilty and was convicted accordingly;

(iii)**Count 3:** Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, were all found guilty and were convicted accordingly;

(iv)**Count 4:** Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, were all found guilty and were convicted accordingly; and

(v)**Count 5:** Grace Sarapay Wakhungu, the 1<sup>st</sup> accused, John Koyi Waluke, the 2<sup>nd</sup> accused, and Erad Supplies & General Contractors Limited, the 3<sup>rd</sup> accused, were all found guilty and were convicted accordingly.

On June 25, 2020, the Court passed sentenced on the three accused as follows:<sup>16</sup>

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<sup>15</sup> Chapter 75, Laws of Kenya. **Section 215 of the CPC** states that: “*The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.*”

<sup>16</sup> See, e.g., ‘Waluke’s jail term is 67 years, Judiciary clarifies’ (The Star, June 26, 2020) <<https://www.the-star.co.ke/news/2020-06-26-walukes-jail-term-is-67-years-judiciary-clarifies/>> (Accessed July 15, 2020).

The 1<sup>st</sup> accused, Grace Sarapay Wakhungu;

<b>COUNT</b>	<b>FINE (KES)</b>	<b>IMPRISONMENT</b>	<b>(IN</b>
		<b>DEFAULT OF FINE)</b>	
Count 1	100,000.00	1 year	
Count 2	100,000.00	1 year	
Count 3	500,000.00	3 years	
	594,175,000.00	7 years	
Count 4	500,000.00	3 years	
	26,729,342.80	7 years	
Count 5	500,000.00	3 years	
	5,121,219.20	7 years	
	80,000,000.00	7 years	
<b>Total</b>	<b>707,725,562.00</b>		

The 2<sup>nd</sup> accused, John Koyi Waluke;

<b>COUNT</b>	<b>FINE (KES)</b>	<b>IMPRISONMENT</b>	<b>(IN</b>
		<b>DEFAULT OF FINE)</b>	
Count 3	500,000.00	3 years	
	594,175,000.00	7 years	
Count 4	500,000.00	3 years	
	26,729,342.80	7 years	
Count 5	500,000.00	3 years	
	5,121,219.20	7 years	
	100,000,000.00	7 years	
<b>Total</b>	<b>727,525,562.00</b>		

The 3<sup>rd</sup> accused, Erad Supplies & General Contractors Limited;

<b>COUNT</b>	<b>FINE (KES)</b>	<b>IMPRISONMENT</b>	<b>(IN</b>
		<b>DEFAULT OF FINE)</b>	
Count 3	500,000.00	3 years	
	594,175,000.00	7 years	
Count 4	500,000.00	3 years	
	26,729,342.80	7 years	
Count 5	500,000.00	3 years	

	5,121,219.20	7 years
	100,000,000.00	7 years
<b>Total</b>	<b>727,525,562.00</b>	

The 1<sup>st</sup> accused, Wakhungu, was sentenced to pay a cumulative fine of **KES 707,725,562.00** and in case of default serve a cumulative custodial sentence on all the five counts. The 2<sup>nd</sup> accused, Waluke, was sentenced to pay a cumulative fine of **KES 727,525,562.00** and in case of default serve a cumulative custodial sentence on three counts. The 3<sup>rd</sup> accused, Erad, which is a corporate entity was similarly sentenced to pay a cumulative fine of **KES 727, 525, 562.00** and in case of default serve a cumulative custodial sentence on three counts.<sup>17</sup>

### **1.3 The Criminal Liability of the Corporate Entity, Erad Supplies & General Contractors Limited, in Relation to the Individual Criminal Liability of its Two Co-Directors**

Regarding the criminal liability of the 3<sup>rd</sup> accused, Erad Supplies & General Contractors Limited, the Chief Magistrate, Honourable Elizabeth Juma, stated that:

*On the 7<sup>th</sup> issue of criminal liability of the 3<sup>rd</sup> accused, since a company is an artificial person, it can only act through an agent. In Quin and Axtens v Salmon [1909] AC 442, it was established that the decisions of the directors are deemed to be the decision of the company. This was further cemented in Shaw Sons Ltd v Shaw [1935] 2 UB 113 that declared that directors are empowered to manage the company's affairs.*

*In this respect, the company is bound by the actions of its agents the directors as seen in Leonard's Carrying Company Ltd v Asiatic Petroleum Co [1915] A.C 705 HL. This agency relationship and company liability only ensues in the scope of the director's mandate. Anything aside from that, they will be personally liable.<sup>18</sup>*

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<sup>17</sup> See, e.g., Everlyne Judith Kwamboka, 'Sirisia MP Waluke to serve 67 years in prison' (The Standard, June 27, 2020) <<https://www.standardmedia.co.ke/western/article/2001376642/sirisia-mp-waluke-to-serve-67-years-in-prison>> (Accessed July 15, 2020).

<sup>18</sup> Judgment of June 22, 2020, p 62.

Comparing the individual criminal liability of a natural person and the criminal liability of a corporate entity, the Chief Magistrate expressed the view that, a corporate entity is considered to be a legal entity, separate and distinct from its members per **Salomon v. Salomon**,<sup>19</sup> and that a corporate entity has the same criminal liability as a natural person by virtue of **Section 3(1) of the Interpretation and General Provisions Act**<sup>20, 21</sup> Further, relying on **Section 23 of the Penal Code**,<sup>22</sup> the Chief Magistrate went on to explain the extent of the criminal liability of the directors for the criminal acts of the corporate entity and stated that:

*Where an offence is committed by either a natural or juristic person (a corporation), every person who is in charge of the control of the management of the affairs or activities of the company is guilty of the offence and is liable to be punished for it (Also seen in **R v Ivan Arthur Campus [2002] 1 KLR 461**). This is the rule, which exempts liability from parties who either were not aware of the offence being intended or about to be committed, or that they did their due diligence and took all the necessary steps to avoid its commission.*<sup>23</sup>

However, it is unfortunate that even though the Chief Magistrate relied on the English cases above to elaborate on how criminal liability is ascertained as between the corporate entity and its directors, she failed to apply the same in the case of Erad and its directors. The Court merely used the two cases to impute criminal liability on the corporate entity from the acts of the two co-directors. This the Court did in order to arrive at the conclusion that “*the 3rd accused can be held liable and culpable in counts 3, 4 and 5, it was on account of the nature of count 1 that the 3rd is exonerated.*”<sup>24</sup> The Court thus took the view that the 1<sup>st</sup> and 2<sup>nd</sup> accused acted both personally and independent of the 3<sup>rd</sup> accused but that at the same time their actions were those of the 3<sup>rd</sup> accused—thereby finding individual criminal liability for Wakhungu and Waluke and at the same time corporate criminal liability for Erad.

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<sup>19</sup> [1897] AC 22.

<sup>20</sup> Chapter 2, Laws of Kenya.

<sup>21</sup> *Judgment of June 22, 2020, pp 62-63.*

<sup>22</sup> Chapter 63, Laws of Kenya.

<sup>23</sup> *Judgment of June 22, 2020, p 63.*

<sup>24</sup> *Id.* p 64.



Accordingly, the Court failed to notice that since the corruption and criminal charges arise from the same facts, the two co-directors could either have been found to be personally liable for the corruption and criminal acts in question or that since the two were acting for the 3<sup>rd</sup> accused, then the 3<sup>rd</sup> accused was wholly liable (vicariously) for the corruption and criminal acts in question. Alternatively, criminal liability could be shared between the three accused to the extent of their involvement in the corruption and criminal acts in question, but the cumulative liability should not be excessive. It is regrettable that in the **Waluke Case**, the Court simply treated the corporate entity and its two co-directors as three persons acting independently to commit the same crime based on the same facts, and used the corporate entity merely as the common factor linking the three to each other.

The Court used the same analogy when passing sentence on the three accused. The Court imposed fines and default custodial sentences on Wakhungu, Waluke, and Erad as though each had committed the corruption and criminal acts therein solely and independent of each other. The result is that the cumulative punishment meted against the three is clearly excessive in comparison to the alleged losses incurred by NCPB. Moreover, as regards the default custodial sentence imposed on Erad, the Chief Magistrate expressed herself in the manner that, since a company cannot serve a custodial sentence, the two co-directors, Wakhungu and Waluke, would have to serve the custodial sentence imposed on Erad, on behalf of the corporate entity, should the corporate entity fail to pay the fine imposed on it. In essence, the two co-directors would have to serve the corporate entity's custodial sentence in addition to their own individual custodial sentences, if they fail to raise the fines imposed on them.

## **2 Corporate Civil Liability Versus Corporate Criminal Liability**

The civil and criminal liability of a corporate entity stems from the principle of separate legal personality of a company, a corporation, or a corporate entity, which enables it to sue and be sued and to acquire and dispose of interests in property in its own name. The common law principle of separate legal personality for the corporate entity was espoused in the landmark case of

**Salomon v. Salomon**;<sup>25</sup> that a corporate entity is a legal or juristic person in itself in relation to its owners and directors (the corporate entity's directing mind or controlling mind).<sup>26</sup>

The common law principle of separate legal personality for the corporate entity has been restated by Kenyan courts in various cases. In **Victor Mabachi & Another v. Nurtun Bates Limited**,<sup>27</sup> the Court held that a company as "*a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.*"<sup>28</sup> The Court went further to elaborate that the separate legal personality of a corporate entity does not necessarily make it a sham, such that unless the corporate veil is lifted, one cannot go after the owners or agents of the corporate entity in order to impose personal liability on them. In doing so, the Court quoted the case of **Jones & Another v. Lipman & Another**,<sup>29</sup> where Russel, J held that: "*if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgment even against the person behind that company.*"<sup>30</sup>

In addition, in **Kolaba Enterprise Limited v. Shamshudin Hussein Varvani & another**,<sup>31</sup> the court stated thus;

*It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO. LTD. v SALOMON [1887] A.C. 22 H. L. that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any*

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<sup>25</sup> [1897] AC 22.

<sup>26</sup> See also *Macaura v. Northern Assurance Co. Ltd* [1925] AC 619; and *Lee v. Lee's Air Farming* [1961] UKPC 33.

<sup>27</sup> [2013] eKLR.

<sup>28</sup> *Id.* at para 23.

<sup>29</sup> [1962] 1 W.L.R 832, 833.

<sup>30</sup> *Id.*

<sup>31</sup> [2014] eKLR.

*proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.*<sup>32</sup>

The jurisprudence around a corporate entity's civil liability has developed over time, under the vicarious liability principle and principal-agent relationship. The corporate entity remains liable for the torts of its servants committed *intra vires*, that is, within the scope of their employment, on the basis of the vicarious liability principle.<sup>33</sup> The acts of the corporate entity's agents in the course of the business of the corporation, if the acts are *intra vires*, are the acts of the corporation. An incorporated body always acts through its agents.<sup>34</sup>

Conversely, whereas it is common for corporate entities to stand civil trial and shoulder civil liability, criminal liability for corporate entities is shrouded in confusion. This is largely due to the fact that traditionally, the criminal justice system developed with the natural person in mind. The distinction between corporate civil liability and corporate criminal liability is premised on the criminal law principle of attributing not only the act, but also the guilty mind

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<sup>32</sup> Id. at para 20.

<sup>33</sup> See e.g., Arthur L. Goodhart, 'Essays in jurisprudence and the common law,' (Cambridge University Press, 1931) pp 91-109. In **Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd [1915] AC 705**, the Court expressed the view that: "*a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.*"

<sup>34</sup> George O. Otieno Ochich, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008), <<http://kenyalaw.org/kl/index.php?id=1919>> (Accessed July 1, 2020).

to the perpetrator of the acts and omissions in question. This is not the case for civil criminal liability.

As a result, corporate criminal liability remains a complex area of criminal justice because establishing the criminal liability of a corporate entity is not as straight forward as that of a natural person.<sup>35</sup> Due to the separate legal personality of the corporate entity, it is possible to establish that certain crimes are committed by the directors or such other persons who act as the controlling mind of the company, and that certain other crimes are committed by the corporate entity itself by direct attribution to the directors or the controlling mind of the corporate entity or its authorized agents, while on official duty. Consequently, courts have faced dilemma in finding a corporate entity liable as opposed to its directors or its controlling mind, more so in criminal matters.

### 3 Statutory Analysis Of Corporate Criminal Liability

Corporate criminal liability in Kenya has since been codified in a number of Statutes. These include: the **Companies Act, 2015**;<sup>36</sup> the **Interpretation and General Provisions Act**;<sup>37</sup> the **Anti-Corruption and Economic Crimes Act, 2003 (ACECA)**;<sup>38</sup> the **Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA)**;<sup>39</sup> the **Public Procurement and Asset Disposal Act, 2015 (PPADA)**,<sup>40</sup> and the **Penal Code**.<sup>41</sup>

First and foremost, the **Interpretation and General Provisions Act** defines the word '*person*' to include "*a company or association or body of persons, corporate or incorporate.*"<sup>42</sup> This definition has allowed criminal charges and

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<sup>35</sup> See, e.g., McSyd Hubert Chalunda, 'Corporate Crime and the Criminal Liability of Corporate Entities in Malawi' Resource Material Series No. 76 <[https://www.unafei.or.jp/publications/pdf/RS\\_No76/No76\\_08PA\\_Chalunda.pdf](https://www.unafei.or.jp/publications/pdf/RS_No76/No76_08PA_Chalunda.pdf)> (Accessed June 29, 2020).

<sup>36</sup> Act No. 17 of 2015, Laws of Kenya. Aside from the regulatory offences prescribed in the Companies Act, 2015, statutory provisions have been crafted with a bearing on criminal sanctions for corporate entities.

<sup>37</sup> Chapter 2, Laws of Kenya.

<sup>38</sup> Act No. 3 of 2003, Laws of Kenya.

<sup>39</sup> Act No. 9 of 2009, Laws of Kenya.

<sup>40</sup> Act No. 33 of 2015, Laws of Kenya.

<sup>41</sup> Chapter 63, Laws of Kenya.

<sup>42</sup> Section 3(1) of the Act.

penal sanctions to be imposed on corporate entities. For example, **Section 45 of ACECA** prescribes offences for the protection of *inter alia* public property and revenue. Under the said provision, a person is guilty of an offence if the person fraudulently or otherwise unlawfully: (a) acquires public property or a public service or benefit; (b) mortgages, charges or disposes of any public property; (c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or (d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges. This provision has been applied to corporate entities in the same manner as natural persons, where corporate entities are suspected of involvement in the acts outlawed therein.

**Republic v. Grace Sarapay Wakhungu and 2 others**,<sup>43</sup> above, is a good example of such cases where **Section 45 of ACECA** has been used to impose criminal charges on a corporate entity. In that case, Erad Supplies and General Contractors Limited was charged alongside two natural persons, Wakhungu and Waluke, for fraudulent acquisition of public property contrary to **Section 45(1)** as read with **Section 48(1) of ACECA**. Another example is **Republic v. Muhammed Abdalla Swazuri & 16 others**<sup>44</sup> where three corporate entities (Dashe Investment Limited, Keibukwo Investment Limited, and Olomotit Estate Limited) were among accused persons charged with various criminal offences under **ACECA**.

On its part, **POCAMLA** creates offences in relation to money laundering. The Act embodies the concept of corporate criminal liability by creating separate penalties for the natural person and the corporate entity. **Section 16 of POCAMLA**, which provides for penalties for contravention of the provisions of the Act, states thus;

1. *A person who contravenes any of the provisions of sections 3, 4 or 7 is on conviction liable—*

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<sup>43</sup> Anti-Corruption Case No. 31 of 2018.

<sup>44</sup> Anti-Corruption Case No. 33 of 2018.

- a) *in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and*
- b) *c) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.*
2. *A person who contravenes any of the provisions of sections 5, 8, 11(1) or 13 is on conviction liable—*
  - a) *in the case of a natural person, to imprisonment for a term not exceeding seven years, or a fine not exceeding two million, five hundred thousand shillings, or to both and*
  - b) *in the case of a body corporate, to a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher.*
3. *A person who contravenes any of the provisions of section 12(3) is on conviction, liable to a fine not exceeding ten per cent of the amount of the monetary instruments involved in the offence.*
4. *A person who contravenes the provisions of section 9, 10 or 14 is on conviction liable—*
  - a) *in the case of a natural person, to imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both and*
  - b) *in the case of a body corporate, to a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher.*
5. (...)
6. *Where any offence under this Part is committed by a body corporate with the consent or connivance of any director, manager, secretary or any other officer of the body corporate, or any person purporting to act in such capacity, that person, as well as the body corporate, shall be prosecuted in accordance with the provisions of this Act.*

In distinguishing between penalties to be imposed on natural persons and those to be imposed on corporate entities, **POCAMLA** clearly demonstrates the extent to which corporate entities can be held liable for crimes created under the Statute. It is also evident that hefty fines are meted out on corporate entities to discourage engagement in these crimes that can easily go unnoticed. Interestingly, **Section 16(6) of POCAMLA** demonstrates that in offences where both the corporate entity and its controlling mind or directing mind have actively participated in its perpetration, both parties are subject to prosecution.

The provisions in **POCAMLA** were recently a thorn in the flesh of many banking institutions that were investigated for suspicion of crimes in the nature proceeds of crime and money laundering. This was evident in the case of **Family Bank Limited & 2 others v. Director of Public Prosecutions & 2 others**,<sup>45</sup> where Family Bank Limited, which was charged alongside two natural persons, unsuccessfully sought to prevent their prosecution for money laundering offences under **POCAMLA**.

