

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki, & Ouko, SCJJ)*

**PETITION NO. 14 OF 2020**

– BETWEEN –

**DIRECTOR OF PUBLIC PROSECUTION ..... APPELLANT**

– AND –

**CHRYSANTHUS BARNABAS OKEMO ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL KIMUNCHU GICHURU ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF MAGISTRATE’S COURT ..... 4<sup>TH</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.. 5<sup>TH</sup> RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal (E. M. Githinji, H. M. Okwengu & J. Mohammed, JJ.A) delivered on 2<sup>nd</sup> March, 2018 in Civil Appeal No. 5 of 2016 as consolidated with Civil Appeal No. 23 of 2016).*

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**REASONS FOR THE JUDGMENT OF THE COURT**

(Pursuant to Rule 28(2) of the Supreme Court Rules, 2020)

**A. INTRODUCTION**

[1] This appeal was finally heard on 21<sup>st</sup> October, 2021 after having been in the justice system for ten years, a period this Court derided. The Court raised concerns over this delay because the central issue in dispute that has involved all four tiers of the courts is the question of interpretation of the Constitution as to which office between the Attorney General (AG) and the Office of the Director of Public

Prosecution (ODPP) has the mandate to process an extradition request. Bearing in mind this inordinate delay which does not augur well with the tenets of judicial efficiency as decreed by Article 159(2)(b) of the Constitution that **“justice shall not be delayed”** the Court delivered a shortened version of the Judgment on 5<sup>th</sup> November, 2021.

**[2]** In the said *ex tempore* Judgment delivered on 5<sup>th</sup> November, 2021 this Court found the appeal turned on four issues, namely: -

- i. Whether extradition proceedings in Kenya are criminal, civil, or sui generis in nature.***
- ii. Whether it is the Attorney General or the Director of Public Prosecutions to initiate and conduct extradition proceedings.***
- iii. What is the nature of Prosecutorial Powers vested in the Director of Public Prosecutions, and if the same include the initiation and conduct of extradition proceedings?***
- iv. Whether the ‘authority to proceed’ issued on the 6<sup>th</sup> of July 2011, by the Director of Public Prosecutions was valid.***

**[3]** Upon considering the above issues, the majority decision of the Court was as follows:

***“(i) On the nature of extradition proceedings***

*A reading of Article 157 of the Constitution, the relevant extradition Treaties, and other applicable laws, leaves no doubt that extradition proceedings are criminal in nature.*

***(ii) On who may institute extradition proceedings***

*The fact that extradition proceedings are criminal in nature, divests the Attorney General of any authority to involve him/herself in their initiation (i.e. issuance of authority to proceed) and conduct before a court of law. The Attorney General however retains the Executive Authority to receive requests for extradition and to transmit the same to the Director of Public Prosecutions for necessary action.*

**(iii) On the nature of the prosecutorial powers vested in the Director of Public Prosecutions**

*Under the current constitutional dispensation, the powers to prosecute any conduct of a criminal nature is the exclusive preserve of the Director of Public Prosecutions. This is subject to the provisions of Article 157 (6) (a) regarding a court martial, and any legislation that may be enacted by Parliament pursuant to Article 157 (12) of the Constitution. Such legislation must however be consistent with the preceding sub-articles of the main Article.*

**(iv) On the validity or otherwise of the ‘authority to proceed’ issued by the Director of Public Prosecutions:**

*Flowing from the above, it follows that the ‘authority to proceed’ issued by the Director of Public Prosecutions on 6<sup>th</sup> July 2011 was valid.”*

**[4]** Ultimately with *Njoki Ndungu, SCJ* concurring and *Ouko, SCJ* dissenting the following Orders were issued:

**(i) The appeal dated 10<sup>th</sup> August, 2020 is hereby allowed;**

- (ii) *The Judgment of the Court of Appeal dated 2<sup>nd</sup> March, 2018 is hereby overturned;***
- (iii) *The proceedings before the Magistrates Court which had been triggered by the Authority to Proceed issued on 6<sup>th</sup> July, 2011 by the Director of Public Prosecution are to continue forthwith on a priority basis either in the same court or court of competent jurisdiction;***
- (iv) *The costs of this appeal shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.***

**[5]** We now set out the reasons that informed the shortened version of our Judgment by first giving the necessary synopsis of the pertinent facts so as to place the judgment in perspective.

## **B. BACKGROUND**

### **(i) *Factual History***

**[6]** By a request made by the Attorney General of Jersey dated 26<sup>th</sup> May, 2011 pursuant to the provisions of Section 7 (1) of the Extradition (Commonwealth Countries) Act (the Extradition Act) to the AG of Kenya, the former sought surrender (extradition) of Chrysanthus Barnabas Okemo (the 1<sup>st</sup> respondent) and Samuel Kimunchu Gichuru (the 2<sup>nd</sup> respondent) to Jersey. Both respondents are Kenyan citizens. The request was made following the indictment of the 1<sup>st</sup> and 2<sup>nd</sup> respondents for several offences in Jersey. The offences ranged from money laundering to fraud committed during the period between 1991 and 2002 when the 1<sup>st</sup> respondent was the Minister of Energy while the 2<sup>nd</sup> respondent was the Managing Director of Kenya Power and Lighting Company (KPLC), which at the time fell under the 1<sup>st</sup> respondent's Ministry. In a nutshell, it was alleged that the 1<sup>st</sup> and 2<sup>nd</sup> respondents received bribes from foreign businesses which had

contracted with KPLC and hid the same in a Jersey bank account held by Windward Trading Limited, a Jersey Company believed to be under the control of the 2<sup>nd</sup> respondent. The bribes being proceeds of fraud were later transferred to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' Jersey bank accounts.