On another front, **Section 176 of PPADA** creates offences in relation to public procurement and asset disposal. In recognizing the uniqueness of corporate criminal liability, **Section 177 of PPADA** provides for penalties specific to corporate bodies aside from natural persons, as follows:

*A person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction—*

*(a) if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both;*

*(b) if the person is a body corporate, to a fine not exceeding ten million shillings.*<sup>46</sup>

In summary, recently enacted Statutes are embracing the present reality that corporate entities ought to be factored in when creating offences and prescribing the attendant penalties, since corporate crime is on a steady rise lately, particularly in the context of corruption and economic crimes. However, in the overall, **Section 23 of the Penal Code** provides in regard to offences by corporate entities *inter alia* that:

*Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or*

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<sup>45</sup> [2018] eKLR.

<sup>46</sup> See also PPADA, 2015, Section 176(2).

*omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.*

#### **4 Corporate Entities And The Criminal Trial Process**

Kenyan courts recognize that corporate entities can stand criminal trial as separate legal entities from their owners and directors,<sup>47</sup> but it is the directors that bear the consequences of the corporate entity's criminal acts and omissions.<sup>48</sup> Moreover, the courts have declared that directors can equally be charged in their personal capacities for offences attributable to the corporate entity, based on their positions and their conduct in relation to the corporate entity.<sup>49</sup> This begs the question, who bears criminal liability in cases where the offence(s) cannot be attributed to the directors of the corporate entity? Further, it is double jeopardy (double punishment) if both the corporate entity and its directors or authorized agents are punished for the same crime based on the same facts.

In this section of the article, we examine the process of charging, plea-taking, trial, conviction and sentencing for corporate crimes (generally, criminal trials involving corporate entities) in Kenya, and some possible reforms in this area.

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<sup>47</sup> See, e.g., **Paper House of Kenya Ltd. v Republic [2006] eKLR**, where Paper House of Kenya Ltd., a corporate entity, was charged, tried, and convicted by the Subordinate Court of the First Class Magistrate Court at City Hall, Nairobi, for the offences of failing to comply with a notice (to abate a nuisance) contrary to Section 115 as read with Section 118 and 119 and punishable under Section 120 and 121 of the Public Health Act. Paper House of Kenya Ltd. was then sentenced to serve a fine of KES 886,500/= and in default one year imprisonment (per Section 28 of the Penal Code, which provides for the appropriate default custodial sentence for a fine where none has been provided under a particular Statute). The conviction and sentence imposed on Paper House of Kenya Ltd was upheld on appeal, by both the High and the Court of Appeal (**Paper House of Kenya Limited v. Republic [2014] eKLR**).

<sup>48</sup> See e.g., **Rebecca Mwikali Nabutola & 2 others v. Republic [2016] eKLR**, where the High Court stated that; "*While Maniago Safaris Limited is a separate legal entity, all the acts in this case were executed by its director, the 2nd appellant. In accordance with section 23 of the Penal Code, the directors of the company bear the responsibility of a company's criminal actions.*"

<sup>49</sup> See, e.g., **Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR**.



#### **4.1 Charging a Corporate Entity**

Generally, the power to institute or discontinue criminal proceedings against any person, natural or juristic, lies with the DPP.<sup>50</sup> So, how should the DPP charge when faced with corporate crime? Should the corporate entity be charged alongside its directors? Are all the directors to be charged alongside the corporate entity? When should some directors be charged alongside the corporate entity and not others? Are there instances where the directors alone can be charged without preferring charges against the corporate entity itself? These are some questions that arise as concerns the charging of a corporate entity for corporate crimes.

Even so, the law has not left the DPP to run amok as concerns the decision to charge or not to charge. The constitutional threshold for the institution and discontinuation of criminal proceedings by the DPP is twofold: one, the DPP is constitutionally required to exercise independent judgment, devoid of the direction or control of any person or authority, in commencing criminal proceedings and in the exercise of his or her prosecutorial powers or functions;<sup>51</sup> and two, the DPP is constitutionally required to have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of legal process in exercising his or her prosecutorial powers.<sup>52</sup>

That being the case, the DPP's decision in charging for corporate crimes can successfully be challenged in court, on the grounds that the alleged criminal proceedings are tantamount to an abuse of legal process, are contrary to public interest or the interests of the administration of justice, or are influenced by ulterior motives and should thus be halted in the interest of justice.<sup>53</sup>

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<sup>50</sup> Article 157(6) of the Constitution of Kenya, 2010.

<sup>51</sup> Article 157(10) of the Constitution of Kenya, 2010.

<sup>52</sup> Article 157(11) of the Constitution of Kenya, 2010. See also Office of the Director of Publications, *Guidelines on the Decision to Charge*, 2019, pp 25-35.

<sup>53</sup> See, e.g., *Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others* [2014] eKLR, paras 21 and 22, where the High Court stated thus:

*21. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office.*

Essentially, one must satisfy the Court, through cogent reasons, that the discretion given to the DPP to charge or not to charge for crimes ought to be interfered with.<sup>54</sup>

For instance, in **Rebecca Mwikali Nabutola & 2 others v. Republic**,<sup>55</sup> the High Court was called upon to determine *the question whether it was proper to charge the director of a corporate entity independently and at the same*

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*The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, **if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.** The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore **the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).***

*22. It is therefore clear that **whereas the discretion given to the [DPP] to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.***

<sup>54</sup> Id. at para 24.

<sup>55</sup> [2016] eKLR.

***time as director of the corporate entity, for the same offence and on the basis of the same facts.*** In this case, both the corporate entity, Maniago Safaris Limited, and its director, the 2<sup>nd</sup> accused, were charged with the offences of conspiracy to defraud the public of monies. It was alleged that the 1<sup>st</sup> and 2<sup>nd</sup> appellants together with Maniago Safaris Limited conspired to defraud the Ministry of Tourism over expenses incurred for a trip by the Permanent Secretaries of the Government of Kenya to Maasai Mara in October 2007. As concerns the drafting of charges against both the corporate entity and its director, the court was of the view that:

*The offences as drafted are against both the 2nd appellant [the director] and the company in the applicable instances. While the charges are also drawn against the company, the implications of Section 23 above are that, upon determination of its liability, the directors shall bear the responsibility. In my view therefore, the charges as drafted were proper, and no question of mis-joinder arises. The question of liability will only be determined upon consideration of evidence, and a further determination on whether the 2nd appellant bears liability as a director of the company.*<sup>56</sup>

However, the court was of the view that ***a company and its sole-director could not conspire to defraud public funds, as the company and its director counted as one person.*** The court stated as follows:

(...) having discharged the 1<sup>st</sup> appellant of the offence of conspiracy under count II, it follows that the 2<sup>nd</sup> appellant could not have conspired with the company in which he is the director to defraud the public of the monies in question. The offence of conspiracy entails overt acts by two or more persons and cannot therefore be sustained against one person. While Maniago Safaris Limited is a separate legal entity, all the acts in question in this case were executed by its director, the 2<sup>nd</sup> appellant. In accordance with section 23 of the Penal Code, the directors of

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<sup>56</sup> Id. at p 11.

*the company bear the responsibility of a company's criminal actions.*<sup>57</sup>

The 2<sup>nd</sup> appellant, the director, was thus acquitted on that count.

In **Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others**,<sup>58</sup> the High Court considered *the question whether where a criminal offence is alleged to have been committed by a Company with more than one director, it is competent to charge only one or some of the directors.*<sup>59</sup> In this case, the one director accused (to the exclusion of three other co-directors) alongside Clay City Developers Limited, the corporate entity, brought judicial review proceedings challenging the DPP's decision to charge the company and himself only for the offence of conspiracy to defraud contrary to **Section 317 of the Penal Code**,<sup>60</sup> stating that the offence charged was against the corporate entity and not himself personally. He alone had been charged alongside the corporate entity and not three other co-directors of the corporate entity, although there was no company resolution to evidence the fact that the corporate entity had resolved to have only one of its directors shoulder criminal liability on its behalf. He alleged that the DPP arrested and charged only him to appear and plead on behalf of the corporate entity without disclosing that there were three other co-directors of the corporate entity. He alleged that he was randomly picked by the DPP without any due regard to any criminal liability of the directors of the corporate entity and their responsibility in as far as the alleged offence was concerned.

On the charging of director(s) for the criminal offences alleged to have been committed by the corporate entity, the High Court was of the view that the state of mind of the director(s) constitutes the state of mind of the corporate entity. The Court expressed itself as follows:

*25. The law relating to corporations is well known. A company may in many ways be linked to a human body. It has a brain and*

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<sup>57</sup> Id. at p 18.

<sup>58</sup> [2014] eKLR.

<sup>59</sup> Id. at para 19.

<sup>60</sup> Chapter 63, Laws of Kenya.

*nerve centre, which control what it does. It also has hands, which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work. Others are directors and managers who represent the mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. However, a corporation is an abstract. It has no mind of its own; its active and directing will must consequently be sought in the persons of somebody who for some purpose may be called an agent and will of the corporate, the very ego and centre of the personality of the corporation in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself. See **Lenard's Carrying Co. vs. Astatic Petroleum [1915] AC 705 H.L AT P. 713-714.**<sup>61</sup>*

However, on the basis of **Section 23 of the Penal Code**,<sup>62</sup> the High Court was of the view that, where there are more than one directors of the corporate entity in question, each director would be liable to extent of available evidence regarding their culpability. The High Court stated thus: *“It is therefore clear that where a person charged with or concerned or acting in, the control or management of the affairs or activities of a company proves that through no act or omission on his part, he was not aware that the offence was being or*

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<sup>61</sup> Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, para 25.

<sup>62</sup> Chapter 63, Laws of Kenya. **Section 23 of the Penal Code** provides that: *“Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”*

was intended or about to be committed, or that he took all reasonable steps to prevent its commission, he will not be guilty of an offence committed by the company and shall not be liable to be punished thereof.”<sup>63</sup> As such, in considering which director(s) to charge, or not to charge, the DPP is enjoined by **Article 157(11) of the Constitution of Kenya, 2010** (hereinafter “**the Constitution**”)<sup>64</sup> to have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Accordingly, the Court stated:

*28. In conducting the investigations it is upon the Director of Public Prosecution and the police based on the evidence and material presented before them to decide whether the material justifies the charging of all the Directors of a Company or only some of them. To charge all the Directors of a Company with an offence committed by the Company where the DPP and the Police are in possession of the evidence showing that some of the Directors are not liable would in my view amount to abuse of power since the DPP and the Police are entitled to act bona fide. As was held in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No.406 of 2001:*

*“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.*

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<sup>63</sup>Clay City Developers Limited v. Chief Magistrate’s Court at Nairobi & 2 others [2014] eKLR, para 27.

<sup>64</sup>**Article 157(11) of the Constitution of Kenya, 2010** provides that: “In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

29. *Under Article 157(11) of the Constitution, the DPP is enjoined in exercising the powers conferred by the said Article to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice in my view dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court. So unless it is manifestly clear to the Court that the DPP is abusing his powers or exercising them in a discriminatory manner in breach of section 4 of the Office of Public Prosecutions Act, No. 2 of 2013, which require that in exercising his discretion he must take into account the principle of constitutionalism, it is not for this Court in judicial review proceedings to minutely examine the evidence before the DPP in order to determine whether or not all the Directors of a Company ought to have been charged.(..)<sup>65</sup>*

In this case, the High Court held that it could not interfere with the DPP's decision to only charge one of four directors of the corporate entity, Clay City Developers Limited, because no evidential material had been led by the applicant director in that regard:

1.  
... ) *there is no material before this Court on the basis of which the Court can find that in making a decision to charge only one Director of the Applicant, the 2nd Respondent did not consider the material before it or that it considered irrelevant matters or that his decision amounts to abuse of his powers or is against the principle of constitutionalism. It was upon the Applicant to place before this Court material on the basis of which this Court could find in its favour. The mere fact that the DPP*

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<sup>65</sup> Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, paras 28 and 29. The Court relied on a number of cases that have dealt with the power of the High Court to interfere the investigative and prosecutorial powers of the DCI and the DPP, respectively, in terms of the exercise of the discretion to investigate or charge for criminal acts and omissions, such as: Meixner & Another v. Attorney General [2005] 2 KLR 189; and Kuria & 3 Others v. Attorney General [2002] 2 KLR 69.

*decides to charge one director while leaving the others is not a ground for interfering with his discretion.*<sup>66</sup>

Further, in **Clay City Developers Limited v. Chief Magistrate’s Court at Nairobi & 2 others**,<sup>67</sup> the High Court considered the question *whether it is competent to call some of the directors to testify for the prosecution where their co-director is charged on behalf of the company, especially with the view of giving evidence against the corporate entity and the charged co-director*.<sup>68</sup> Surprisingly, in this case the other three co-directors, who were not charged, were summoned by the DPP to testify for the prosecution. On that, the accused director alleged that the act of calling the other three co-directors to testify against the company and one of the co-directors was contrary to **Article 50 of the Constitution** as it was tantamount to self-incrimination and prejudiced the defence to the charges. He also claimed that in doing so, the DPP abused the court process.

On the contrary, the High Court relied on **Section 128 of the Evidence Act**<sup>69</sup> and found for the prosecution. According to the Court, the Applicant director failed to cite any provision in the law which provides that a director of a company is not competent to be a witness in criminal proceedings against the company. The Court was of the view that: “(...) taking into account the fact that a Corporation is in law distinct from the its directors where some only of the directors are charged in respect of a criminal offence against the Company, I do not agree that it is illegal to call the directors not charged as witnesses in the same proceedings.”<sup>70</sup>

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<sup>66</sup> Id. at para 31.

<sup>67</sup> [2014] eKLR.

<sup>68</sup> Id. at para 19.

<sup>69</sup> Chapter 80, Laws of Kenya. **Section 128 of the Evidence Act** provides for the compellability of ordinary witnesses and states that: “A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”

<sup>70</sup> Clay City Developers Limited v. Chief Magistrate’s Court at Nairobi & 2 others [2014] eKLR, para 33.



In aggregate therefore, the High Court in **Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others**<sup>71</sup> could not interfere with the DPP's decision to charge only one of four directors of a corporate entity, as it was not satisfied that the DPP's decision to charge only one director with an offence committed by the corporate entity in question and the subsequent application for and grant of witness summons against the other three co-directors to testify against the corporate entity and the charged co-director, were tainted with illegality, irrationality or procedural impropriety.<sup>72</sup>

From the above, where there are more than one directors of a corporate entity, the decision on who to (or not to) investigate or charge for the criminal offences of the corporate entity rests with the DPP and the DCI, respectively. The High Court can only interfere with the discretion of the DCI and the DPP where sufficient evidence is placed before the Court to show that the intended or ongoing criminal proceedings constitute abuse of the legal process or are contrary to the public interest, the interests of the administration of justice and constitutionalism, per **Articles 157(11) and 245(4) of the Constitution**.

#### **4.2 Plea taking**

It is a fact that corporations cannot appear in court in person. This therefore calls for authorized representatives to take plea on behalf of the company. In **Republic v. Henry Rotich & 2 others**<sup>73</sup> the High Court was faced with the question of the validity of a plea taken by an advocate on behalf of his clients, two corporate entities. The Court relied on George Otieno Ochich's article on "*The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons*"<sup>74</sup> to suggest that personal appearance by a corporate entity to plead to an offence may not always be necessary:

*Traditionally, the predominant thinking was that a corporation could not be indicted for a crime at all. This was partly*

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<sup>71</sup> [2014] eKLR.

<sup>72</sup> *Id.* at para 34.

<sup>73</sup> [2019] eKLR.

<sup>74</sup> (2008), <<http://kenyalaw.org/kl/index.php?id=1919>> (Accessed July 1, 2020).

*attributable to the fact that it was necessary that the accused person makes a personal appearance in the courts, and a corporation, not being a physical person could not appear. Personal appearance is no longer mandatory in all cases as an accused person, including a corporation, may now appear and plead through a representative.*<sup>75</sup>

The court found that an authorised legal representative could take plea on behalf of the corporate entity. It adopted the United States position as postulated by Hayes Hunt and Michael P. Zabel in their article on “*Corporations in the Unusual Role of Criminal Defendant*”<sup>76</sup> that:

*Unlike with a natural person, however, the plea process for a corporate defendant may be done entirely through its legal counsel, so long as he or she has the proper authority. Rule 43(b)(1) of the Federal Rules of Criminal Procedure explains a corporate defendant need not be present at a plea so long as it is represented by counsel who is present.*<sup>77</sup>

The Court also relied on **paragraph 66 of the Judicial Criminal Procedure Bench Book, 2018** which provides that a corporate entity can be charged with a criminal offence, however, when taking a plea in the case of the corporate entity, the court must satisfy itself that the person taking the plea is duly authorised to take plea on behalf of the corporate entity.<sup>78</sup>

Even so, the court found that it was problematic for advocates to take plea on behalf of a corporate entity that they are representing, and at the same time defend the corporate entity before the court. In the words of the court:

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<sup>75</sup> Republic v. Henry Rotich & 2 others [2019] eKLR, para 29.

<sup>76</sup> (Law.Com/ *The Legal Intelligencer*, August 28, 2013) [https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations\\_in\\_the\\_Unusual\\_Role\\_of\\_Criminal\\_Defendant/](https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations_in_the_Unusual_Role_of_Criminal_Defendant/) (Accessed June 29, 2020).

<sup>77</sup> Republic v. Henry Rotich & 2 others [2019] eKLR, para 30.

<sup>78</sup> Id. at paras 31 and 32.

*In my view, the person who can properly represent a corporation in our courts is an officer of the corporation, properly authorised. Such person would ordinarily be a Director of the corporation. It cannot be just 'anybody', even a 'mason,' as Mr. Monari suggested in his submissions. To hold otherwise may well result in the rather unedifying spectacle of a parade of legal representatives from the Kenyan Bar engaging in the gymnastics of moving from the Counsel table to the dock while simultaneously standing in for and representing their corporate clients as the accused in the dock and also conducting their defence.<sup>79</sup>*

Moreover, the Court found that whether an authorised legal representative could take plea on behalf of the corporate entity also depended on the nature and seriousness of the offence charged.<sup>80</sup> The court thus insisted that in corruption and economic crimes' cases, it is expedient for the accused corporate entities to plead by their director(s) or parties involved in the crimes charged, due to the high public interest in such matters.<sup>81</sup> According to the court, it would beat logic for such parties to hide under the cloak of legal representatives.

Based on the above, the court went ahead to render the plea taken by the defence counsel in this case to be irregular and improper and ordered the said corporate entity to appear and plead to the charges through their director(s).<sup>82</sup>

### **4.3 Evidential threshold**

Akin to establishing corporate civil liability, a corporate entity's criminal liability must be established through the acts or omissions of its agent(s) as the controlling mind and will of the corporate entity.<sup>83</sup> Generally, the prosecution must prove two things to establish corporate criminal liability: (a) that the acts

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<sup>79</sup> Id. at paras 34 and 35.

<sup>80</sup> Id. at para 33.

<sup>81</sup> Id. at para 36.

<sup>82</sup> Id. at para 37.

<sup>83</sup> Hayes Hunt and Michael P. Zabel, 'Corporations in the Unusual Role of Criminal Defendant' (*Law.Com/ The Legal Intelligencer*, August 28 2013) [https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations\\_in\\_the\\_Unusual\\_Role\\_of\\_Criminal\\_Defendant/](https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations_in_the_Unusual_Role_of_Criminal_Defendant/) (Accessed June 29, 2020).

of the corporate entity's agent(s) were within the scope of his or her duties; and (b) that the acts were intended, at least in part, to benefit the corporate entity. Nonetheless, the standard of proof in criminal cases remains to be beyond reasonable doubt. As such, to convict a corporate entity for a criminal offence, it is necessary to prove beyond reasonable doubt that: (a) the corporate entity committed the act prohibited by the offence (*actus reus*); and (b) the corporate entity had a guilty state of mind, that is, the corporate entity had the required mental intent when committing the act that makes it an offence (*mens rea*).

The challenge sets in when trying to ascribe a guilty mind to a company. This issue has been dealt with by the courts in the United Kingdom (UK) crystallizing into **the identification principle**. The identification principle imputes to the corporate entity the acts and the state of mind of those who represent the "directing mind and will" of the corporate entity.<sup>84</sup> Generally, the application of the identification principle is restricted to the actions of the board of directors, the managing director and other superior officers who carry out functions of management and speak and act as the corporate entity. This means that where the criminal act and criminal state of mind in question can be attributed to such individuals, the company can be prosecuted for the offence as a principal offender.

The case of **Tesco Supermarkets Ltd v. Natrass**<sup>85</sup> considered the identification principle further and endorsed the case of **Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd**,<sup>86</sup> specifically the notion of the "directing mind and will" of the corporate entity. The case defined the directing mind and will of a corporate entity as extending to the "board of directors, the managing director and perhaps other superior officers of the company who carry out functions of management and speak and act as the company". To establish who the directing mind and will of any one company is, prosecutors will review the company's constitutional documents.

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<sup>84</sup>Joanna Ludlam, 'Corporate Liability in the United Kingdom' <<https://globalcompliancenews.com/wcc/corporate-liability-in-the-united-kingdom/>> (Accessed June 30, 2020).

<sup>85</sup> [1972] AC 153.

<sup>86</sup> [1915] AC 705.

This common law principle is applicable in Kenya. A strict reading of **Sections 798 and 810 of the Companies Act, 2015** reveals that in case an investigation on the affairs or ownership of a corporate entity results into some evidence that a person has, in relation to the corporate entity or to any other body corporate whose affairs have been investigated committed an offence for which the person is criminally liable, the Court shall submit a copy of the report to the DPP for prosecution. The Companies Act, 2015 tends to lean towards the culpability of the person responsible for the criminal act as compared to the corporate entity. The Act provides for investigation of a corporate entity *inter alia*, due to public interest reasons, for instance, the onslaught on corruption and economic crimes which has seen many corporate entities being investigated.

#### **4.4 Sentencing a Corporate Entity**

Upon conviction of a corporate entity, the question of sentencing sets in and this stretches the bounds of traditional criminal law. This is because of the uniqueness of a corporate entity as a juristic or legal person different in many ways from a natural person. As a result, pragmatism is imperative in sentencing a corporate entity as it is logical that a corporation cannot serve a custodial sentence.

Drawing from the **United States Federal Sentencing Guidelines on the sentencing of organizations**, guidelines on sentencing a corporate entity should achieve the following four principles: (1) a convicted corporate entity should remedy any harm caused by the offence committed; (2) if the corporate entity is operated primarily for a criminal purpose or primarily by criminal means, the fine imposed should be set sufficiently high to divest the organization of all of its assets; (3) for any other corporate entity, the fine imposed should be based on its conduct and culpability; and (4) sentencing a corporate entity to probation is appropriate when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the corporate entity to reduce the likelihood of future criminal conduct.<sup>87</sup>

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<sup>87</sup> United States Sentencing Commission, *Federal Sentencing Guidelines 2015: Introductory Commentary to Chapter 8 – Sentencing of Organizations*

In the **Waluke Case**,<sup>88</sup> the trial magistrate relied on UK cases to allude to the fact that there are limits to criminal offences that can be committed by a corporate entity, in that, even though a corporate entity acts through its directors as its controlling mind, there are certain criminal offences which a corporate entity, unlike a natural person, is incapable of committing.<sup>89</sup> A corporate entity is incapable of committing offences such as perjury and bigamy because by their very nature they cannot be committed by corporate entities. Besides, for offences such as murder, where the only available

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<<https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8>> (Accessed July 13, 2020); there are four general principles on sentencing of organizations:

*"First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.*

*Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.*

*Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.*

*Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."*

See also Law Library - American Law and Legal Information, 'Corporate Criminal Responsibility' <<https://law.jrank.org/pages/747/Corporate-Criminal-Responsibility-Sentencing.html>> (Accessed July 2, 2020).

<sup>88</sup> Judgment of June 22, 2020, p 63.

<sup>89</sup> *Majestic Theatre Co. Ltd v. Regina* [1952] KLR 157; and *R v. Nassa Ginnors Ltd* [1955] EA 33.

criminal punishment in most cases is custodial, it is tricky to charge a corporate entity for the same unless an alternate non-custodial punishment exists.

In the event that the corporate veil is lifted and the directors, the controlling mind and will of the corporate entity, are punished, slapping the corporate entity too with a fine amounts to double punishment. On the flip side, finding the corporate entity culpable suggests that the directors breached some of their statutory duties leading to the commission of the crime by the corporate entity. The implication of this is that the separate legal personality of the corporate entity is therefore at its best fictitious when sentencing a corporate entity, because the effect of such sentencing will be felt by the controlling mind and will of the corporate entity, the directors. This position is justified under **Section 23 of the Penal Code**,<sup>90</sup> which provides for offences by corporations and states that:

*Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.*

The High Court endorsed the application of **Section 23 of the Penal Code** in the case of **Rebecca Mwikali Nabutola & 2 others v. Republic**,<sup>91</sup> as already indicated above, when it stated that: “*The offences as drafted are against both the 2<sup>nd</sup> appellant and the company in the applicable instances. While the charges are also drawn against the company, the implications of Section 23 above are that, upon determination of its liability, the directors shall bear the responsibility.*”

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<sup>90</sup> Chapter 63, Laws of Kenya.

<sup>91</sup> 2016] eKLR.

This leaves the criminal justice system in Kenya in a precarious position, since there are no clear cut rules or jurisprudence on the sentencing of a corporate entity. The law has cast its net wide to catch anyone who would have causative link with the offences committed by a corporate entity. It appears that the Kenyan legislature has not intended that corporate entities should bear the criminal burden alone.<sup>92</sup> Although **Section 23 of the Penal Code** recognizes that a corporate entity may commit an offence in its own right, it does not contemplate that the criminal charge may be brought against the corporate entity alone, or that the criminal penalty may be imposed upon the corporate entity alone.<sup>93</sup>

That being the case, **Section 23 of the Penal Code** is retrogressive to the development of corporate criminal liability jurisprudence in Kenya. As such, it is time the Legislature re-evaluates this provision to determine whether it resonates with the fight against corruption and economic crimes. Without elaborate judicial principles and statutory provisions on corporate criminal liability, the sentencing of corporate entities will remain hinged on a game of chance with low efficiency if any. A ray of hope is glimmering with the recent practice of enacting Statutes with separate penalty provisions for corporate entities and natural persons.

Nonetheless, as concerns corruption and economic crimes, **Section 48 of ACECA** prescribes **an additional mandatory fine** to reflect the severity of the offences prescribed under the Act, in terms of benefits accruing to the convicts or losses incurred by any other person as a result of the offence committed. The Section provides as follows;

*(1) A person convicted of an offence under this Part shall be liable to—*

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<sup>92</sup> George O. Otieno Ochich, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008), <<http://kenyalaw.org/kl/index.php?id=1919>> (Accessed July 1, 2020).

<sup>93</sup> Id.



*(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and*

*(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.*

*(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—*

*(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);*

*(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.*

In **Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others**,<sup>94</sup> Majanja J. considered the issue of discrepancy in penalties under the Penal Code and the ACECA.<sup>95</sup> At issue in the case was the penalty prescribed under **Section 127 of the Penal Code**,<sup>96</sup> and that under **Section 48(1)(b) of ACECA**. **Section 48(1)(a) of ACECA** imposes a similar penalty to that under **Section 127 (2) of the Penal Code**. However, the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners therein alleged that **Section 48(1)(b) of ACECA**, in prescribing an additional mandatory fine, imposes a penalty more severe than that imposed by **Section 127 of the Penal Code**. In his findings, Majanja J. was of the view that the additional mandatory fine under **Section 48(1)(b) of ACECA** was necessitated by the specific objectives of ACECA in curbing corruption and economic crimes. He expressed himself as follows:

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<sup>94</sup> [2013] eKLR.

<sup>95</sup> *Id.* paras 57-63.

<sup>96</sup> **Section 127 of the Penal Code** provides for the offence of fraud or breach of trust by public officers and states that: “(1) Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether the fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a felony. (2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.”

59. (...) acceding to the petitioners' submission would entail this court adopting an interpretation that presupposes Parliament was oblivious of the existence of the **Penal Code** when it enacted the **ACECA** in the year 2003. It certainly was aware and saw it fit that in addition to the sentence under the paragraph (a) of the section, a mandatory punishment be specifically provided for in cases where a public officer had received a benefit as a result of the economic crime.

60. These provisions cannot be read in isolation and at all times, the purpose of the legislation ought to be borne in mind. **ACECA** was introduced to serve a specific purpose of thwarting corruption and economic crimes. It is, "An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith."

61. On the other hand, the **Penal Code** is not a one stop shop of all the criminal offences, several other Acts create similar offences, depending on the specific objects of the legislation in question and the gravity of the offence. It is notable that even under the **Penal Code** itself, we have varied sentences for similar offences. Take for instance, punishment for stealing under **section 275** which differs depending on the unique circumstances of the crime so that we have varied sentences for what is for all intents and purposes the crime of theft, such as stealing by servant.

(...)

63. The legislature is (...) entitled to adopt different levels of penalties to satisfy certain policy objectives. The question of severity of punishment cannot of itself render a statute unconstitutional. The substance of legislation including the sentence to be meted out is within the realm of the legislature and the court's role is limited and will not interfere unless it is shown

that such sentence violates any of the known Constitutional rights and freedoms. (...)<sup>97</sup>

## 5 Twinning Corporate Criminal Liability and Criminal Liability of Public Officers in Anti-Corruption Cases

Recent anti-corruption cases in Kenya have seen a mix of corporate entities and public officers who are together accused of committing offences arising from the same facts. Such cases include: **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited**,<sup>98</sup> **Republic v. Muhammed Abdalla Swazuri & 16 Others**,<sup>99</sup> **Republic v. Muhammed Abdalla Swazuri & 23 others**,<sup>100</sup> **Republic v. Moses Lenolkulal & 13 others**,<sup>101</sup> and **Republic v. Ferdinand Ndung'u Waititu Babayao & 12 others**.<sup>102</sup> In this section, the article

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<sup>97</sup>Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR, paras 59-63 and 80-84.

<sup>98</sup> Anti-Corruption Case No. 31 of 2018.

<sup>99</sup> Anti-Corruption Case No. 33 of 2018. The corporate entities charged alongside the natural persons were Dasehe Investment Limited (15<sup>th</sup> accused), Keibukwo Investment Limited (16<sup>th</sup> accused), and Olomotit Estate Limited (17<sup>th</sup> accused). See **Muhammed Abdalla Swazuri & 16 others v. Republic [2018] eKLR, High Court of Kenya at Nairobi, Anti-Corruption and Economic Crimes Division, Criminal Revision No. 13 of 2018**, ruling by Ong'udi, J. dated 1<sup>st</sup> day of November 2018.

<sup>100</sup> Anti-Corruption and Economic Crimes Case No. 6 of 2019. The corporate entities charged alongside the natural persons were; Sunside Guest House Ltd (11<sup>th</sup> accused) and Tornado Carriers Limited (19<sup>th</sup> accused). See **Muhammed Abdalla Swazuri & 23 others v. Republic [2019] eKLR; High Court at Nairobi, Anti-Corruption Crimes Division, Criminal Revision No. 13 of 2019**, ruling by Mumbi Ngugi, J. dated 2<sup>nd</sup> May 2019.

<sup>101</sup> Anti-Corruption Case No. 3 of 2019. See **Moses Kasaine Lenolkulal v. Director of Public Prosecutions [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019**, ruling by Mumbi Ngugi, J. dated 24<sup>th</sup> July 2019. See also **Moses Kasaine Lenolkulal v. Republic [2019] eKLR, Court of Appeal at Nairobi, Criminal Appeal No. 109 of 2019**, ruling by Musinga, Gatembu, and Murgor, JJA. dated 20<sup>th</sup> December 2019.

<sup>102</sup> Anti-Corruption Case No. 22 of 2019. See **Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019**, ruling by Ngenye, J. dated 8<sup>th</sup> August, 2019). Bienvenue Delta Hotel alongside its director Susan Wangari Ndung'u, Testimony Enterprises Ltd., and Saika Two Estate Developers Limited are corporate entities which are also charged in the case.

considers the charging, trial, conviction and sentencing of public officers for corruption and economic crimes; especially because in the **Waluke Case**, Waluke is a public officer, that is, the Member of the National Assembly for Sirisia Constituency, in Bungoma County.

### **5.1 The Quagmire of Bail and Bond Terms for Public Officers in Cases Involving Corruption and Economic Crimes**

In accordance with **Article 49(1)(h) of the Constitution**, every arrested or accused person has the right to be released on bail or bond, on reasonable conditions, pending a criminal charge or trial, unless there are compelling reasons to be denied bail or bond. As such, bail or bond is a constitutional right of an arrested or an accused person.<sup>103</sup> In addition, under **Article 49(2) of the Constitution**, an accused is not to be remanded in custody for an offence, if the offence is punishable by a fine only or by imprisonment for not more than six months.

Pursuant to **Section 123A(1) of the Criminal Procedure Code (CPC)**,<sup>104</sup> the court is to consider all the relevant circumstances in exercising the discretion to grant or deny bail or bond, including: (a) the nature or seriousness of the offence; (b) the character, antecedents, associations and community ties of the accused person; (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and (d) the strength of the evidence of his having committed the offence.<sup>105</sup> Moreover, a court may deny bail if satisfied that the person: (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody; and (b) should

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See also **Ferdinand Ndung'u Waititu Babayao v. Republic, Court of Appeal at Nairobi, Civil Appeal No. 416 of 2019**, ruling by Musinga, Gatembu, and Murgor, JJA. dated 20<sup>th</sup> December 2019. The matter has been appealed to the Supreme Court, in Supreme Court Petition No. 2 of 2020.

<sup>103</sup> See, e.g., **Andrew Young Otieno v. Republic [2017] eKLR** (Kimaru J. held that the bail or bond terms set by the trial court should not be such that they amount to a denial of the constitutional right of the accused to be released on bail pending trial.)

<sup>104</sup> Chapter 75, Laws of Kenya.

<sup>105</sup> See generally, Judiciary of Kenya, *Bail and Bond Policy Guidelines* (National Council on the Administration of Justice, March 2015).

be kept in custody for his own protection.<sup>106</sup> The prosecution is to satisfy the court on a balance of probabilities as to the existence of compelling reasons to justify the denial of bail.<sup>107</sup>

Even so, the jurisprudence on bail and bond terms for public officers charged with corruption or economic crimes is at best marshy. This article takes a look into the jurisprudence on bail and bond terms in such cases, based on the rulings that have been handed down by the Courts when faced with accused persons charged with corruption and economic crimes. This is imperative, especially for accused persons who are public officers, because of the link between integrity and leadership that arises in such cases.