[7] Upon receipt of the request for extradition of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the AG forwarded the same to the Department of Public Prosecutions (currently the ODPP under the Constitution, 2010). At the material time, the Department of Public Prosecutions was under the office of the AG (OAG). Thereafter, on 6<sup>th</sup> July, 2011, about a month after the appointment of the first Director of Public Prosecution (DPP) under the Constitution, 2010, the DPP issued an authority to proceed with extradition proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents under Section 7(3) of the Extradition Act. It is the said authority to proceed that led to the institution of Misc Applic. No. 9 of 2011 (extradition proceedings) in the Chief Magistrate's Court at Nairobi (subordinate court).

## ***(ii) Litigation History***

### ***(a) At the subordinate court***

[8] Apart from calling into question the competency of the extradition proceedings, the 1<sup>st</sup> and 2<sup>nd</sup> respondents also raised constitutional issues they deemed should be referred to the High Court for determination. Of relevance, the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged that the authority to proceed issued by the DPP was in contravention of Section 7(3) of the Extradition Act. They contended that it is only the AG who could issue the authority to proceed and therefore, the extradition proceedings were fatally defective.

[9] On the other hand, the DPP's position on the competency of the extradition proceedings was threefold. Firstly, it was posited that since the promulgation of the Constitution, 2010 and in particular, Article 157 thereof not only was the ODPP

established as an independent office but the AG was also divested of all prosecutorial powers in criminal proceedings, which mandate was conferred on the DPP. Secondly, extradition proceedings are criminal in nature hence an authority to proceed can only be issued by the DPP. Thirdly, Section 7 (3) of the Extradition Act should be construed in conformity with the Constitution as far as it pertains to who can issue the authority to proceed thereunder.

[10] In a Ruling delivered on 5<sup>th</sup> February, 2013, the subordinate court agreed with the DPP and dismissed the 1<sup>st</sup> and 2<sup>nd</sup> respondents' objection on competency of the extradition proceedings before it.

**(b) At the High Court**

[11] Aggrieved by the decision of the subordinate court the, 1<sup>st</sup> and 2<sup>nd</sup> respondents invoked the High Court's supervisory jurisdiction under Article 165(6) and (7) of the Constitution vide Constitutional Application No. 111 of 2013 (the application). The respondents urged the High Court to call for the record of proceedings in regard to the extradition proceedings and set aside, vary or discharge the subordinate court's ruling. They also entreated the High Court to refer to itself and determine a number of constitutional issues they had raised therein.

[12] Subsequently, on 12<sup>th</sup> March, 2013 the application was consolidated with Constitutional Petition Nos. 320 and 321 of 2011 which had been instituted earlier, at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, challenging the constitutionality of the extradition proceedings. In addition, it is at this juncture that the AG and the Ethics and Anti-Corruption Commission (the 5<sup>th</sup> respondent) were joined as interested parties.

[13] With respect to the pertinent issues, the 1<sup>st</sup> and 2<sup>nd</sup> respondents reiterated their position in the subordinate court. Holding the same opinion, the AG added that extradition proceedings are *sui generis* in nature; that they involve

international relations between States hence fall within the mandate of the Executive arm of government; that, the AG is rightly placed to deal with extradition proceedings being a Minister, so referred, in the Executive. Further, the AG's position was that the only reason the ODPP had conduct of the extradition proceedings in issue was because at the time it was a department under the OAG.

**[14]** The DPP supported the subordinate court's findings and insisted that the AG was estopped by his conduct, subsequent to the matter at hand, of referring other extradition proceedings to the ODPP from contending otherwise.

**[15]** On its part, the 5<sup>th</sup> respondent did not take any position as far as the issues in question were concerned leaving the matter to the court to determine.

**[16]** By a Judgment dated 18<sup>th</sup> December, 2015 the High Court upheld the subordinate court's decision. In doing so, the High Court found that although extradition proceedings had elements of international law, the reference of person's subject to surrender/extradition to other commonwealth countries in the preamble of the Extradition Act as 'accused' and 'convicted' persons placed extradition proceedings within the realm of criminal law. Furthermore, the court was of the view that extradition proceedings continue to bear the criminal nature/element of the initial criminal proceedings in the requesting state.

***(c) At the Court of Appeal***

**[17]** Dissatisfied with the High Court's decision, the 1<sup>st</sup> and 2<sup>nd</sup> respondents lodged their respective appeals in the Court of Appeal being, Civil Appeal Nos. 5 and 23 of 2016 respectively, which were later consolidated. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and the AG maintained their arguments at the High Court.

**[18]** Supporting the High Court's decision, the DPP made reference to Section 2 of the ODPP Act, 2013 and in particular, the definition given to the term

‘prosecution’ as including extradition proceedings. In the DPP’s view, the said definition demonstrates not only the nature of extradition proceedings but also reveals the organ bestowed with the power of issuing the authority to proceed.

**[19]** The 5<sup>th</sup> respondent, like in the High Court, maintained a neutral position and did not address the Court of Appeal on the issues in question.

**[20]** In the end, by a Judgment dated 2<sup>nd</sup> March, 2018 the Court of Appeal allowed the appeal in part to the extent that it found that extradition proceedings fell wholly within the ambit of international law and were *sui generis* in nature; that it is the AG as opposed to the DPP who is empowered to issue the authority to proceed; and therefore, the extradition proceedings in issue were a nullity.

**(d) At the Supreme Court**

**[21]** The DPP’s appeal dated 10<sup>th</sup> August, 2020 challenged the Court of Appeal’s decision on a number of grounds which formed the basis of the issues framed by this Court as set out in paragraph (2) of these reasons. The DPP sought the following reliefs:

1. *Allowing of the appeal*
2. *Setting aside of the judgment of the Court of Appeal dated 2<sup>nd</sup> March, 2018.*
3. *Declarations that-*
  - i. *Extradition proceedings are criminal in nature.*
  - ii. *The power, responsibility and role to issue an authority to proceed under section 7(1) of the Extradition Act is vested in the DPP.*
  - iii. *The power, responsibility and role to issue an order under section 6 of the Extradition (Contiguous and Foreign Countries) Act is vested in the DPP.*

- iv. *The Attorney General has neither any responsibility nor role in extradition proceedings.*
  - v. *The DPP can competently request for and render mutual legal assistance in criminal matters under the Mutual Assistance Act, 2011.*
  - vi. *The Mutual Legal Assistance Act, 2011 in as far as it confers upon the office of the Attorney General the general responsibility to deal with the extradition and provision of mutual legal assistance, is inconsistent with the Constitution and Article 157(6) thereof and is therefore null and void to the extent of that inconsistency.*
  - vii. *Section 7(1) of the Extradition Act in as far as it retains the office of the Attorney General as the competent authority is inconsistent with the Constitution and Article 157(6) thereof and is therefore null and void to the extent of that inconsistency.*
4. *An order that Chief Magistrate's Court Misc. Applic. No. 9 of 2011 be mentioned and directions of the hearing thereof be given.*
  5. *Such other and further reliefs, directions and orders as the Honourable Court may deem fit to grant.*

## **C. PARTIES SUBMISSIONS**

### **(i) DPP's submissions**

**[22]** During the hearing of the appeal, the team representing the DPP was led by Mr. Taib, SC assisted by learned counsel, Mr. Mule, Mr. Muteti and Mrs. Obuo. The DPP submitted that the Court of Appeal's holding that the definition of the term 'prosecution' under Section 2 of the ODPP Act as including extradition proceedings was a drafting error had no basis. This was for reasons that the particular issue was never canvassed by the parties before the High Court. Further, counsel for the DPP submitted that enactment of legislation entails elaborate

processes, that is, from drafting of a Bill by the AG, to the Bill undergoing public participation, and being presented before the two Houses of Parliament for consideration amongst other processes. It followed therefore, that an issue of a drafting error cannot arise in light of the aforementioned processes. In addition, the DPP argued that while enacting the ODPP Act to give effect to Articles 156 and 157 of the Constitution, Parliament was intentional in encompassing extradition proceedings as falling within the definition of prosecution thereunder.

**[23]** Counsel for the DPP went on to submit that contrary to the impugned Judgment by the Court of Appeal, extradition proceedings are criminal in nature and fall under the mandate of ODPP. Towards that end, the DPP reiterated that it is quite obvious going by firstly, the definitions given to the term prosecution in the ODPP Act; secondly, the use of the terms **‘accused’** and **‘convicted’** in the preamble of the Extradition Act; thirdly, Section 9 of the Extradition Act which provides that a Magistrate presiding over extradition proceedings shall have the same jurisdiction and powers as in a trial; and fourthly, other terminologies used in the Extradition Act like fugitive, bail and committal order, that extradition proceedings are akin to criminal proceedings. As such, extradition proceedings by dint of Article 156 of the Constitution, which places criminal proceedings exclusively under the DPP, fall squarely under the DPP’s realm.

**[24]** The DPP further argued that Acts of Parliament with respect to extradition prescribe various stages that are taken in any extradition proceedings. The first being receipt of a request from a foreign country through diplomatic channels; and it is the request, in the DPP’s view, that is handled at the administrative or executive stage where the AG decides whether it meets the requirements of law so as to forward the same to the relevant state office/organ responsible for initiating the second stage. The second stage is, as counsel for the DPP put it, the judicial stage involving courts; the initiating organ at this stage is the DPP due to the criminal nature of the proceedings; in other words, it is the DPP who conducts

extradition proceedings at the judicial stage. Subsequently, the DPP submitted that after the court deals with the matter, it returns its findings to the Executive where another decision has to be made.

**(ii) *The 1<sup>st</sup> respondent's submissions***

[25] Mr. Ngatia, SC appeared for the 1<sup>st</sup> respondent. He submitted that when the ODDP Act was being formulated as a Bill at the legislative stage, it had a clause 33 which empowered the DPP to deal with extradition. Nonetheless, the Bill was amended by deletion of the said clause by the Committee of the whole house of Parliament which amendment was passed by Parliament. Consequently, in the 1<sup>st</sup> respondent's view, the retention of the definition of the term prosecution as including extradition proceedings in Section 2 was, as correctly found by the Court of Appeal, an omission.

[26] The 1<sup>st</sup> respondent maintained that extradition proceedings are *sui generis* in nature. In that regard, the 1<sup>st</sup> respondent postulated that the source of extradition law is anchored on a treaty which gives rise to reciprocal obligations between the concerned States. In this case, it was the London Scheme for Extradition within the Commonwealth, 2002 which gave rise to the Extradition Act; and Article 132(5) of the Constitution places a duty on the Executive to deal with the country's treaty obligations.

[27] Counsel further submitted that in the 1<sup>st</sup> respondent's opinion, the High Court erred in laying emphasis on the use of the words '**accused**' and '**convicted**' in the preamble of the Extradition Act hence arrived at the wrong conclusion as to the nature of extradition proceedings. The 1<sup>st</sup> respondent contended that of importance is how Kenya surrenders an accused or convicted person to the requesting State. There is no determination of guilt or innocence in extradition proceedings by the Kenyan courts. Moreover, extradition proceedings are not

equivalent to a trial as understood in the criminal or civil sense but are merely limited to the matter of surrender.