The cases cited above also dealt with the issue of removal from office of public officers facing charges of corruption and economic crimes. At the core of the issue in these cases was **Section 62(6) of ACECA**, which provides that for constitutional office holders whose process of removal is specified under the Constitution, the constitutional procedure has to be adhered to. **Section 62 of ACECA** provides for the effect of a charge on corruption or economic crime on the holders of public office, that is, suspension from public office, as follows:

## ***62. Suspension, if charged with corruption or economic crime***

*(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:*

*Provided that the case shall be determined within twenty-four months.*

*(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.*

*(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.*

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<sup>106</sup> Section 123A(2) of the CPC.

<sup>107</sup> Judiciary of Kenya, *Bail and Bond Policy Guidelines* (National Council on the Administration of Justice, March 2015), p 25.

*(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.*

*(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the [DPP]—*

*(a) this section does not apply to the charge unless permission is given by the court or the [DPP] to prosecute or the proceedings are taken over by the Attorney-General; and*

*(b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.*

*(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.*

*(7) This section does not apply with respect to a charge laid before this Act came into operation.*

We will now look at how the Courts in the cases mentioned above have interpreted and applied **Section 62(6) of ACECA**, as concerns bail and bond terms for public officers who are constitutional office holders and facing charges of corruption and economic crimes.

### **5.1.1 Republic v. Muhammed Abdalla Swazuri & 16 Others<sup>108</sup>**

Prof. Muhammad Abdalla Swazuri was the Chairperson of the National Land Commission (NLC) between February 2013 and 2019. NLC is a constitutional commission established under **Article 67(1) of the Constitution**, and specified as such under **Article 248(2)(b) of the Constitution**. The appointment and removal from office of the Chairperson of NLC, like any other constitutional commission, is provided for under **Articles 250 and 251 of the Constitution**, respectively. Moreover, while **Section 10 of the**

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<sup>108</sup> Anti-Corruption Case No. 33 of 2018.

**National Land Commission Act, 2012 (NLCA)**<sup>109</sup> makes provision for when the office of Chairperson of NLC is deemed to be vacant, **Section 11 of the Act** buttresses **Article 251 of the Constitution** regarding the removal of the Chairperson of NLC from office.

On August 13, 2013, Prof. Muhammad Abdalla Swazuri was arraigned before the Chief Magistrate's Court at Nairobi, to answer to charges of corruption and economic crimes under ACECA. Upon application for bail or bond, he and other accused were granted bail or bond but with conditions, as follows:

*For 1<sup>st</sup> and 2<sup>nd</sup> accused who face more charges, each faces at least seven counts, as well as accused A13, 14, 15 who faces at least six count each; they shall be released with executing a bond (six million) for a surety of like amount or in the alternative each shall deposit cash bail of Kshs. Three million five hundred thousand only (3.5) million.*

(i)

*s for accused A3, 4, 5 and 16. Nos. 12, 6, 7, 8, 9, 10 and 11 who face count 1 and XIX only and separate alternative counts, each shall be released on a bond of Kshs 3,000,000 (three million) plus a surety of like amount or an alternative of Kshs One million five hundred thousand (1.5) million each.*

(ii)

*hey shall further be required to deposit their passports with the court.*

(iii)

*or public officers who have been in office, they are hereby ordered to keep off their offices unless accompanied by police officers and upon prior arrangement with the new management of those institutions.*

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<sup>109</sup> Act No. 5 of 2012, Laws of Kenya.

(iv)

*he accused person shall not make contact either by themselves or through proxies with witnesses whom they shall be aware of.*

*Orders accordingly.*

On August 22, 2013, Prof. Muhammad Abdalla Swazuri requested the trial court to review the bail condition barring him from accessing his office “*unless accompanied by police officers and upon prior arrangement with the new management of those institutions.*” On August 28, 2018, the trial magistrate, Honourable L. N. Mugambi, reviewed the bail terms as follows:

*The condition requiring that accused be accompanied by police officer appears to have been misconceived. However, it is a condition which in my view is still relevant for reasons explained in the foregoing. The court considers that since the essence is to safeguard evidence by reducing the frequency of contact with witnesses or any possible suppression of evidence to ensure credibility of the judicial process, an order modifying the same to make it less onerous is necessary. The order to have police escort every time they make visit to their offices is vacated and replaced with the following:*

1

*or public officers who do not hold Constitution Offices; they are hereby barred from accessing their offices unless there is prior written authorization by the respective Heads of departments who shall be notified to the Investigative agency in advance of any such visit so that if a need arises for any arrangements to minimize contact with the witnesses who will testify against the accused or secure any other evidence appropriate measures can be taken in that regard.*

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*or the Constitution office holders, the 1st accused, who has been at the helm of the NLC and indeed any other Constitutional office holder for that matter, a prior written*



*authorization by the person exercising the duties of the Secretary/CEO of the Commission, who is also not an accused in this case, authorizing access after due consultations with the investigative agency in this case so that any appropriate arrangements can be made to ensure contact with witnesses who are expected to testify against the accused is minimized and/or any other form of evidence secured.*

Prof. Muhammad Abdalla Swazuri claimed that the orders of August 13 and 28, 2018 barring him from accessing his office were tantamount to his suspension or removal from constitutional office, in violation of **Articles 248(2)(b), 250(6), and 251 of the Constitution, Section 10 of NLCA, and Section 62(6) of ACECA**. As a result, he filed an application for the revision and setting aside of the said orders of the trial court at the High Court, **Muhammed Abdalla Swazuri & 16 others v. Republic**,<sup>110</sup> under **Section 123(3) and 362 of the Criminal Procedure Code (CPC)**,<sup>111</sup> **Section 10 of NLCA, Section 62(6) of ACECA, and Articles 49(1)(h); 67, 165(6) and (7)**,<sup>112</sup> **248(2) (b), 249(2) 250(b), 251 and 252 of the Constitution**. It is noteworthy that this is the first case where the High Court was called upon to

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<sup>110</sup> [2018] eKLR, Criminal Revision No. 13 of 2018, ruling by Ong’udi, J. dated **1<sup>st</sup> November 2018**.

<sup>111</sup> Chapter 75 of the Laws of Kenya. **Section 123(3) of the CPC** provides that: “*The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.*”; and Section 362 of the CPC provides that: “*The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.*”

<sup>112</sup> **Article 165(6) and (7) of the Constitution of Kenya, 2010** gives the High Court supervisory jurisdiction over subordinate courts, and provides that: “(6) *The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*(7) *For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*”

consider the application of **Section 62(6) of ACECA** in relation to a constitutional office holder facing charges of corruption and economic crimes.

Prof. Muhammad Abdalla Swazuri sought to be allowed unrestricted access to his office because as a constitutional office holder, he could only be suspended or removed from office through the procedure laid down pursuant to the Constitution. He could only be removed from office through a petition for his removal as member and Chairperson of NLC, as provided under **Article 251 of the Constitution**. Moreover, he claimed that the said bail and bond terms subjected him to the authority of the Secretary or CEO of EACC who, together with his administrative officers, prevented him from fulfilling his constitutional mandate as Chairperson of NLC—contrary to **Article 249(2) of the Constitution**. Besides, he claimed that he was being restricted from accessing his office although the investigations in the case had already been concluded.

The High Court (Ong’udi J.) delivered its ruling on the application for revision on November 1, 2018. It is notable that both the prosecution and the Court admitted that unlike other public officers, Prof. Muhammad Abdalla Swazuri, being a constitutional office holder, was not subject to **Section 62(1) of ACECA** by virtue of **Section 62(6) of ACECA**.<sup>113</sup> However, the prosecution argued that he was being barred from accessing his office because the same was now a crime scene and most of the witnesses in the case were his subordinates. On this, Ong’udi J. stated that he understood the need to secure the credibility of the judicial process as the charges arose from Prof. Muhammad Abdalla Swazuri’s operations at NLC and the witnesses in the case were also his subordinates. However, Ong’udi J. held that securing the credibility of the judicial process had to be done within the confines of the law and the Constitution.<sup>114</sup> In this case, the problem was that the investigating agency was the EACC and the Secretary or CEO of EACC was to give authorization for Prof. Muhammad Abdalla Swazuri to access his office after consultation with the EACC; that is, EACC was to grant authorization after

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<sup>113</sup> Muhammed Abdalla Swazuri & 16 others v. Republic [2018] eKLR, paras 12 and 35.

<sup>114</sup> *Id.* at para 37.

consultation with itself.<sup>115</sup> In any case, a refusal to grant such authorization by EACC meant that he could not access his constitutional office, an independent constitutional commission.

Ong’udi J. was of the view that **Section 10 of NLCA** on vacancy in the office of chairperson or member of NLC did not apply in this case as Prof. Muhammad Abdalla Swazuri still remained in office because the subject anti-corruption case was yet to be determined by the trial court. He therefore found the trial magistrates order barring Prof. Muhammad Abdalla Swazuri from accessing his office without authorization from EACC to be impracticable because: (1) there was a conflict of interest in that the Secretary or CEO of EACC and the investigating agency (EACC) could be seen to be controlling the affairs at NLC yet both EACC and NLC are independent constitutional commissions;<sup>116</sup> (2) If Prof. Muhammad Abdalla Swazuri wanted to be in his office every day, it would be impracticable for him to obtain authorization from EACC on a daily basis;<sup>117</sup> (3) investigations into the case were complete and what was required was merely to safeguard against witness interference.<sup>118</sup> After considering the legality and practicalities of operationalising the orders of the trial magistrate, Ong’udi J. thus ruled:

*42. From my analysis above and especially on the issue of the operationalization of the Order in respect of the Applicant, I am satisfied that the trial court did not assess the practical impact of the orders it gave in respect to the Applicant. I therefore find that section 362 CPC is applicable in the circumstances of this case. This is for the purposes of making it practical for the Applicant to carry out his official duty and not earn a full salary for doing nothing.*

*43. I therefore set aside the order complained of and substitute it with an order directing the Applicant to make an undertaking not to interact and/or interfere with the witnesses at his work place*

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<sup>115</sup> Id. at paras 38-39.

<sup>116</sup> Id. at para 40.

<sup>117</sup> Id. at para 41.

<sup>118</sup> Id.

or any other witness. He will also undertake not to interfere with the records and/or documents relevant to the case at hand. Failure to comply will lead to automatic cancellation of his bond. Orders accordingly.<sup>119</sup>

In essence, Ong’udi J. held that restricting constitutional office holders from accessing their offices during the pendency of a criminal trial is illegal, unconstitutional and impractical, as the said public officers still remain in office unless removed as provided under the Constitution. Instead, an undertaking that the said public officers will not interfere with witnesses and the records or documents relevant for the criminal trial is sufficient in safeguarding the integrity of the judicial process, without infringing on the law and the Constitution.

### **5.1.2 Republic v. Muhammad Abdalla Swazuri & 23 others**<sup>120</sup>

The accused in the case were charged with offences comprising corruption and economic crimes under ACECA, such as abuse of office, unlawful acquisition of public property, dealing with suspect property, and conspiracy to commit an act of fraud leading to an irregular payment of KES 109,769,363.00. The accused pleaded not guilty to the charges and applied for bail and bond.

On April 23, 2019, the trial magistrate, Honourable L. N. Mugambi, granted the accused bail and bond accordingly. However, conditions of bail were also imposed on the accused, in that, they were to deposit their passports in court, they were not to contact any witnesses, and *every accused person who was a public officer was barred from accessing his or her office without prior written authorization of the head of the respective organization, and the authorization was to be made after consultation with the investigative agency in the case.*

Dissatisfied with the ruling of the trial court, Prof. Muhammad Abdalla Swazuri and the other accused applied for revision of the orders of the trial magistrate at the High Court; in **Muhammed Abdalla Swazuri & 23 others**

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<sup>119</sup> Id. at paras 42 and 43.

<sup>120</sup> Anti-Corruption and Economic Crimes Case No. 6 of 2019.

**v. Republic.**<sup>121</sup> They claimed that the trial court imposed unjust, unreasonable and exorbitant bail and bond terms that were in contravention of **Article 49 of the Constitution** and urged the court to revise the orders and issue reasonable bail or bond terms.

They argued that the setting of bail and bond terms is a constitutional and legal process guided by precedence and is not an emotional decision on the part of the trial court. In this case, they claimed that in arriving at the bail and bond terms, the trial magistrate had expressed the view that corruption and economic crimes were more grievous compared to murder. In sum, they faulted the ruling of the trial magistrate on four grounds, that: (1) the trial magistrate ignored local precedence and judicial trends on bail and bond terms; (2) the trial magistrate categorised the accused into groups and set bail and bond terms on the basis of those categories; (3) the trial magistrate considered the quantum alleged to have been misappropriated by the accused as a basis for setting the bail and bond terms; and (4) the trial magistrate relied on a decision from India in which the court considered the public interest in setting bail and bond terms against an accused person.<sup>122</sup>

However, Mumbi Ngugi, J. was of the view that the trial magistrate properly applied the principles on bail and bond and took into account the constitutional and statutory provisions and judicial precedents on bail and bond. On May 2, 2019, Mumbi Ngugi, J. ruled as follows:

*42. We are in familiar, yet uncharted territory, when it comes to corruption and anti-corruption prosecutions. We are familiar with corruption because, as this court observed in the cases of **Lenolkulal** and **Lumenyete**, it wreaks havoc on our society and economy and on the needs and rights of citizens. We are, however, in uncharted territory because the recent past has probably seen the first serious and concerted effort to deal with it and ensure that those who perpetrate it are brought to justice. This is where the public interest consideration and the need not*

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<sup>121</sup> [2019] eKLR, High Court at Nairobi, Anti-Corruption Crimes Division, Criminal Revision No. 13 of 2019.

<sup>122</sup> *Ibid.* at paragraph 24.

*to diminish public confidence in the administration of justice that the Chief Magistrate in this case spoke of come in. Yet, these considerations must be balanced with the constitutional right of an accused person to bail, which is linked to his or her constitutional right to be presumed innocent.*

43. *In the circumstances, in order to balance these important yet competing considerations but in the absence of any averments with respect to the personal circumstances of the applicants, I will exercise discretion and revise the terms of bail and bond set by the trial court as follows:*

- 1. The 1st, 2nd, 3rd, 4th 7th, and 8th accused persons namely Mohammad Abdalla Swazuri, Emma Muthoni Njogu, Tom Aziz Chavangi, Salome Ludenyi Munubi, Francis Karimi Mugo and Catherine Wanjiru Chege shall each be released on a bond of Kshs 15 million with one surety of a similar amount or cash bail of Kshs 7 million;***
- 2. The 12th accused, Samuel Rugongo Muturi shall be released on a bond of Kshs 7.5 million with one surety of a similar amount or cash bail of Kshs 3 million;***
- 3. The 16th accused, Sostenah Ogero Taracha, shall be released on a bond of Kshs. 5 million with one surety of a similar amount or cash bail of Kshs 1.5 million;***
- 4. The 6th, 13th, and 14th accused persons, Lilian Savai Keverenge, Evahmary Wachera Gathundu and Michael George Onyango Oloo shall each be released on a bond of Kshs 2.5 million with one surety of a similar amount or cash bail of Kshs 750,000.***

44. *The bond approvals in this matter shall be done before the Chief Magistrate's Anti-Corruption Court seized of ACEC No. 6 of 2019, and any applications in respect of the orders made in this ruling shall be made before the same court.*

45. The other terms set by the Chief Magistrate's Court in the ruling dated 23rd April 2019 shall remain in force.

46. Orders accordingly.

So, Mumbi Ngugi J. did not rule on the conditions of bail, especially as concerns the condition that every accused person who was a public officer was barred from accessing his or her office without prior written authorization of the head of the respective organization nor the fact that the authorization was to be made after consultation with the investigative agency in the case.

### **5.1.3 Republic v. Moses Lenolkulal & 13 others<sup>123</sup>**

The Governor of Samburu County was charged, alongside 13 other accused, with various offences under ACECA: the offence of conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48(1) of ACECA; the offence of abuse of office contrary to Section 46 as read with Section 48(1) of ACECA; the offence of conflict of interest contrary to Section 42(3) as read with Section 48(1) of ACECA; and the offence of unlawful acquisition of public property contrary to Section 45(1)(a) as read with Section 48(1) of ACECA. He was alleged to have committed these offences between March 27, 2013 and March 25, 2019, while Governor of Samburu County.

Moses Lenolkulal was arraigned before the Chief Magistrate's Court at Nairobi on April 2, 2019. He pleaded not guilty to the charges and applied for bail or bond pending trial. As is the emerging trend, the prosecution did not oppose his application for bail or bond, instead the prosecution requested the trial court to impose stringent bail and bond terms. The prosecution alleged that Moses Lenolkulal committed the offences charged in his capacity as the Governor of Samburu County and as such only stringent bail and bond terms would suffice in this case. According to the prosecution: *"In the event that the court did not impose terms that would render it impossible for the applicant to continue rendering services as Governor, justice would be compromised. The DPP requested the court to consider the provisions of section 65(1) of*

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<sup>123</sup> Anti-Corruption Case No. 3 of 2019.