**[28]** Counsel for the 1<sup>st</sup> respondent went on to urge that the High Court's finding to the effect that Section 7(1) of the Extradition Act should be construed in conformity with the Constitution to mean that it is the DPP who has the power to issue the authority to proceed, would result in absurdity and an unworkable situation. This is because Section 3(1) of the Extradition Act confers the AG with the power to designate which countries are within the Commonwealth for purposes of the Act. Further, while a magistrate can issue a provisional warrant of arrest against a person subject of extradition proceedings prior to issuance of authority to proceed, the magistrate is required under Section 8 to inform the AG of the same. Counsel pointed that interestingly, it is the AG, who has the power under Section 8 (3)(b) to cancel the warrant and even release the arrested person. In any event, Section 11 provides that it is the AG who can surrender the subject of the extradition proceedings thus leaving no room for the DPP. Lastly, the 1<sup>st</sup> respondent contended that the argument by the DPP that there are different stages in extradition involving different actors is not in tandem with the appeal filed in this Court.

***(iii) The 2<sup>nd</sup> respondent's submissions***

**[29]** The 2<sup>nd</sup> respondent, represented by Mr. Waweru, SC together with learned counsel, Mr. Nyamori and Mr. Muchiri, associated himself with the 1<sup>st</sup> respondent's submissions. Counsel urged us to find; firstly, extradition proceedings are special international proceedings founded on international relations between States; secondly, extradition of offenders/fugitives is an executive/ministerial act hence falls within the ambit of the National Executive; and thirdly, comparative jurisprudence from States with similar legal systems as

Kenya are clear that extradition proceedings are *sui generis* in nature as opposed to civil or criminal proceedings.

**[30]** As to who between the AG and the DPP is entrusted to handle extradition proceedings, counsel for the 2<sup>nd</sup> respondent argued that the answer lay in the Constitution and statute law. While advancing the argument that it is the AG who has the requisite authority to carry out extradition proceedings, the 2<sup>nd</sup> respondent delved into the different roles played by the AG and the DPP. It was the 2<sup>nd</sup> respondent's submission that not only is the AG a member of the Executive by virtue of being the President's appointee to the Cabinet but is also charged with the responsibility of ensuring that Kenya's international obligations are fulfilled. Whilst the DPP by dint of Article 157 of the Constitution exercises prosecutorial powers in criminal proceedings and is not subject to the direction of any person. Consequently, the 2<sup>nd</sup> respondent posed the question, how then can the DPP be answerable to the executive authority of Kenya on extradition issues? Further, the 2<sup>nd</sup> respondent maintained that the Extradition Act gives the AG, to the exclusion of any other person, the power to deal with extradition proceedings. All in all, the 2<sup>nd</sup> respondent urged the Court to uphold the Court of Appeal's decision.

**(iv) AG & Chief Magistrates' Court submissions**

**[31]** Learned counsel, Mr. Kamau and Mr. Bitta, representing the AG and the Chief Magistrates Court (4<sup>th</sup> respondent), argued that the issue in dispute is one of statutory interpretation. More specifically, Section 7 of the Extradition Act. It was their position that the Court of Appeal properly applied the principles of interpretation of statute in arriving at its decision. In that, the Court of Appeal paid regard to the literal interpretation of the provision in issue, the legislative history as well as other statutes touching on international relations to discern the intention of the legislature.

[32] Expounding further, counsel submitted that the Extradition Act was purposely enacted to provide a legal framework for international relations in the field of persons accused of having committed or convicted of serious crimes and as such, the Act points to treaty obligations. In their view, the Court of Appeal considered, and rightly so, the import of the provisions of Articles 131, 132, 152, 156 and 157 of the Constitution and recognised that Kenya’s principal foreign agent is the President; and if this Court was to consider the said Articles, it would arrive at the same conclusion. The Court was urged to take into account that even the Fourth Schedule to the Constitution delineates one of the functions of the National Executive as foreign policy.

[33] That aside, they claimed that the Court of Appeal’s interpretation was in consonance with Article 10 of the Constitution. This was because, in their view, by virtue of Article 132, the President is accountable to the National Assembly regarding foreign relations and fulfilment of Kenya’s foreign obligations; and on the contrary, the DPP is not accountable to anybody due to decisional independence. Last but not least, on the issue of the interpretation of the term ‘prosecution’ in the ODPP Act, they contended that Section 2 thereof is an interpretation clause which does not confer powers, duties or rights; rather, it merely provides for peculiar interpretation of words as applied in the relevant legislation.

**(v) *The 5<sup>th</sup> respondent’s submissions***

[34] Learned counsel Mr. Ruto appeared for the 5<sup>th</sup> respondent who, in similar fashion, took a neutral position with regard to the issues in dispute.

**D. ANALYSIS**

[35] The instant appeal was anchored on Article 163(4)(a) of the Constitution and Section 15(2) of the Supreme Court Act which clothe this Court with jurisdiction to

determine appeals from the Court of Appeal on questions of interpretation and application of the Constitution. Taking into account the dispute that culminated in the instant appeal as well as the issues for determination as framed by this Court, there can be no question that the entire appeal falls within the parameters of the Court's appellate jurisdiction as delineated under Article 163 (4) (a) of the Constitution. See **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another**, SC Petition No. 3 of 2012; [2012] eKLR. In that case, this Court stated that it has jurisdiction to entertain not just concluded cases but also interlocutory matters where final orders vesting or divesting rights or obligations have been pronounced.

[36] For starters, the issue in contestation, that is, who between the AG and the DPP has the power to issue an authority to proceed with extradition proceedings, revolves around the interpretation and application of Articles 156 and 157 which not only establish the Offices of the AG and DPP but also confer the said offices with their respective constitutional mandate. Further, it is the interpretation and application of the said Articles by the Superior Courts below that form the basis of the appeal. We will now tackle the issues as framed by the Court sequentially.

(i) **Nature of Extradition Proceedings**

[37] The general definition of extradition includes; the delivery, handing over or the surrender of an accused or a convicted person to a State where he/she is accused of, or has been convicted of, a crime, by a State in whose territory the person in question happens to be. See *Parry, C., Grant J., and Barker, J. 2009, Parry & Grant Encyclopaedic Dictionary of International Law*, Ebook Academic Collection Trial (Oxford University Press). **Halsbury's Laws of England**, 4<sup>th</sup> Edition Vol. 18 at page 74 paragraph 201 describes extradition as follows:

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

[38] We find the foregoing definition is in tandem with the Extradition Act, the subject matter of this appeal, wherein in Section 2 the term surrender is defined as—

***““surrender” means the surrender of a fugitive to a requesting country in accordance with the provisions of this Act; ...”***

while a fugitive is defined as—

***““fugitive” means any person who is, or is suspected of being, in or on his way to Kenya and whose surrender is requested under this Act on the grounds that he is accused of, or is unlawfully at large after conviction for, an extradition offence committed within the jurisdiction of the requesting country; ...”***

[39] That said, this takes us to the examination of the nature of extradition proceedings in Kenya. Beginning with the Extradition Act, like the findings by the High Court, we too observe it is replete with terms which fall within the sphere of criminal law such as an **“accused”**, **“convicted”**, **“remand”**, **“bail”** and **“committal orders”**. Further, Section 4 thereof defines an extradition offence in the following terms:

“4

1) *For the purposes of this Act, an offence is an extradition offence if—*

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

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

2) ...

3) *The descriptions contained in the Schedule to this Act include in each case offences of attempting or conspiring to commit, of assisting, counselling or procuring the commission of or being accessory before or after the fact to the offence described, and of impeding the apprehension or prosecution of persons guilty of those offences.* [emphasis added]

[40] Moreover, looking at the committal proceedings under Section 9 of the Extradition Act wherein the subordinate court is seized with the extradition

proceedings and which kick in after the issuance of an authority to proceed, it is apparent the court is called upon to exercise some aspect of criminal jurisdiction. In particular, this is what is prescribed under Section 9(5)–

“9

...

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

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

***b) where the fugitive is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large, the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his surrender, but if the court is not so satisfied, or if the committal is so prohibited, the court shall discharge him from custody.*** [emphasis added]

[41] What is clear about the above provisions of the law is that the subordinate court is required to determine whether the offence for which an accused or

convicted person is sought to be surrendered or extradited, amounts to an extradition offence; whether there is sufficient evidence that would warrant the trial of the accused person for the said offence had it been committed in Kenya; or whether the convicted person has indeed been convicted in the requesting State and appears to be at large; and whether to surrender the accused or convicted person. Perhaps, that is what informed the Legislature in enacting Section 9(3) to recognize that the subordinate court in conducting committal proceedings can exercise similar jurisdiction and powers as in criminal trial. Section 9(3) stipulates that—

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

[42] However, the Court of Appeal relying on foreign decisions as well as the ***Black’s Law Dictionary*** found that extradition proceedings are not criminal proceedings since there is no determination of culpability of the person subject to the said proceedings. ***Black’s Law Dictionary*** 9<sup>th</sup> Edition at Pg. 1324, defines criminal proceeding as:

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

[43] While the above definition of criminal proceedings in the strict sense is true, it does not derogate that extradition proceedings are akin to a preliminary hearing in a criminal matter. In that, the subordinate court, is charged with the duty of determining whether the evidence presented before it justifies the extradition/surrender of an accused or convicted person to face trial or punishment in the requesting State. In that regard, Steven Lubet in ***Extradition***

***Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*** (1982) 15 Cornell Int'l LJ 247 states:

***“Extradition proceedings are preliminary in nature and are analogous to the preliminary hearing in a criminal case.”***

See also ***Benson v. McMahon***, 127 U.S. 457 (1888). Further, Yoram Dinstein in ***Some Reflections on Extradition*** (1993) 36 German YB Int'l L 46 expressed as follows:

***“Extradition proceedings in the requested State have “decidedly criminal consequences”, although they are not criminal proceedings in the technical sense.”***

[44] Consequently, we agree with the High Court that although extradition proceedings in Kenya have some aspects of administrative procedure that involves the Executive arm of government as regards receipt of request, the processing of the request largely falls within the realm of criminal law.

**(ii) Who can initiate and conduct extradition proceedings?**

[45] Determination of this issue calls for consideration of the roles/duties performed by the AG and DPP; and in turn, where extradition proceedings, which we have found are criminal nature, fall. As was correctly observed by the two Superior Courts below, under Section 26(3) of the repealed Constitution, the AG was bestowed with the power to institute and undertake criminal proceedings in the following terms:

**“26 (3)**

***a) institute and undertake criminal proceedings against any person before any court (other than a***

***court-martial in respect of any offence alleged to have been committed by that person;***

***b) take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and***

***c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or another person in authority”***

Furthermore, the AG was empowered under Section 26(5) to delegate the power to institute and undertake criminal proceedings as prescribed under 26(3)(a) to officers' subordinate to him acting under his instructions or guidance. It is on the basis of the said delegation that the AG exercised his powers in criminal matters through the then Department of Public Prosecutions which was under the OAG.

[46] Be that as it may, following the promulgation of the Constitution, 2010 the Department of Public Prosecution which became the ODPP was separated from the OAG with both offices being distinct and independent of each other. See Articles 156 and 157 of the Constitution.