*ACECA and order that the applicant keeps away from the County offices where the majority of witnesses are working.*"<sup>124</sup>

The prosecution also urged the court to consider the provisions of **Chapter 6 of the Constitution**, especially **Article 75 of the Constitution** concerning the conduct of State officers, including conflict of personal interests and public or official duties. The prosecution alleged that Moses Lenolkulal was trading with his own government and prayed for orders that the Director of the Integrated Financial Management Information System (IFMIS) at the National Treasury<sup>125</sup> bars the 13 accused persons from accessing Government of Samburu accounts on the IFMIS platform.<sup>126</sup> The prosecution requested the trial court for leave to file a formal application to lay out its arguments.

In a ruling dated April 2, 2019, the trial magistrate, Honourable Ogoti, granted bail and bond and ordered the release of Moses Lenolkulal and the other accused. **Moses Lenolkulal, was granted bond of KES 150 million with one surety of a similar amount or cash bail of KES 100 million.** Honourable Ogoti also issued interim orders as follows:

*i. That since the Samburu County offices is where the crime took place, it is a scene of crime. The Governor is hereby prohibited to access those offices till the application to be directed to be filed is heard and determined.*

*ii. Since it is public money that is involved, the Director of IFMIS is directed not to allow the 13 accused persons i.e*

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<sup>124</sup> Moses Kasaine Lenolkulal v. Republic [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption and Economic Crimes Revision No. 7 of 2019 (the ruling delivered by Mumbi Ngugi J. on 3<sup>rd</sup> April 2019), at para 4.

<sup>125</sup> Integrated Financial Management Information System (IFMIS) is an automated public finance management platform under the National Treasury; for e-procurement of goods, works, and services by public entities.

<sup>126</sup> Moses Kasaine Lenolkulal v. Republic [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption and Economic Crimes Revision No. 7 of 2019 (the ruling delivered by Mumbi Ngugi J. on 3<sup>rd</sup> April 2019), at para 5.



from 1-13 access to the Government of Samburu accounts  
till the application to be filed is heard and determined.

*iii. The DPP to file a formal application and have it served  
on the accused persons.*

Moses Lenolkulal was dissatisfied with the decision of the trial court. On the same day, 2<sup>nd</sup> April 2019, he applied for revision of the decision of the trial magistrate by the High Court; **Moses Kasaine Lenolkulal v. Republic**.<sup>127</sup> He claimed that the bail and bond terms were completely outrageous, unprecedented and excessive, contrary to the Bail and Bond Policy Guidelines, 2015 which require that bail and bond terms should not be greater than is necessary to secure the attendance of the accused in court. Basically, bail and bond terms are not a criminal punishment in themselves but rather are a means to secure the attendance of the accused in court, during trial. Moses Lenolkulal also claimed that as Governor he was not a flight risk and would attend court.

Mumbi Ngugi J. noted that the application for revision dated 2<sup>nd</sup> April 2019 was targeted at the bail and bond terms, and not the interim orders regarding Moses Lenolkulal's access to Samburu County Government offices and accounts. In reviewing the bail and bond terms, Honourable Mumbi Ngugi, J. considered that the penalty for the offences charged is a fine not exceeding KES 1 million or a term of imprisonment for ten years or both per **Section 48(1)(a) of ACECA**, unless the additional mandatory fine under **Section 48(1)(b) and (2) of ACECA** applied in the case. Accordingly, the Honourable judge held that:

*14. (...) given the nature and circumstances of this case and the penalty provided in law, it is my view that the bond terms imposed on the applicant are excessive, and may well amount to a denial of bail. It has not been demonstrated that he is a flight risk, and I note that the Prosecution did not oppose his application for bail. The applicant has also been barred from accessing County*

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<sup>127</sup> [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption and Economic Crimes Revision No. 7 of 2019.

*offices, so the apprehension that he may interfere with witnesses is not a consideration.*

15. *I accordingly vary the said terms as follows:*

*i. The applicant may be released on a bond of Kenya shillings thirty million (Kshs 30,000,000) and one surety of a similar amount.*

*ii. In the alternative, the applicant may be released on a cash bail of Kenya Shillings Ten Million (Kshs 10,000,000).<sup>128</sup>*

**Mumbi Ngugi J. thus reduced Moses Lenolkulal's bond from KES 150 million to KES 30 million, and the cash bail from KES 100 million to KES 10 million.** Regarding the interim orders barring the accused from accessing Samburu County Government offices and accounts, Mumbi Ngugi J. ordered that the said interim orders of the trial court would stay in force pending the hearing and determination of the application by the prosecution, as directed by the trial court.<sup>129</sup>

Via an application dated 16<sup>th</sup> April 2019, the prosecution sought orders to bar Moses Lenolkulal and other accused from accessing any of the Samburu County Government offices pending the hearing and determination of the criminal trial against them. On 15<sup>th</sup> May 2019, the trial court (Honourable Murigi) thus ordered that; ***“The 1st Respondent who is the Governor of Samburu County is barred from accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who shall put measures if any in place so as to ensure that there is no contact between the 1st Respondent with the prosecution witnesses and preserve the evidence until further orders of this Court.”***

Moses Lenolkulal was aggrieved by the said orders of the trial magistrate. As a consequence, on 3<sup>rd</sup> June 2019, he filed an application for the revision of the

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<sup>128</sup> Id. at paras 14 and 15.

<sup>129</sup> Id. at para 16.

trial magistrate's orders of 15<sup>th</sup> May 2019 by the High Court, under **Article 165(6) and (7) of the Constitution** as read with **Section 362 of the CPC**; **Moses Kasaine Lenolkulal v. Director of Public Prosecutions**.<sup>130</sup> One, Moses Lenolkulal faulted the order barring him from accessing the Samburu County Government offices without the prior written authorization of the CEO of EACC, on the ground that it was illegal and unconstitutional and contrary to **Section 62(6) of ACECA**. He claimed that as the sitting Governor of Samburu County, elected as such under **Article 180 of the Constitution of Kenya, 2010**, he was a constitutional officeholder and could only be removed from office under **Article 181(1) of the Constitution of Kenya, 2010**,<sup>131</sup> and **Section 33 of the County Government Act, 2012 (CGA)**.<sup>132</sup>

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<sup>130</sup> [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019.

<sup>131</sup> **Article 181 of the Constitution of Kenya, 2010** makes provision for the removal of a County Governor. It states that: “(1) A county governor may be removed from office on any of the following grounds—(a) gross violation of this Constitution or any other law; (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law; (c) abuse of office or gross misconduct; or (d) physical or mental incapacity to perform the functions of office of county governor. (2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).”

<sup>132</sup> No. 17 of 2012. **Section 33 of CGA** provides the procedure of removal of a County Governor, as follows:

“(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.

(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—

(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and

(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to

hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) A special committee appointed under subsection (3)(b) shall—

(a) investigate the matter; and

Two, Moses Lenolkulal faulted the legality and practicalities of the operationalizing or implementing the orders of the trial court. He claimed that it would be impractical to obtain authorization from the Secretary or CEO of EACC on a daily basis if he wanted to be in office every day, and that the grant or denial of such authorization would be tantamount to the Secretary or CEO of EACC controlling the affairs of the office of the duly elected Governor of Samburu County. He relied on **Muhammed Abdalla Swazuri & 16 Others v. Republic**,<sup>133</sup> above, where a similar order issued by the trial court directing that Prof. Muhammed Abdalla Swazuri obtains prior written authorization of the Secretary or CEO of the EACC to access his office, NLC, was set aside by the High Court (Ong’udi J) following an application for revision.

Three, he claimed that any concern that he would interfere with witnesses on the basis of his authority was merely speculative, and in any case

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*(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*

*(5) The governor shall have the right to appear and be represented before the special committee during its investigations.*

*(6) If the special committee reports that the particulars of any allegation against the governor—*

*(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*

*(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*

*(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*

*(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.*

*(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.*

*(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.”*

<sup>133</sup> [2018] eKLR, Criminal Revision No. 13 of 2018.

investigations in the case were complete. Therefore, he urged the High Court to set aside the orders of the trial court barring him from accessing the Samburu County Government offices without prior authorization of the Secretary or CEO of EACC. The prosecution did not attend the revision hearing on 26<sup>th</sup> June 2019 despite being served with the application for revision.

In a ruling delivered on 24<sup>th</sup> July 2019, Mumbi Ngugi J. noted the **similarities between Moses Lenolkulal's case and that of Prof. Muhammed Abdalla Swazuri**, the then NLC Chairman, in **Muhammed Abdalla Swazuri & 16 Others v. Republic**.<sup>134</sup> The Honourable Judge thus stated:

*27. [Moses Lenolkulal] is the Governor of Samburu County Government and would thus appear to be exempt from the provisions of section 62(1) of ACECA and protected by section 62(6) thereof as the grounds for his removal are set out in the Constitution.*

*28. Further, by requiring that he seeks authorisation from the EACC and its CEO, he is, to some extent, subordinated to the EACC. There may also be, as the court in **Swazuri** found, some practical difficulties in the manner in which the authorisation is to be given. (...)*<sup>135</sup>

However, Mumbi Ngugi J. chose to depart from the Swazuri case on what she termed as **public interest in 'political hygiene', as opposed to the individual interests of the accused constitutional office holder**. The Honourable Judge stated that:

*28. (...) It is thus notable that the concern in the **Swazuri** case was with respect to the interests of the applicant, the accused*

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<sup>134</sup> Id.

<sup>135</sup> Moses Kasaine Lenolkulal v. Director of Public Prosecutions [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019, paras 27 and 28.

*person, who also happened to be the Chairperson of an independent constitutional commission.*

*29. However, there is another perspective from which I believe the question of the applicant's access to his office must be considered, a perspective that looks beyond the interests of the individual holder of the constitutional office and considers the wider public interest. This perspective speaks to the question of what Mr. Nyamodi termed 'political hygiene,' and is a perspective that raises serious concerns that require judicial consideration with respect to section 62(6) of ACECA.<sup>136</sup>*

The Honourable judge was of the view that **Section 62(6) of ACECA** accorded differential treatment of public officers; public officers who are constitutional office holders versus public officers who are not holders of constitutional office. She questioned the rationale behind **Section 62(6) of ACECA** and weighed the said Section against the constitutional provisions on leadership and integrity (**Chapter Six of the Constitution**) and the national values and principles of governance (**Article 10 of the Constitution**), which applied to all public officers, State officers and State organs.<sup>137</sup> The Honourable Judge merged the considerations of 'public interest' and the constitutional provisions on leadership and integrity and the national values and principles of governance as against the rationale behind **Section 62(6) of ACECA**, as follows:

*47. The question then arises: after promulgating the Constitution with the national values and principles at Article 10 and the clear provisions on leadership and integrity in Chapter Six, could the people of Kenya have intended to then pass legislation that allowed state officers for whom grounds for removal from office are provided in the Constitution, to ride roughshod over the integrity required of leaders, face prosecution in court over their alleged corrupt dealings, and still continue to enjoy the trappings*

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<sup>136</sup> Id. at paras 28 and 29.

<sup>137</sup> Id. at para 44.

*of office as they face corruption charges alleged to have been committed while in office and committed within the said offices"*  
48. *Could the people of Kenya have wished to have their legislative authority, which they have delegated, under Article 1, to the legislature, to be exercised in such a way as to pass legislative provisions such as section 62(6) of ACECA that allow state officers whose removal is provided for in the Constitution to remain in the same offices that they are alleged to have abused and used to their personal enrichment to the detriment of the public they are supposed to serve while undergoing prosecution for such offences"*

49. *An examination of the rationale behind suspending public or state officers who have been charged with corruption may shed some light on the sort of answer that the people of Kenya would expect to the above questions if their governance is to accord with the constitutional principles with respect to leadership and integrity.*<sup>138</sup>

The Honourable Judge could not find local authorities to support her point of view. As result, she relied on a case from India's High Court of Judicature at Madras, that supported her view point; the case of **R. Ravichandran v. The Additional Commissioner of Police, Traffic, Chennai & Another**, the orders of Honourable Mr. Justice S. Manikumar of 5 October 2010.<sup>139</sup> This case birthed the term 'moral turpitude' and 'moral ill-health' into the Kenyan legal system, especially as concerns charges of corruption and economic crimes against public officers who are constitutional office holders.<sup>140</sup> Unfortunately, the term 'moral turpitude' or 'moral ill-health' has operated as a presumption of guilt until innocence is proven for public officers charged with corruption and economic crimes, contrary to the constitutional right of accused persons under **Article 50(2)(a) of the Constitution** to presumed innocent until the contrary is proved.

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<sup>138</sup> Id. at paras 47-48.

<sup>139</sup> Id. at paras 50 and 51.

<sup>140</sup> Id. at paras 27 and 28.

The Honourable Judge applied the Indian case to Moses Lenolkulal's case, as follows:

*52. In the matter before me, the Governor of a County, to whom Article 10 and Chapter Six apply is charged with the offence of abuse of office. He is charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve. Would it serve the public interest for him to go back to office and preside over the finances of the County that he has been charged with embezzling from" What message does it send to the citizen if their leaders are charged with serious corruption offences, and are in office the following day, overseeing the affairs of the institution" How effective will prosecution of such state officers be, when their subordinates, who are likely to be witnesses, are under the direct control of the indicted officer"*

*53. It seems to me that the provisions of section 62(6), apart from obfuscating, indeed helping to obliterate the 'political hygiene' that Mr. Nyamodi spoke of, are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.*

*54. The question then is what should be done in a case such as this in order to protect the public interest and ensure that the applicant does not use his position to undermine his prosecution. (...)<sup>141</sup>*

Mumbi Ngugi J. was of the view that **Section 62(6) of ACECA** violates the letter and spirit of the Constitution, as far as the public interest derived from the constitutional provisions on leadership and integrity and national values and principles of governance is concerned. Nonetheless, since **Section 62(6) of ACECA** is still the prevailing law, the only way for the Honourable Judge to go around the said Section was to allow access to office for the subject

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<sup>141</sup> Id. at paras 52-54.



constitutional office holders but at the same time impose restrictions that protect ‘public interest’; a kind of clawback of the protection afforded by **Section 62(6) of ACECA** to public officers who are constitutional office holders. Thus, her view was that issuing an order requiring Moses Lenolkulal not to access his office without prior authorisation of the Secretary or CEO of EACC did not amount to a ‘removal’ from office in contravention of the provisions for removal of a Governor under **Article 181 of the Constitution**. The Honourable Judge thus upheld the ruling of the trial court and in so doing expressed herself as follows:

*57. First, I consider what the implications of directing that the applicant does not access his office are. Under the provisions of the County Government Act, where the Governor is unable to act, his functions are performed by the Deputy Governor. This is provided for in section 32(2) of the County Governments Act, which states that:*

***(2) The deputy governor shall deputize for the governor in the execution of the governor’s functions.***

*58. The Governor in this case is not being ‘removed’ from office. He has been charged with an offence under ACECA, and in my view, a proper reading of section 62 of ACECA requires that he does not continue to perform the functions of the office of governor while the criminal charges against him are pending. However, if section 62(6), which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the applicant’s access to his office, then conditions must be imposed that protect the public interest. This is what, in my view, the trial court did in making the order requiring that the applicant obtains the authorisation of the CEO of EACC before accessing his office. In the circumstances, I am not satisfied that there has been an error of law that requires that this court revises the said order, and I accordingly decline to do so.*

*59. Should there be difficulty, as the court in the **Swazuri** case was concerned about, in obtaining the authorisation from the*

*EACC, I believe that there will be no vacuum in the County. I take judicial notice of the fact that there have been circumstances in the past in which county governors have, for reasons of ill health, been out of office, and given the fact that the Constitution provides for the seat of a deputy governor, the counties have continued to function. In this case, the applicant is charged with a criminal offence; he has been accused of being in ‘moral ill-health’, if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is complete, his access to the County government offices should be limited as directed by the trial court.*

*60. I accordingly decline to exercise powers of revision over the decision of the trial court in this matter. The terms set for the applicant’s access to his office shall remain in force for the duration of his trial. I need not add that it is in the public interest and the interest of the applicant that the case against the applicant in ACC No. 3 of 2019 is proceeded with expeditiously.*

*61. Orders accordingly.*

It is notable that Justice Mumbi Ngugi’s take on the constitutionality of **Section 62(6) of ACECA** in Moses Lenolkulal’s case was a complete departure from her earlier holding in **Alex Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 others**,<sup>142</sup> where she had been called upon to consider the constitutionality of **Section 62 of ACECA**.<sup>143</sup> In that case, the Petitioners argued that **Section 62 of ACECA** was unconstitutional because: (1) it violated their right under **Article 50(2)(a) of the Constitution** to be presumed innocent until proved guilty; (2) it was discriminatory to them as some other public officers such as Members of Parliament are not suspended in similar circumstances; and (3) their suspension on half pay violated their socio-economic rights.<sup>144</sup> Mumbi Ngugi J. proceeded to examine the constitutionality of **Section 62 of ACECA** against

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<sup>142</sup> [2016] eKLR, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 258 of 2015.

<sup>143</sup> Id. at para 59.

<sup>144</sup> Id. at para 59.