[47] Towards that end, the AG's mandate as set out in Article 156 (4) includes:

**“156**

**4. The Attorney-General—**

***a) is the principal legal adviser to the Government;***

***b) shall represent the national government in court or in any other legal proceedings to***

*which the national government is a party, other than criminal proceedings; and*

*c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”*

In addition, Section 5(1) of the OAG Act delineates the AG’s functions in the following manner:

“5

*1) In addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for—*

- a) ...*
- b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;*
- c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies.”*

[48] While the DPP’s mandate as spelt out under Article 157 (6) entails;

**6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—**

- a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
- b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
- c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”**

**[49]** It is not in dispute from the foregoing that the State’s powers of prosecution which relate to criminal matters were removed from the AG and are now conferred in the DPP exclusively. As such, having found that extradition proceedings in Kenya are criminal in nature, it goes without saying that they fall within the DPP’s mandate. Likewise, it is the DPP as opposed to the AG who can initiate and conduct extradition proceedings. A reading of Section 7(1) and (3) of the Extradition Act

reveals that extradition proceedings are initiated through an authority to proceed. The provisions in question provide as follows:

***“7. Authority to proceed***

- 1) Subject to the provisions of this Act relating to provisional warrants, a fugitive shall not be dealt with in any manner under this Act except in pursuance of the written authority of the Attorney-General, issued in pursuance of a request made to the Attorney-General by or on behalf of the government of the designated Commonwealth country in which such person is accused or was convicted.***
- 2) ...***
- 3) On receiving a request, the Attorney-General may issue an authority to proceed, unless it appears to him that a warrant of surrender in that case could not lawfully be made, or would not in fact be made, under this Act.”***

**[50]** It follows therefore that having pronounced that it is the DPP who can issue an authority to proceed with extradition proceedings, the Court of Appeal was wrong to fault the High Court for invoking Section 7 (1) of the Sixth Schedule to the Constitution in order to bring Section 7(1) of the Extradition Act into conformity with the Constitution. To begin with, the Court of Appeal misconstrued the import of Section 7 (1) of the Sixth Schedule which provides that;

**“7. Existing laws**

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

[51] This Court in **Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others**, SC Petition No. 14 of 2014 as consolidated with Petition Nos. 14A, 14B and 14C of 2014; [2014] eKLR, while discussing the essence of Section 7(1) of the Sixth Schedule expressed that—

“

- i. The Constitution of 2010 came into operation being cognizant of existing legislation. Flowing from the Constitution’s supremacy clause, it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation, without creating a vacuum. Section 7(1) of the Sixth Schedule, therefore, is vital as a medium for ensuring harmonious transition.**
- ii. ...**
- iii. All laws in force immediately before the promulgation of the Constitution remain in force, but subject to Section 7(1) of the Sixth Schedule.**

***iv. In construing any pre-Constitution legislation, a Court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution.”***

**[52]** It is common ground that the Extradition Act was in existence prior to the promulgation of the Constitution, 2010; and that initiation and conduct of criminal matters by virtue of Article 157(6) of the Constitution is conferred upon the DPP and not the AG. Therefore, it was necessary for purposes of bringing Section 7(1) of the Extradition Act in conformity with the Constitution to construe the provision as prescribing that it is the DPP who can issue an authority to proceed thereunder.

**[53]** Secondly, the fact that the Extradition Act had been amended as late as the year 2012 without any alteration to Section 7(1) by itself cannot warrant interpretation of the said provision in manner that is contrary to the Constitution. This is simply due to the supremacy of the Constitution as appreciated by this Court in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition 10 of 2013; [2014] eKLR as follows:

***“As rightly submitted by the appellants, the Court of Appeal interpreted Article 87(2) of the Constitution so as to place it in conformity with the provisions of Section 76(1)(a) of the Elections Act. This is tantamount to elevating a statutory provision above that of the Constitution, and is not tenable, in the light of the provisions of Article 2 of the Constitution. The provisions of the Constitution are superior to any legislation. As such, when interpreting the provisions of an Act of Parliament, the Court must always ensure that the same***

**conform to the Constitution and not vice versa.**” [emphasis added]

[54] Thirdly, we are unable to see how holding that it is the DPP who can issue an authority to proceed would render the Extradition Act unworkable or inoperative on account of the other functions conferred therein to the AG as insinuated by the Court of Appeal. Besides, bearing in mind that extradition has elements of international relations between States, the AG retains the executive authority to receive requests for extradition and is required to transmit the same to the DPP for the necessary action.

[55] It is important at this juncture to address the Court of Appeal’s finding in respect of the definition of what amounts to prosecution under Section 2 of the ODPP Act. Section 2 defines prosecution in the following terms:

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

In that regard, the Court of Appeal stated –

***“We hold that the definition in ODPP alone, which was apparently retained through drafting error, without express statutory power cannot confer power on the ODPP to perform extradition proceedings.”***

[56] The position taken by the Court of Appeal was informed by ODPP Bill No. 69 of 2012 which initially under clause 33 provided—

“33

*1) All extradition proceedings instituted under this Act or any other law in force immediately before or after the coming into effect of this Act shall, for all intents and purpose be deemed to be criminal proceedings.*

*2) Pursuant to the provisions of Article 157 (6)(a) of the Constitution it is the function of the Office to take steps to secure the extradition of any person required to answer to a charge or an offence, or to serve a sentence imposed, in Kenya or in any other requesting state in accordance with the law.”*

However, the Bill was amended by the Committee of the whole House on 3<sup>rd</sup> January, 2013 by deletion of the said clause amongst others and which amendment was approved and passed by Parliament culminating in the ODPP Act.

[57] It is trite that objective of a court in interpreting legislation is to give effect so far as the language therein permits to the intention of the Legislator. See ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Petition No. 26 of 2014; [2014] eKLR. Therefore, notwithstanding the deletion of clause 33 of the ODPP Bill, we find that the Court of Appeal was wrong in holding that the definition of prosecution under Section 2 of the ODPP Act to the extent of including extradition proceedings was a drafting error despite the unambiguous words employed thereunder. Furthermore, the Supreme Court of Canada in its persuasive decision in ***Placer Dome Canada Ltd. v. Ontario (Minister of***

**Finance**), [2006] 1 S.C.R. 715, 2006 SCC 20 aptly made the following observations which we endorse:

***“Under the presumption against tautology in the interpretation of statutes, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.”***

***(iii) Nature of prosecutorial powers vested in the DPP***

[58] Based on the provisions of Article 157(6) as well as the ODPP Act, the DPP, as we have observed herein above, is bestowed with the power to prosecute any criminal matter save for matters within the sphere of a court martial and the legislation envisaged to be enacted under Article 157 (12) of the Constitution. The breadth of these prosecutorial powers as we have found include extradition proceedings.

***(iv) Validity of the authority to proceed issued by the DPP on 6<sup>th</sup> July, 2011***

[59] Flowing from our finding that it is the DPP who should issue an authority to proceed under Section 7 (1) of the Extradition Act, the inescapable conclusion is that the authority to proceed issued in regard to the extradition proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 6<sup>th</sup> July, 2011 was valid.

**E. REASONS FOR THE CONCURRING OPINION OF NJOKI NDUNGU, SCJ.**

[60] I have read the decision of the majority and while I concur with the final decision and orders in this matter, I adopt a different opinion from that of the majority, particularly on the nature of extradition proceedings. I hold the view that

extradition proceedings are quasi-criminal having elements of both criminal and administrative law.

[61] Extradition is defined by Black’s Law Dictionary, 9<sup>th</sup> Edition as:

*“The official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by authorities where the fugitive is found.”*

[62] Similarly, the **Cambridge Dictionary** defines extradition as the “act of making someone return for trial to another country or state where they have been accused of doing something illegal.”

[63] From the foregoing definitions, it is clear that extradition is the act of surrendering a person accused of committing a crime to another country having jurisdiction over the crime for trial. As such, to determine whether extradition proceedings are civil, criminal, or *sui generis* in nature it is important to interrogate the extradition process in Kenya.

[64] In the present case, the relevant laws are the Extradition (Commonwealth Countries) Act, 1968 (The Extradition Act), Mutual Legal Assistance Act, 2011, and the Commonwealth Scheme for International Cooperation in Criminal Matters.

[65] It is important to note from the outset that according to **Commonwealth Scheme for International Cooperation in Criminal Matters**, (as adopted in 1966 and amended in 2002) and to which Kenya is a Member State party, outlines the mode of international cooperation in criminal matters between member countries that involve a range of formal and informal actions. Many such actions are governed by national legislation and bilateral or multilateral treaties and involve formal diplomatic and/or judicial functions. Others, such as informal

law enforcement cooperation, may not be subject to specific legislative frameworks but are governed by policy and practice, often on the basis of reciprocity or as a prelude to formal cooperation.

[66] The Preamble of the Extradition Act states as follows:

***“An Act of Parliament to make provision for the surrender by Kenya to other Commonwealth countries of persons accused or convicted of offences in those countries, to regulate the treatment of persons accused or convicted of offences in Kenya who are returned to Kenya from such countries; and for purposes incidental thereto and connected therewith.”*** [emphasis added]

[67] Such preamble, being a statement of objectives of the said Act, then makes the function of the Extradition Act to regulate the surrender process of persons accused or convicted of offences in the requesting country and vice versa. The purpose, therefore, is not to determine the culpability of the person accused of committing a crime, but to, interrogate any evidence tendered in support of the request for the surrender, and to determine whether the evidence is sufficient to warrant his trial for that offence, if it had been committed in Kenya. In the instant case, it is my opinion therefore, that it cannot be argued that the proceedings before the magistrate are exclusively criminal in nature because those proceedings do not subject the 1<sup>st</sup> and 2<sup>nd</sup> respondents to a trial for a criminal offence in Kenya. The magistrate’s role is only confined to the interrogation of evidence to ascertain whether they ought to be surrendered to the jurisdiction of the requesting country, in this case Jersey, to face trial for offences as charged before that foreign Court. It is before that court, in the requesting country, that extradited persons can be charged with criminal offences, convicted and punished if found culpable.

[68] Pursuant to Section 7 (1) of the Extradition Act, the extradition process begins with a request from the requesting country to the Attorney General. Consequently, upon receipt of the request for extradition and if the Attorney General is satisfied that the request should be honoured, it will issue authority to proceed.

[69] On receipt of the authority to proceed a magistrate may issue a warrant of arrest to the fugitive. According to Section 8 of the Extradition Act, such warrant may be issued upon such evidence as would, in the opinion of the magistrate, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence or, as the case may be, of a person alleged to be unlawfully at large after conviction of an offence, in Kenya.

[70] A person arrested pursuant to a warrant of arrest shall be brought to court as soon as practicable. Section 9(5) of the Extradition Act further provides as follows:

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

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

***(b) where the fugitive is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,***

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

[71] I take note that under Section 11 of the Extradition Act, it is the Attorney General who reserves the right to issue the warrants of surrender and this demonstrates that the extradition process involves elements of both criminal proceedings, that is the judicial phase before a criminal court, and administrative proceedings which involves the attention and action by the Attorney General.

[72] Coming to the case at hand, the appellant contended that on 6<sup>th</sup> June, 2011, the Attorney General of the Republic of Kenya received, on behalf of the Government of Kenya through the British High Commission in Nairobi, a request for the extradition of the 1<sup>st</sup> and 2<sup>nd</sup> respondents from the United Kingdom on behalf of the Attorney General of Jersey, vide a *Note Verbale* number 452/11.