**Articles 50(2), 27 and 43 of the Constitution** and ultimately held that: “**The provisions of section 62 of the Anti-corruption and Economic Crimes Act are not unconstitutional.**”<sup>145</sup>

Moses Lenolkulal was aggrieved by the decision of Mumbi Ngugi J. and therefore he appealed against the same at the Court of Appeal; **Moses Kasaine Lenolkulal v. Republic**.<sup>146</sup> He faulted the decision of Mumbi Ngugi J. delivered on July 24, 2019 on the grounds of:

- 1. Failing to give effect to the provisions of section 62(6) of the ACECA contrary to Article 10 of the Constitution.*
- 2. Finding that section 62(1) of the ACECA should apply to the appellant notwithstanding clear and unambiguous provisions of section 62(6) of the ACECA.*
- 3. Finding that section 62(6) of the ACECA was contrary to Chapter 6 of the Constitution.*
- 4. Finding that a proper reading of section 62 of the ACECA requires that the appellant, once charged with an offence under ACECA, should not continue to perform the function of the office of the Governor while criminal proceedings are still pending, notwithstanding the clear and unambiguous wording of section 62(6) of the ACECA that expressly exempt the application of section 62(1) the ACECA to the appellant.*
- 5. Applying an unknown doctrine of constitutional interpretation and application in interpreting the constitutionality or otherwise of section 62(6) of the ACECA.*
- 6. Introducing new issues and arguments not urged before the High Court at the hearing of the application for revision brought under section 362 of the Criminal Procedure Code, which application was not opposed, thereby denying the appellant the opportunity to respond contrary to Article 50 of the Constitution.*

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<sup>145</sup> Id. at para 83.

<sup>146</sup> [2019] eKLR, Court of Appeal at Nairobi, Criminal Appeal No. 109 of 2019.

*7. Failing to find that the orders of trial court barring the appellant, a constitutional office holder, from accessing his office without the written authorization of the CEO of the EACC rendered the appellant subject to their authority and control contrary to the express provisions of the Constitution and was unlawful and unconstitutional.*

*8. Failing to assess the practical impact of the orders of trial court barring the Appellant from accessing his office unless authorized in writing by the CEO of EACC.<sup>147</sup>*

The Court of Appeal (Musinga, Gatembu, and Murgor, JJA.) was thus called upon to consider whether Mumbi Ngugi J. rightly exercised her discretion to decline to review the bail and bond terms ordered by the trial court and whether the interpretation of the relevant statutory provisions was in accordance with the requirements of the Constitution.

First, on the issue of whether the High Court declared **Section 62(6) of ACECA** to be unconstitutional, the Court of Appeal was of the view that this was not so. According to the Court of Appeal, the learned Judge of the High Court merely remarked that **Section 62(6) of ACECA** stands against the intent and purport behind the constitutional provisions on leadership and integrity but did not proceed to declare or hold the said provision unconstitutional.<sup>148</sup>

Second, on whether the High Court was wrong in declining to apply **Section 62 (6) of ACECA** to the circumstances of Moses Lenolkul's case, the Court of Appeal was of the view that the application of the said provision to the case was not necessary, nor was the High Court compelled to apply the said provision. The Court of Appeal expressed itself as follows:

*Determining whether or not **section 62 (6)** was applicable, requires that the genesis of the application be considered. The application for review in the High Court arose from a bail application in the trial court, which the respondent did not*

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<sup>147</sup> Id. at pp 3 and 4.

<sup>148</sup> Id. at p 8.

oppose, but nevertheless requested for the imposition of stringent bail conditions on the appellant. **Article 49 (1) (h)** of the **Constitution**, allows the trial court to impose bail terms.

(...)

**Section 62 (6)** prohibits application of **section 62 (1)** in the case of a constitutional office holder charged with a corruption offence, where the Constitution already provides a method for removal, which in this case is, **Article 181**. When these provisions are considered against **Article 49 (1) (h)** which allows for imposition of reasonable bail terms, it becomes patently clear that they address two disparate circumstances. One is concerned with removal from office and the other imposition of bail.

The complaint is that denying the appellant access to the County offices during the period of the trial was tantamount to his removal from office as contemplated by **Article 181**, and hence contrary to the requirements of **section 62 (6)**. But limiting the governor's access to the County offices whilst he is facing trial for corruption offences cannot be construed or equated to a removal from office. The governor has not been ordered to vacate his office. He may access his office, but on the conditions imposed by the court.

Though his access is limited, he remains the governor. Given the foregoing, our view is that the allegation that the imposition of bail terms barring the appellant from the County offices was tantamount to a removal from office is therefore unfounded. As such, we agree with the High Court that application of **section 62 (6)** was unnecessary, and the learned judge was not compelled to apply that provision to the circumstances of this case.<sup>149</sup>

Third, the Court of Appeal considered the issue whether the bail terms issued by the trial court were reasonable in so far as they barred Moses Lenolkulal from accessing Samburu County Government offices without prior authorization of the Secretary or CEO of EACC, and therefore subjected the Samburu County Government to the control of EACC. The Court of Appeal

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<sup>149</sup> Id. at p 9.

found that the impugned bail terms were constitutional and lawful, as both the trial court and the High Court properly applied their discretion under **Article 49(1)(h) of the Constitution** and **Section 123 of the CPC** in arriving at their decisions on the said bail terms. According to the Court of Appeal, the trial court took into account the nature of the corruption charges preferred in the case, and considering the possibility of witness interference or suppression or tampering with evidence imposed the said bail terms.<sup>150</sup> As concerns the public interest considerations drawn from the constitutional provisions on leadership and integrity and the national values and principles of governance, the Court of Appeal stated that:

*(...) contrary to the appellant's assertion that the learned judge introduced new arguments, both courts below acceded to the dictates of **Article 10 (1) (b)** of the Constitution, and took into account the imperatives of Chapter 6 of the Constitution on leadership and integrity and, other public interest elements of the Constitution, and arrived at bail terms that were reasonable and constitutional. In observing that the safeguarding of public interest was an essential requirement in such cases, the High Court found that the bail terms imposed were sufficient and concluded that no error or misdirection had been made on the trial court's part.*

*Likewise, we too are satisfied that both courts below properly exercised their discretion when they took into account the appropriate principles or guidelines on bail. Further we can find no wrong in the two courts application of the national values and constitutional imperatives set out in Chapter 6 of the Constitution to arrive at bail terms imposed. After all, under both **Articles 10 (1) (b)** and **259 (1)** of the Constitution courts are duty bound to take into account the national values, principles of governance, and the Chapter 6 principles on leadership and integrity when applying provisions of the Constitution.<sup>151</sup>*

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<sup>150</sup> Id. at p 11.

<sup>151</sup> Id.

On the fact that the bail terms subordinated the Offices of the County Government to the CEO of the EACC, the Court of Appeal was of the view that despite the inconvenience imposed on Moses Lenolkulal in accessing Samburu County Government offices, the bail terms were necessary to eliminate the possibility of witness interference and tampering with evidence. The Court of Appeal also found that the High Court had assessed the impact of the ruling on Samburu County Government in holding that there would be no vacuum in the County Offices with the Deputy Governor deputizing for the Governor in the execution of the Governor's function.

In its ruling delivered on December 20, 2019, the Court of Appeal thus upheld the High Court's decision, as follows:

*We would agree. Having found as we have that the bail terms did not remove the appellant from office, but merely required compliance with constitutionally sanctioned terms that of necessity limited his access to the County offices until determination of the trial, we find that the learned judge sufficiently addressed the issue by pointing out the relevant constitutionally crafted remedy.*

*All issues considered, we are satisfied that the learned judge determined and analysed only matters that were placed before her, and as we have found no misdirection in the exercise of discretion, we have no basis upon which to interfere with the High Court's decision.<sup>152</sup>*

Accordingly, the Court of Appeal in **Moses Kasaine Lenolkulal v. Republic**,<sup>153</sup> overturned the considerations of the High Court in **Muhammed Abdalla Swazuri & 16 others v. Republic**.<sup>154</sup>

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<sup>152</sup> Id. at p 12.

<sup>153</sup> [2019] eKLR, Court of Appeal at Nairobi, Criminal Appeal No. 109 of 2019.

<sup>154</sup> [2018] eKLR, Criminal Revision No. 13 of 2018, ruling by Ong'udi, J. dated **1<sup>st</sup> November 2018**.

### **5.1.4 Republic v. Ferdinand Ndung’u Waititu Babayao & 12 others<sup>155</sup>**

Ferdinand Ndung’u Waititu Babayao (hereinafter “**Waititu**”) is the immediate former Governor of Kiambu County. On July 29, 2019, Waititu (the 1<sup>st</sup> accused) and twelve other accused were arraigned before the Chief Magistrate’s Court at Nairobi, Honourable L. N. Mugambi (the Anti-Corruption Court), to answer to charges of corruption and economic crimes under ACECA. The offences charged relate to the period when Waititu was Governor of Kiambu County. Waititu was charged under Counts I, II and III as follows:

Count 1: The offence of conflict of interest contrary to Section 42(3) as read with Section 48 of ACECA. The particulars of the charge were that between 2<sup>nd</sup> July 2018 and 13<sup>th</sup> March 2019 at Kiambu County, Waititu knowingly acquired an indirect private interest through the receipt of KES 25,624,500.00, which are payments to Testimony Enterprises Limited (the 11<sup>th</sup> accused) for contracts awarded to the corporate entity by Kiambu County Government.

Count 2: The offence of dealing with suspect property contrary to Section 47(1) as read with Sections 47(2)(a) and 48 of ACECA. The particulars of the charge were that between 2<sup>nd</sup> July 2018 and 13<sup>th</sup> March 2019 in Nairobi, Waititu and Saika Two Estate Developers Limited (the 12<sup>th</sup> accused), a corporate entity associated with Waititu, received KES 18,410,500.00 from Testimony Enterprises Limited (the 11<sup>th</sup> accused), having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.

Count 3: The Offence of dealing with suspect property contrary to Section 47(1) as read with Section 47(2)(a) and 48 of ACECA, against Waititu and his wife, Susan Wangari Ndung’u (the 2<sup>nd</sup> accused) trading as Bienvenue Delta Hotel, a corporate entity (the 13<sup>th</sup> accused), for receiving KES 7,214,000 from Testimony Enterprises Limited (the 11<sup>th</sup> accused), while having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.

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<sup>155</sup> Anti-Corruption Case No. 22 of 2019.



The other charges, Counts IV to XI, related to the other accused: Count IV - abuse of office contrary to Section 46 as read with Section 48 of ACECA; Count V - wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of ACECA; Count VI and VII - engaging in a fraudulent practice in procurement contrary to Section 66(1) as read with section 177 of PPADA; Count VIII - fraudulent acquisition of public property contrary to Section 45(1)(a) as read with Section 48 of ACECA; and Count X to XI - money laundering contrary to Section 3(b)(i) as read with Section 16 of POCAMLA.

Waititu and the other accused denied the charges and applied to be released on bail or bond pending trial. As usual the prosecution did not oppose the application for bail or bond, rather it requested the trial court to impose the following bail terms: **Waititu be barred from going back to the Kiambu County Government office pending the determination of the criminal case;** (b) all the accused deposit their travel documents with the court; (c) all the accused persons not to contact witnesses, either directly or indirectly or in any way tamper with the exhibits; (d) all the accused persons not to access their offices pending the determination of the criminal case. Waititu opposed the bail terms proposed by the prosecution. He claimed that the condition barring him from accessing Kiambu County Government offices violated **Article 49(1)(h) of the Constitution** and **Section 62(6) of ACECA** and was tantamount to him being unlawfully removed from office.

In his ruling dated July 30, 2019, Honourable L. N. Mugambi granted bail or bond to the accused as follows: the 1<sup>st</sup> accused, Waititu, the 3<sup>rd</sup> accused and the 4<sup>th</sup> accused were to be released on **a cash bail of KES 15 million or bond of KES 30 million with a surety of a similar amount;** the 2<sup>nd</sup> and 5<sup>th</sup> accused were to be released on a cash bail of KES 4 million or bond of KES 10 million with a surety of a similar amount; and the 6<sup>th</sup> to 10<sup>th</sup> accused were to be released on a cash bail of KES 1 million or bond of KES 3 million with a surety of a similar amount. **No bail or bond was imposed on the accused corporate entities, the 11<sup>th</sup> to 13<sup>th</sup> accused.** However, the trial magistrate also imposed the following conditions of bail:

1. *The 1<sup>st</sup> accused shall not access his office until this criminal case is heard and determined.*
2. *Equally accused persons who are employees of the county will not access their offices during the pendency of this criminal Case.*
3. *The rest of the accused are also barred from setting foot in Kiambu County Offices pending full trial.*
4. *All accused will deposit their travelling documents with the court to minimize the risk of the accused travelling out of this court's jurisdiction without leave of court. For those without passports a confirmation of the fact must be given by the department of immigration.*
5. *They must not contact witnesses or in any way interfere with exhibit or any evidence.*

In a departure from the previous cases, the trial magistrate completely denied the accused public officers, including Waititu, access to the Kiambu County Government offices until the criminal case had been determined. Waititu and the other accused were dissatisfied with the trial court's ruling hence applied for revision of the said ruling by the High Court, under **Article 165(6) of the Constitution** and **Section 362 of the Criminal Procedure Code; Ferdinand Ndungu Waititu Babayao & 12 others v. Republic.**<sup>156</sup> The accused were dissatisfied with the amounts of bail and bond imposed by the trial court. Waititu was also aggrieved by the bail term that limited his access to Kiambu County Government offices. The accused claimed that the bail and bond terms imposed by the trial court were excessive and illegal, and amounted to constructive denial of bail without compelling reasons.

The prosecution opposed the application for the revision of the bail and bond terms on the ground that the application offended **Section 364(5) of CPC**, and alleged that an appeal should have been filed instead.<sup>157</sup> According to the

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<sup>156</sup> [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019.

<sup>157</sup> **Section 364(5) of the CPC** provides that: "*When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*"

prosecution, the applicants/ accused sought the interpretation of various constitutional questions which the High Court could only deal with when sitting as a constitutional court and not as an anti-corruption court. The prosecution also claimed that since the bail and bond terms imposed by the trial court met the threshold set out under **Article 49(1)(h) of the Constitution**, there was no need for the High Court's intervention in this particular instance.

Honourable Ngenye-Macharia J thus had to determine three issues: a) whether the High Court had jurisdiction to entertain the application for revision; b) whether the trial magistrate erred in imposing a condition to the bail terms that the 1<sup>st</sup> Applicant/accused, Waititu, does not set foot in his office pending the hearing and determination of the trial; and c) whether the bail terms imposed on the Applicants/accused were harsh and excessive. On the question of jurisdiction, the Honourable judge held that the High Court has supervisory jurisdiction over the decisions of subordinate courts pursuant to **Section 362 and 364 of the CPC and Article 165(6) and (7) of the Constitution**.<sup>158</sup>

On the issue of the bail term requiring Waititu to keep off his office during the pendency of the criminal case, it was argued for Waititu that the said bail condition was set in contravention of **Section 62(6) of ACECA, Section 33 of CGA, and Articles 181 and 182 of the Constitution** as it amounted to the removal of Waititu from his position as Governor of Kiambu County. It was stated that from a literal interpretation, **Section 62(6) of ACECA** did not apply to Waititu as the Governor of Kiambu County and that it was erroneous for the trial magistrate to purport to rely on the decision of Mumbi Ngugi J. in **Moses Kasaine Lenolkulal v. Director of Public Prosecutions**<sup>159</sup> to bar Waititu from setting foot in his office until the criminal case is determined.<sup>160</sup> The applicant also relied on Justice Mumbi Ngugi's earlier decision in **Alex**

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<sup>158</sup> Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, at paras 14-17.

<sup>159</sup> [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019.

<sup>160</sup> Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, at para 21.

**Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 others**,<sup>161</sup> where she had held that: “*The provisions of section 62 of the Anti-corruption and Economic Crimes Act are not unconstitutional.*”<sup>162</sup> The Applicant also urged the High Court to rely on the case of **Muhammed Abdalla Swazuri & 16 others v. Republic**,<sup>163</sup> where Ong’udi J. found that **Section 62(1) of ACECA** was not applicable to constitutional officer holders like Waititu, the then Governor of Kiambu County.

However, Honourable Ngenye-Macharia distinguished **Alex Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 others**,<sup>164</sup> from the case of Waititu by stating that in that case Mumbi Ngugi J. only considered the constitutionality of **Section 62(1-4) of ACECA** and not the constitutionality of **Section 62(6) of ACECA** despite her sweeping holding on the constitutionality of **Section 62 of ACECA**.<sup>165</sup> On the other hand, the Honourable Judge distinguished the case of **Muhammed Abdalla Swazuri & 16 others v. Republic**,<sup>166</sup> from the Waititu case by stating that the finding by Ong’udi J. therein that **Section 62(6) of ACECA** did not apply to constitutional office holders and that their removal or suspension from office would only occur as provided under the constitution was merely an *obiter dictum* remark and not the *ratio decidendi* in the case.<sup>167</sup> According to Ngenye-Macharia J., Ong’udi J. did not consider the constitutionality of the order barring Prof. Muhammad Abdalla Swazuri from accessing his office at NLC but rather the practicality of implementing the said order.<sup>168</sup> Regarding Justice Mumbi Ngugi’s decision in **Moses Kasaine Lenolkul v. Director of Public**

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<sup>161</sup> [2016] eKLR, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 258 of 2015.

<sup>162</sup> Id. at para 83.

<sup>163</sup> [2018] eKLR.

<sup>164</sup> [2016] eKLR, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 258 of 2015.

<sup>165</sup> Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, paras 23-27.

<sup>166</sup> [2018] eKLR.

<sup>167</sup> Id. at para 28.

<sup>168</sup> Id.

**Prosecutions.**<sup>169</sup> Ngenye-Macharia J. stated that her understanding of the decision was that Mumbi Ngungi J. was simply stating that “(...) *in as much as State Officers are exempt from suspension from office because the Constitution provides for a mechanism for their removal, that statement in the legislation is against the spirit and letter of Chapter Six of the Constitution.*”<sup>170</sup> In her case, Ngenye-Macharia J. took what she considered to be a **holistic approach in the interpretation of Section 62(6) of ACECA** in relation to the removal from office of constitutional office holders and stated thus:

*(...) I understand Section 62(6) of ACECA to be restating the supremacy of the Constitution. Similar sentiments are restated under Sections 63(4) and 64(2) of ACECA. To that extent, I agree that since the Constitution provides for mechanisms of removal or vacating of such state offices no other law would supersede it.*<sup>171</sup>

The Honourable Judge then considered the provisions of **Article 181 of the Constitution** and **Section 33 of CGA** on the procedure for the removal of a Governor from office. Therefore, arguing from the point of the supremacy of the Constitution, she held that *attaching conditions to the grant of bail is not tantamount to a removal of the Governor from office.*<sup>172</sup>

That notwithstanding, Justice Ngenye-Macharia decided to uphold the trial court’s order barring Waititu from setting foot at the Kiambu County Government offices, except once to pick his personal belongings, on grounds of the constitutional provisions on leadership and integrity.<sup>173</sup> The Honourable Judge also emphasized on the discretionary powers of the trial court under

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<sup>169</sup> [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019.

<sup>170</sup> Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, at para 30.

<sup>171</sup> Id. at para 31.

<sup>172</sup> Id. at para 33.

<sup>173</sup> Id. at paras 36-40 (Ngenye-Macharia J. stated that, “*it is clear that the charges currently facing the 1<sup>st</sup> Applicant are antithetical to the letter and spirit of the Constitution*”).

**Article 49(1)(h) of the Constitution** and the guidance offered by the **Bail and Bond Policy Guidelines, 2015** in attaching suitable bail or bond conditions to ensure that the relationship between the accused and the witnesses does not undermine the interests of justice.<sup>174</sup> The Honourable Judge expressed herself in the manner that:

*47. After considering the nature of the charges, the whereabouts of potential witnesses, the source of evidence and the position of influence held by the 1st Applicant, it was reasonable for the trial court to attach the condition that the 1st Applicant will not access the Kiambu County Government offices.*

*48. In the respect of the 1st Applicant he is placed on such a high pedestal that his office requires him to execute his duties while beyond reproach. The charges facing him are so grave that owing to his position, the weight of the offence and the public interest there is demand that stringent terms of bail be attached. I find no fault in the decision of the learned magistrate in barring the 1<sup>st</sup> Applicant, alongside the other accused persons from setting foot into the offices of the County Government of Kiambu.*

*49. I am alive to the fact that the 1st Applicant may have been arrested unexpectedly and may have left behind personal belongings he may require for his personal use. For this purpose only, this court shall accommodate him on a single date he elects to be accompanied by the investigating officer with the authority of the Secretary/CEO EACC to go back to the office. Thereafter, he must keep off the office until the conclusion of the trial.*

*50. I have borne in mind what impact the absence of the 1st Applicant will have in the running of the County Government of Kiambu. Whereas, this is not a question I was asked to determine I would concur with the observation of my senior sister Mumbi, J. in the Lenolkulal case that **the 1st Applicant ought to be considered in “moral ill health”**. I am also alive to the fact that **other counties have suffered similar impacts when their***

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<sup>174</sup> Id. at paras 41-46.

***governors have fallen ill and have been absent from office. The course taken by those Counties in such instances should apply to the County of Kiambu.***

51. Additionally, I take solace in the fact that there are mechanisms and officers in place, namely; the County Executive Committee and Deputy Governor who can ably carry out the management and coordination of the functions of the County administration and its departments. They are required to be accountable to the people of Kiambu through the provision of full and regular reports to the County assembly. This mandate is provided under Article 179 of the Constitution. He best that both the 1st Applicant and the prosecution can do is to mobilize all resources and ensure that the trial is expedited.

52. In the premises, I find no irregularity, impropriety, illegality or incorrectness in the order of the learned trial magistrate in directing the 1st Applicant to not set foot in the offices of the County Government of Kiambu whilst the trial is ongoing save for the window accorded by this court to go and collect any personal belongings.<sup>175</sup>

In essence, despite the terms of **Section 62(6) of ACECA**, a constitutional office holder who is charged with corruption and economic crimes is to be presumed to be of **‘moral-ill health’** until proven otherwise. This is despite the presumption of innocence under **Article 50(2)(a) of the Constitution**.

On whether the bail terms imposed on the applicants/ accused were harsh and excessive, the Honourable judge of the High Court only varied the cash bail and bond imposed on the 3<sup>rd</sup> and 4<sup>th</sup> accused. She ruled that a cash bail of KES 15 million or bond of KES 30 million imposed on the 1<sup>st</sup> accused /applicant and bail and bond amounts imposed on the other accused were appropriate keeping in mind the offences charged and their respective circumstances.<sup>176</sup>

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<sup>175</sup> Id. at paras 47-52.

<sup>176</sup> Id. at paras 57-62.

Being dissatisfied with the ruling of Ngenye-Macharia J. dated 8<sup>th</sup> August 2019, Waititu appealed against the decision at the Court of Appeal; **Ferdinand Ndung'u Waititu Babayao v. Republic**.<sup>177</sup> He sought for the High Court ruling to be set aside, he be allowed to access his office and discharge his constitutional functions as Governor of Kiambu County, and for the reduction of the cash bail from KES 15 million to KES 2 million and the bond from KES 30 million to KES 5 million.

Accordingly, the Court of Appeal considered the question whether denial of access to office in Waititu's case did amount to his removal from office. Through a ruling dated 20<sup>th</sup> July 2019, the Court of Appeal (Musinga, Gatembu, and Murgor JJA.) concurred with the trial court and the High Court that since the bail terms were not meant to remove Waititu from Office of Governor Kiambu County, **Section 62(6) of ACECA** did not apply in this case. The Court of Appeal was also of the view that the constitutionality of **Section 62(6) of ACECA** was not up for determination before it. The court expressed itself thus:

*In our view, to the extent that neither the trial magistrate nor the learned judge's holding purported to remove or suspend the appellant from office of Governor, Kiambu County, section 62 (6) of ACECA had no application in the matter that was before her. The appellant has not been suspended from his office, he is still the Governor of Kiambu County; he is still entitled to his full pay, not half. In the circumstances, the learned judge cannot be accused of having failed to apply the "omitted case" canon of statutory interpretation in affirming the terms of the appellant's grant of bail. The issue of constitutionality or otherwise of section 62 (6) of ACECA is not before us for determination in this appeal and therefore we cannot express any opinion on the same.*<sup>178</sup>

The Court of Appeal did not fault the fact that Waititu was barred from accessing his office pending the determination of the criminal case owing to the nature of the charges he was facing, the circumstances under which the offences are alleged to be committed, and the fact some of the prosecution

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<sup>177</sup> Court of Appeal at Nairobi, Civil Appeal No. 416 of 2019.

<sup>178</sup> Id. at para 44.



witnesses were County staff subordinate to him.<sup>179</sup> In doing so, the Court alluded to instances in other cases where vital documents had been lost from offices where the subject public or State officers facing charges of corruption and economic crimes had been allowed unrestricted access to their offices.<sup>180</sup> In addition, the Court of Appeal was of the view that because of the structure of governance and legislative and administrative institutions of a county, the bail terms denying Waititu access to his office would not paralyse the operations of Kiambu County Government.<sup>181</sup> Further, the Court of Appeal concurred with the High Court that there was no reason to interfere with the trial court's discretion under **Article 49(1)(h) of the Constitution** and **Section 123 and 123A of the CPC** to set impose on Waititu a cash bail of KES 15 million or bond of KES 30 million with a surety of similar amount.<sup>182</sup> Consequently, the Court of Appeal dismissed the entire appeal. The matter has further been appealed to the Supreme Court and is yet to be determined; in **Ferdinand Ndungu Waititu Babayao v. Republic**.<sup>183</sup>

## **5.2 The Conviction and Sentencing of Public Officers and its Effects**

For public officers in particular, **Sections 63 and 64 of ACECA** provide for the effect of a conviction on corruption or economic crimes on the holders of public office, that is, their suspension or disqualification from public office. **Section 63 of ACECA** provides *inter alia* for suspension from public office if convicted of corruption or economic crime as follows:

- (1) *A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeals.*
- (2) *The public officer ceases to be suspended if the conviction is overturned on appeal.*
- (3) *The public officer shall be dismissed if— (a) the time period for appealing against the conviction expires without the conviction being appealed; or (b) the conviction is upheld on appeal.*

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<sup>179</sup> Id. at para 48.

<sup>180</sup> Id.

<sup>181</sup> Id. at para 49.

<sup>182</sup> Id. at paras 50-52.

<sup>183</sup> Supreme Court Petition No. 2 of 2020.

- (4) *This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.*
- (5) *This section does not apply with respect to a conviction that occurred before this Act came into operation.*

**Section 64 of ACECA** provides for disqualification from public office if one is convicted of corruption or economic crime and states that:

- (1) *A person who is convicted of corruption or economic crime shall be disqualified from being elected or appointed as a public officer for ten years after the conviction.*
- (2) *This section does not apply with respect to an elected office if the Constitution sets out the qualifications for the office.*
- (3) *This section does not apply with respect to a conviction that occurred before this Act came into operation.*
- (4) *At least once a year the Commission shall cause the names of all persons disqualified under this section to be published in the Gazette.*

In **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited**,<sup>184</sup> the 2<sup>nd</sup> accused, Waluke, is the incumbent Member of the National Assembly for Sirisia Constituency in Bungoma County. As such, the Chief Magistrate, Hon. Elizabeth Juma indicated during the delivery of the sentence that the court would write to the Speaker of the National Assembly to declare Sirisia Constituency National Assembly seat vacant, in case MP Waluke failed to post the fine imposed upon him.

## **6 Comparative Study Of Corporate Criminal Liability In Other Jurisdictions**

### **6.1 United Kingdom (UK)**

For a long time in the UK, corporate entities have been held liable to commit crimes. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of

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<sup>184</sup> Anti-Corruption Case No. 31 of 2018.

an act of will needing a particular state of mind. In **Director of Public Prosecutors v. Kent and Sussex Contractors Ltd.**<sup>185</sup> the court stated that: “*a body corporate is a person to whom there should be imputed the attribute of a mind capable of knowing and forming an intention. A body corporate can have the intent but not criminal intent*”. A corporate entity can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. This decision has seen development of various statutes providing for corporate criminal liability.

In order to simplify the question of imputing criminal liability on corporate entities, the UK came up with the **Corporate Manslaughter and Corporate Homicide Act, 2007** and the **Bribery Act, 2010**. Under the **Corporate Manslaughter and Corporate Homicide Act, 2007** prosecution is brought against the corporate entity itself and not any official of the corporate entity. A corporate entity is guilty of the offence under the Act if the way in which it manages or organizes its activities causes a death and amounts to a gross breach of a relevant duty of care to the deceased.

A corporate entity can be held liable under both vicarious and non-vicarious liability. The offence of bribery under the **Bribery Act, 2010** falls under vicarious liability. The corporate entity commits an offence if a person associated with the corporate entity bribes another person, intending to either obtain or retain business for the corporate entity or obtain or retain an advantage in the conduct of business for the corporate entity.

The **Tesco Case**'s ratio is still the prevailing law of corporate criminal liability in the UK. However, the UK has gone a step ahead in enacting legislation that can see a corporate entity being arraigned in court and standing trial on its own account.

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<sup>185</sup> [1944] KB 146.

The sanctions imposed on a corporate entity include imprisonment (up to a certain number of years) and an unlimited fine.<sup>186</sup> Even though, a corporate entity cannot be imprisoned, if individuals are separately convicted in relation to the same activity, they may be. In the event of a corporate conviction, the court will most likely impose a fine, while taking into consideration the corporate entity's plea. A corporate entity that has pleaded guilty to the offence charged or to some lesser offence can expect to receive a lower fine than if it had fought the case unsuccessfully. The degree of discount depends on the stage at which the guilty plea is entered.<sup>187</sup>

## 6.2 United States of America (US)

US law, both at the State and Federal levels, provide for criminal liability for corporate entities, for crimes committed by individual directors, managers, or low-level employees.<sup>188</sup> The Model Penal Code, 1962, introduced an added prerequisite in proving corporate crimes. It provides that the execution of the offence should be approved, demanded, directed, carried out or accepted in a reckless manner by the board of directors or a senior manager working on behalf of the corporate entity within the limits of his office.<sup>189</sup> Thus, the code distinguishes between the ability of the managerial employees and the lower level employees to prevent a corporate crime.

Sentencing in the United States is left to the general statutory sentencing provisions. The sentencing court however, has the discretion in applying fines

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<sup>186</sup> Kingsley O. Mrabure and Alfred Abhulimhen-Iyoha, 'A Comparative Analysis of Corporate Criminal Liability in Nigeria and Other Jurisdictions' (2020) 11 *Beijing Law Review*, 429-443 <[https://www.scirp.org/pdf/blr\\_2020042114144981.pdf](https://www.scirp.org/pdf/blr_2020042114144981.pdf)>.

<sup>187</sup> Linklaters (2016), 'Corporate Criminal Liability: A Review of Law and Practice across the Globe'

(2016) <[https://knowledgeportal.linklaters.com/llpublisher/knowledge\\_1/corporate-criminal-liability-a-review-of-law-and-practice-across-the-globe\\_1](https://knowledgeportal.linklaters.com/llpublisher/knowledge_1/corporate-criminal-liability-a-review-of-law-and-practice-across-the-globe_1)> (Accessed July 20, 2020).

<sup>188</sup> Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481-1505 <[https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2735&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2735&context=faculty_scholarship)> (Accessed July 20, 2020).

<sup>189</sup> Kingsley O. Mrabure and Alfred Abhulimhen-Iyoha, 'A Comparative Analysis of Corporate Criminal Liability in Nigeria and Other Jurisdictions' (2020) 11 *Beijing Law Review*, 429-443 <[https://www.scirp.org/pdf/blr\\_2020042114144981.pdf](https://www.scirp.org/pdf/blr_2020042114144981.pdf)>.

and may take into account a variety of factors, including the presence of an effective ethics and compliance program. This is good practice that should be emulated in our jurisdiction. A corporate entity may be punished by fine or their property can be confiscated which can be levied by the orders of the court. Corporate entities are also to be placed on probation or ordered to pay restitution for crimes committed under the statutory regime. Depending on the specific statute, other sanctions can be instituted, such as suspension or debarment from entering into contracts with the Federal government.<sup>190</sup> This practice should be adopted in Kenya to bar corporate entities caught up in corrupt dealings from doing business with the Government, in order to enhance strict compliance with corporate criminal liability principles. The jurisdictions above, and others, have also adopted deferred prosecution agreements in modifying the regime for corporate criminal liability. We discuss this model below.

### **6.3 Deferred Prosecution Agreements**

A Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and a corporate entity which could be prosecuted, under the supervision of a judge.<sup>191</sup> The agreement allows a prosecution to be suspended for a defined period, provided the corporate entity meets certain specified conditions.<sup>192</sup> DPAs can be used for fraud, bribery and other economic crimes. They apply to corporate entities (organizations) and not individuals.

DPA is deemed to be the probable answer to the conundrum of corporate criminal liability. DPA has been used in the UK, US, France, Singapore, and Australia. This model allows the corporate entities to remedy the crimes committed within a set period of time. Through this, time and cost for litigation is saved thus, shouldering the taxpayer from such expenses. It also protects the

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<sup>190</sup> Linklaters (2016), 'Corporate Criminal Liability: A Review of Law and Practice across the Globe' (2016) <[https://knowledgeportal.linklaters.com/lipublisher/knowledge\\_1/corporate-criminal-liability-a-review-of-law-and-practice-across-the-globe\\_1](https://knowledgeportal.linklaters.com/lipublisher/knowledge_1/corporate-criminal-liability-a-review-of-law-and-practice-across-the-globe_1)> (Accessed July 20, 2020).

<sup>191</sup> Serious Fraud Office, 'Deferred Prosecution Agreements' <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>> (Accessed July 1, 2020).

<sup>192</sup> Id.

corporate entities from negative publicity that would potentially damage a corporate entity's brand.

Positively, the ODPP has, pursuant to **Article 157 and 159 of the Constitution**, the **National Prosecution Policy, 2015** and the **Diversions Policy, 2019**, introduced 'Differed Prosecution' as an alternative to Prosecution in Kenya.<sup>193</sup> This will be a definitive moment in the prosecution of corporate entities as the weaknesses of the identification principle will be cured. Corporate entities will therefore serve criminal sanctions on their own personality. This is set to revolutionize corporate criminal liability and cushion the traditional criminal justice system which was stretched to its elastic limit in trying to deal with corporate crimes. This is the way to go in Kenya if we are deal with corporate crimes effectively.

## **8. Possible Reforms**

### **8.1 A New Anti-Corruption Dispensation**

This entails putting side by side the purposes of the criminal justice system against the anti-corruption and economic crimes regime for Kenya. This article vouches for a new anti-corruption dispensation, in terms of the charging, conviction, and sentencing for anti-corruption and economic crimes. The purposes of the criminal justice system entail; punishment, retribution, restoration, and rehabilitation or reform of the offender. As opposed to merely punishing for punishment's sake, the criminal justice system is first and foremost an instrument for the reform and reintegration of the offender back to society.

However, the current anti-corruption and economic crimes regime is geared more towards the restoration of the State and society while being against the offender who is intended to be punished merely for punishment's sake. But,

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<sup>193</sup> See, e.g., Stephen Adier, Evans Monari and Cecil Kuyo. (2020). 'Deferred Prosecution Agreements as an Alternative to the Prosecution of Corporate Organizations in Kenya: Fresh Jurisprudence' (2000) <<https://www.bowmanslaw.com/insights/dispute-resolution/deferred-prosecution-agreements-as-an-alternative-to-the-prosecution-of-corporate-organizations-in-kenya-fresh-jurisprudence/>> (Accessed on July 1, 2020).

the new anti-corruption dispensation should aim for both the restoration of the State and Society and the reform of the offender, rather than focusing on merely punishing the offender, if it is to be beneficial in the long run. Otherwise, society loses.

The new anti-corruption and economic crimes regime should focus more on asset recovery, to recover the lost public assets from suspected persons rather than merely aiming to punish the offender for punishment's sake. This is because a pure focus on criminal punishment neither benefits the State nor society, nor the offender. The first port of call should be the recovery of the stolen property and if and only this fails should criminal punishment be pursued as the last port of call.

## **8.2 Need for Court Decisions in Anti-Corruption Cases to Align with the Constitution**

The jurisprudence on the grant or denial of bail and bond and the revision of bail terms as concerns charges of corruption and economic crimes against public officers has been considered above; in the cases of **Republic v. Muhammed Abdalla Swazuri & 16 Others**,<sup>194</sup> **Republic v. Muhammed Abdalla Swazuri & 23 others**,<sup>195</sup> **Republic v. Moses Lenolkulal & 13 others**,<sup>196</sup> and **Republic v. Ferdinand Ndung'u Waititu Babayao & 12 others**.<sup>197</sup> The inconsistency in the decisions is glaring, in a manner that portrays judicial reasoning as fluid and prone to change based on the temperament and mood swings of the Judge or Magistrate concerned.

Courts have equally brought in **Article 10 of the Constitution**,<sup>198</sup> on national values and principles of governance, and **Chapter 10 of the Constitution**, on

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<sup>194</sup> Anti-Corruption Case No. 33 of 2018.

<sup>195</sup> Anti-Corruption and Economic Crimes Case No. 6 of 2019.

<sup>196</sup> Anti-Corruption Case No. 3 of 2019.

<sup>197</sup> Anti-Corruption Case No. 22 of 2019.

<sup>198</sup> Article 10 of the Constitution of Kenya, 2010 provides as follows:

### **10. National values and principles of governance**

*(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*

*(a) applies or interprets this Constitution;*

leadership and integrity, to override **Section 62(6) of ACECA**, which provides that holders of constitutional office can only be removed from office as provided Constitution. In so doing, the courts have constructively determined **Section 62(6) of ACECA** to be null and void in supposed ‘public interest’. Consider the ruling of Justice Mumbi Ngugi in **Moses Kasaine Lenolkulal v. Director of Public Prosecutions**,<sup>199</sup> which is nothing short of presuming public officers charged with corruption and economic crimes guilty until proven otherwise. This is contrary to the presumption of innocence under **Article 50(2)(a) of the Constitution**. A new term, ‘**moral turpitude**’ or ‘**moral ill-health**’ is being used to remove public officers charged with corruption and economic crimes from office. In the words of Justice Mumbi Ngugi, in **Moses Kasaine Lenolkulal v. Director of Public Prosecutions**:<sup>200</sup> “*In this case, the applicant is charged with a criminal offence; he has been accused of being in ‘moral ill-health’, if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is complete, his access to the County government offices should be limited as directed by the trial court.*”<sup>201</sup>

### 8.3 A New Way of Sentencing for Corporate Crimes

Sentencing for corporate crimes should avoid double criminal punishment, in that, the net sum of the punishment imposed upon the accused (the corporate

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(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

<sup>199</sup> [2019] eKLR.

<sup>200</sup> [2019] eKLR.

<sup>201</sup> Id. at para 59. The term “moral turpitude” has become analogous with the removal from office of public officers facing prosecution for corruption and economic crimes, the same having been drawn by Justice Mumbi Ngugi (at paragraphs 50 and 51 of the judgment in the Lenolkulal case) from the Indian case, **R. Ravichandran v. The Additional Commissioner of Police, Traffic, Chennai & Another [2010], In the High Court of Judicature at Madras** <<https://indiankanoon.org/doc/83803/>> (Accessed July 21, 2020).



entity and its directors) should not exceed the gravity of the offence charged. The common law rule against double punishment targets double jeopardy, which occurs at the punishment or sentencing stage of the trial process, once the accused has been found guilty and convicted accordingly.<sup>202</sup> Double criminal punishment can thus be termed as double jeopardy in a single trial or multiple punishments based on the same set of facts.<sup>203</sup>

Double criminal punishment in the context of corruption and economic crimes and corporate crimes can occur in various forms. First, double criminal punishment occurs when the accused is punished severally on several counts drawn from various provisions of the law (within the same Statute or several Statutes) but based on the same set of facts; it is like punishing an accused person for both murder and robbery with violence based on the same facts. Second, double criminal punishment in the context of corporate crimes occurs when punishment is meted against the corporate entity itself alongside the individual director(s), and in excess of the punishment prescribed in law. Since the criminal penalty meted on the corporate entity will be borne by the directors, as the corporate entity's controlling minds, sentencing for corporate crimes should clearly show that it is the corporate entity that is being punished for criminal acts and omissions committed by the directors on behalf of the corporate entity. Imposing a penalty against the corporate entity itself and a separate penalty for the directors individually is nothing short of double criminal punishment and even the law does not smile on this.

#### **8.4 Streamlining the Roles of State Agencies as Concerns the Investigation and Prosecution of Corruption and Economic Crimes**

Generally, the powers to prosecute crime in Kenya are vested in the DPP. On the other hand, the powers to investigate crime are vested in various investigative State agencies in Kenya. By virtue of **Section 2 of the Office of**

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<sup>202</sup>See, e.g., National Judicial College of Australia, 'Double Punishment', <[https://csd.njca.com.au/principles-practice/general\\_sentencing\\_principles/double\\_punishment/](https://csd.njca.com.au/principles-practice/general_sentencing_principles/double_punishment/)> (Accessed on July 14, 2020).

<sup>203</sup>See, e.g., 'Double Jeopardy: Multiple Punishment', <<https://law.jrank.org/pages/1011/Double-Jeopardy-Multiple-punishment.html>> (Accessed on July 14, 2020).

**the Director of Public Prosecutions Act, 2013 (the ODPP Act, 2013),**<sup>204</sup> the investigative State agencies in relation to public prosecutions are: “*the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law.*”<sup>205</sup>

In particular, the EACC, the DCI and the DPP have had a hand in the investigation and prosecution of corruption and economic crimes in the country. As already indicated, the DPP has an overall and general prosecutorial

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<sup>204</sup> Act No. 2 of 2013, Laws of Kenya.

<sup>205</sup> See, e.g., **Africa Spirits Limited v. Director of Public Prosecutions & another (Interested Parties) Wov Beverages Limited & 6 others** [2019] eKLR, at p 9, where Kimaru J. was of the view that the DCI could not digress into the mandates of other authorities and stated that:

*[T]here are various legal regimes that govern the administration of certain Acts of Parliament. For instance, under our tax laws, the body that is recognized as authorized to administer our tax laws are the officers of Kenya Revenue Authority. Under **Section 7 of the Tax Procedures Act 2015** and **Section 7 of the East African Community Customs Management Act 2004**, Kenya Revenue Authority officers have been given “**all powers, rights, privileges and protection of a police officer**” in the performance of their duty. Indeed, the two Acts envisage that the Kenya Revenue Authority officers, as authorized officers have the power to investigate and in appropriate cases, seize and forfeit goods (See **Section 43 and 44 of the Tax Procedures Act** and **Section 210 of the East Africa Community Customs Management Act**). Under the **Proceeds of Crime and Anti-money Laundering Act** and **Section 2** thereof, an authorized officer include the Asset Recovery Agency director, Commissioner of Customs and any other person designated by the Minister as an authorized person to perform any function under the Act. In the instance case, the application that is the subject of the application for revision was filed by the Directorate of Criminal Investigations. In performance of his duties, the Directorate of Criminal Investigations must exercise jurisdictional deference to other authorities that have been established by statute to fulfill their mandates (see **Section 64 of the National Police Service Act**). In this case, it is evident that there was an element of jurisdictional overreach by the Directorate of Criminal Investigations on matters which are statutorily under the jurisdiction of the Asset Recovery Authority and the Kenya Revenue Authority.*

mandate over crimes under the criminal justice system in Kenya.<sup>206</sup> On the one hand, the DCI has a general investigative mandate over crimes under the criminal justice system in Kenya;<sup>207</sup> but upon concluding its criminal investigations, the DCI must forward the files to the DPP to consider whether or not to charge the suspects. The DCI is under the direction, command and control of the Inspector-General of the National Police Service.<sup>208</sup>

On the other hand, the EACC has a specific investigative mandate in respect of corruption and economic crimes in Kenya.<sup>209</sup> Thus, when the EACC concludes its investigations, the files are forwarded to the DPP to consider preferring charges against persons that are the subject of those investigations.<sup>210</sup> In a recent decision, **Ethics and Anti-Corruption Commission v. James Makura M'abira**,<sup>211</sup> the Court of Appeal at Nyeri, considered whether under **Section 35 of ACECA** it is mandatory for EACC (then KACC) to obtain consent from the DPP (then under AG) before charging a suspect for corruption and economic crimes under ACECA. In this case, initially criminal charges were preferred against the Respondent before KACC's investigative report was laid before the AG (the charges were later withdrawn after the AG received the investigative report and the Respondent

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<sup>206</sup> Article 157 of the Constitution of Kenya, 2010 and Section 5 of the ODPP Act, 2013.

<sup>207</sup> See Articles 157(4), 245(4) and (5), and 247 of the Constitution of Kenya, 2010, and Section 35 of the National Police Service Act, No. 11A of 2011. Under Article 157(4) of the Constitution of Kenya, 2010, the DPP has power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is bound to comply with any such direction.

<sup>208</sup> Sections 28, 29(8) and (9), and 35(h) of the National Police Service Act, No. 11A of 2011.

<sup>209</sup> See Article 79 of the Constitution of Kenya, 2010 and Sections 3, 11, 12, 13 and 15 of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 (the EACC Act, 2011).

<sup>210</sup> Section 11(1)(d) of the EACC Act, 2011 and Section 35 of ACECA, 2003. See also Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR, at para 49 (“*Under section 35 of the ACECA, a prosecution can only be brought to the court with the authority of the DPP. The EACC's duty is to investigate and make recommendations for prosecution to the DPP. The DPP applies his mind independently and makes the decision to prosecute.*”).

<sup>211</sup> [2020] eKLR, Court of Appeal at Nyeri, Civil Appeal No. 27 of 2013 (Ouko, Koome, Makhandia, Murgor, and Mohammed, JJ.A.).

re-charged with the same offences). The Court of Appeal reiterated that EACC is vested with investigative powers, but once the investigations are completed, EACC is obligated under **Section 35 of ACECA** to submit the investigation report to the DPP with recommendation that the person who is the subject of the said investigations may be charged with the corruption and economic crimes therein.<sup>212</sup> In any case, the decision whether to charge or not resides with the DPP, as an investigator cannot also be the prosecutor.<sup>213</sup> So, no written consent to prosecute is required from the DPP to prosecute any person, as all criminal cases are instituted by the DPP per **Article 157(6) of the Constitution**.<sup>214</sup> According to the Court of Appeal, if the procedure under **Sections 35, 36 and 37 of ACECA** is not followed, then the suspect can be re-charged upon the set procedure being followed: “*a procedural misstep during pretrial in criminal cases has no bearing on the culpability of the suspect and cannot be taken to vitiate a charge which is predicated on a valid or lawful complaint before the case is tried and concluded in court*”.<sup>215</sup>

There have been instances where the three State agencies have been at loggerheads and that has proven to be destructive in the anti-corruption quest. It is a matter of public knowledge that there has been friction between the DCI and the DPP concerning the investigation and prosecution of persons suspected of corruption and economic crimes. However, the DCI cannot bypass the DPP to prefer criminal charges against any person before any court, as the decision to charge or not to charge rests with the DPP.

Recently, in **Geoffrey K. Sang v. Director of Public Prosecutions & 4 others**,<sup>216</sup> Odunga J. considered the issue of the powers of the DPP in relation to those of the DCI and found that neither the DCI nor the Inspector-General of the National Police Service has any prosecutorial powers.<sup>217</sup> Odunga J. thus held that:

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<sup>212</sup> Id. at paras 23 and 24.

<sup>213</sup> Id.

<sup>214</sup> Id. at paras 28, 29, and 31.

<sup>215</sup> Id. at para 25 and 32.

<sup>216</sup> [2020] eKLR.

<sup>217</sup> Id. at paras 115, 120, 143-144 and 205. See also *Africa Spirits Limited v. Director of Public Prosecutions & another (Interested Parties) Wow Beverages Limited & 6 others* [2019] eKLR, p 9, on the powers of the DCI to investigate crime vis-à-vis other authorities.

126. (...) in terms of prosecutorial powers, the Director of Public Prosecutions may pursuant to Article 157(4) of the Constitution, direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. Upon receipt of such directions, pursuant to Section 35(h) of the National Police Service Act, the Inspector General of Police may direct the Directorate of Criminal Investigations to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution. Clearly therefore there is a clear chain of command set out hereinabove. When it comes to the exercise of prosecutorial powers, as between the three entities, the Director of the Public Prosecutions has the last word. In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.

127. What the foregoing provides is that each of the three entities must of necessity stay on their respective lanes. Any attempt by any of them to trespass onto the other's lane can only end up disastrously. In simple terms an attempt by the Directorate of Criminal Investigations to charge a person with a criminal offence without the consent of the Director of Public Prosecutions is ultra vires the power and authority of the Director of Criminal Investigations and amounts to abuse of his powers. It is therefore null and void ab initio.<sup>218</sup>

In essence, for either the DCI or the EACC to levy charges against any person for corruption and economic crimes without the consent of the DPP would be unconstitutional, unlawful, illegal and null and void ab initio. That notwithstanding, the DPP is not bound by the recommendations of the DCI nor the EACC—the DPP is required to exercise independent judgment,<sup>219</sup> and to exercise prosecutorial discretion in a manner that upholds the public interest and the interests of the administration of justice and which does not result in the abuse of the legal process.<sup>220</sup> On the other hand, as concerns investigations

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<sup>218</sup> Geoffrey K. Sang v. Director of Public Prosecutions & 4 others [2020] eKLR, paras 126 and 127. See also para 128 (“(...) the Director of Criminal Investigations, must keep to its lawful lane and must desist from the temptation to overlap even where he believes that those who are constitutionally empowered to take action are dragging their feet. Once he is done with its mandate he must hand over the button to the next “athlete” and must not continue with the race simply because he believes that the next athlete is “a slow footed runner”).”)

<sup>219</sup> Article 157(10) of the Constitution of Kenya, 2010 and Section 6 of the ODPP Act, 2013.

<sup>220</sup> Article 157(11) of the Constitution of Kenya, 2010 and Section 4 of the ODPP Act, 2013. See, e.g., Geoffrey K. Sang v. Director of Public Prosecutions & 4 others [2020]

on corruption and economic crimes, the DCI should give way to the EACC because of its special mandate in that regard, unless of course the EACC opts to collaborate with the DCI in the investigation of corruption and economic crimes.<sup>221</sup>

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eKLR, para 129 (“(...)the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In other words, the DPP ought not to exercise his/her constitutional mandate arbitrarily.”); and para 132 (“(...) the mere fact that those entrusted with the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution.”). See also Geoffrey K. Sang v. Director of Public Prosecutions & 4 others [2020] eKLR, at paragraphs 133-140; Charles Okello Mwanda v. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR, at paras 47 and 48 (“...So long as there is sufficient evidence on the basis of which a criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the [DPP], the only proviso being that the [DPP] must act in accordance with his constitutional mandate.”); and Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR, at paras 40-43 (“The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority (...). The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in **section 4 of the Office of the Director of Public Prosecutions Act**. These objects are as follows; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.”)

<sup>221</sup> See *Africa Spirits Limited v. Director of Public Prosecutions & another (Interested Parties) Wow Beverages Limited & 6 others* [2019] eKLR, at p 9.

## **9. Conclusion**

This article calls for a new anti-corruption dispensation, which focuses on the recovery of stolen public assets rather than merely punishing the offender for the sake of punishment. The article also calls for a new way of charging and sentencing for corporate crimes that does not further double criminal punishment by punishing the accused severally based on the same facts and by punishing a corporate entity alongside its directors for the criminal acts of the corporate entity. The article also calls for the alignment of court decisions on bail and bond terms with the applicable constitutional and statutory provisions, particularly the application of **Section 62(6) of ACECA** in cases involving constitutional office holders charged with corruption and economic crimes. Constitutional office holders should be removed from office only pursuant to the procedures set out in accordance with the Constitution, and not by preferring criminal charges against them and labelling them of ‘moral ill-health’ in order to remove them from office. In conclusion, it is hoped that newly enacted Statutes will specifically address the unique nature of corporate crimes when creating offences and prescribing criminal penalties for the same—amending old Statutes may equally be imperative.