[73] From the foregoing, the extradition request was made and acted upon pursuant to Section 7 of the Extradition Act, the Mutual Legal Assistance Act, 2011, the London Scheme for Extradition Within the Commonwealth, and the Revised Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth. Therefore, it is my view that the extradition process is commenced based on laws and policies that are based on international agreements that do not fully fall under the purview of domestic criminal law.

[74] Further, it is my opinion that the criminal aspect of the judicial phase of extradition begins with the forwarding by the Attorney General of the authority to proceed, to the Director of Public Prosecution, for commencement of committal proceedings. Accordingly, Section 8 (1) of the Act provides that:

**“ 1) a warrant of the arrest of a fugitive may be issued by a magistrate-**

**a) on receipt of an authority to proceed...**

**2) A warrant of arrest may be issued upon such evidence as would, in the opinion of the magistrate, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence or, as the case may be, of a person alleged to be unlawfully at large after conviction of an offence, in Kenya.**

**3) Where the warrant of arrest issued in respect of a fugitive is a provisional warrant—**

**a) the magistrate who issues it shall forthwith give notice to the Attorney-General, and transmit to him the information and evidence, or certified copies of the information and evidence, upon which the warrant was issued; and**

**b) the Attorney-General may in any case, and shall if he decides not to issue an authority to proceed, cancel the warrant, and discharge the fugitive from custody if he has been arrested under the warrant.” [emphasis added].**

**[75]** From the foregoing, extradition proceedings are affected by international considerations including bilateral and multilateral agreements with States to

extradite persons considered to have committed extradition offences. These international agreements consist of essential conditions in the extradition process. Therefore, it is my considered view that the international agreements constitute the civil elements of extradition.

[76] The Supreme Court of Canada in *United States of America v. Shulman* [2001] 1 SCR 616, acknowledged that extradition proceedings are quasi-criminal in nature. The court held as follows:

*“Even though the ultimate decision to surrender a fugitive to a Requesting State is an executive decision by the Minister of Justice, that decision cannot be made unless and until there has been a judicial determination, and, if necessary an appeal from that determination, that the Requesting State has presented before a Canadian court sufficient prima facie evidence to have the fugitive committed for surrender. As I have previously mentioned, **that judicial phase is not a full-fledged trial, nor is it a mere formality.** Unless the fugitive waives his or her right to a judicial hearing by consenting to committal, the Requesting State must present its case in court. In availing itself of the Canadian judicial process, the Requesting State, like any other party before our courts, and even more so when the liberty of a person is at stake, is subject to the doctrine of abuse of process.”* [emphasis added]

[77] In *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 the Supreme Court of Canada observed that:

*“While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. **It differs from the criminal process in purpose and procedure and, most importantly, in the factors which***

**render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.**

[emphasis added]

[78] Similarly in the *United States v. Kwok* [2001] SCC 18 the Supreme Court of Canada held that:

*“The Extradition Act was amended in 1992. The amendments did not alter the two-tiered structure of the extradition process in Canada. The extradition judge and the Minister of Justice maintain their distinctive roles, the court deciding whether the Requesting State has made out a prima facie case to commit the fugitive, while the Minister makes the ultimate discretionary decision to surrender the fugitive.”*

[emphasis added].

[79] Applying the reasoning adopted by Supreme Court of Canada in the above-quoted cases, I am persuaded that an extradition proceeding unlike a criminal proceeding, is founded on the concepts of reciprocity, comity, and respect for differences in other jurisdictions. The judicial phase is not a full-fledged trial, nor is it a mere formality, the Requesting State must present its case in court. The Attorney General and the Director of Public Prosecution have to play their distinctive roles to ensure that extradition proceedings are carried out in accordance with the law. Consequently, I find that the extradition process is a ***quasi-judicial*** process having both elements of criminal law and administrative law.

## **F. REASONS FOR THE DISSENTING OPINION OF W. OUKO, SCJ.**

### **A. INTRODUCTION**

[80] Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Those are the exact words of Article 50(1) of the Constitution. As a constitutional principle, justice shall not be delayed.

[81] On 5<sup>th</sup> November, 2021 when the Court delivered its Judgment in this appeal and reserved the reasons for that decision, it emphasized these principles and expressed its dissatisfaction with the fact that for the last ten years since 26<sup>th</sup> May, 2011, when the Attorney General of the Island of Jersey wrote a letter requesting Kenya's Attorney General to commence extradition proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and following the issuance by the appellant (DPP) of "authority to proceed" under Section 7 of the Extradition (Commonwealth Countries) Act (the Extradition Act), the contest that has engaged the subordinate court and the three levels of superior courts for all this period has been about, which office between the DPP and the 3<sup>rd</sup> respondent (the AG) has the mandate to commence and undertake the extradition proceedings.

[82] In the end, the Court identified the following issues for determination:

- i. Whether Extradition Proceedings in Kenya are criminal, civil, or sui generis in nature.***
- ii. Whether it is the Attorney General or the Director of Public Prosecutions to initiate and conduct Extradition Proceedings.***
- iii. What is the nature of Prosecutorial Powers vested in the Director of Public Prosecutions, and if the same***

***include the initiation and conduct of Extradition Proceedings?***

- iv. Whether the ‘Authority to Proceed’ issued on the 6<sup>th</sup> of July 2011, by the Director of Public Prosecutions was valid.***

[83] Ultimately, upon considering these issues the majority of the Court allowed the appeal and found that extradition proceedings are criminal in nature hence falling within the purview of the DPP; and that therefore, “the Authority to Proceed” issued by the DPP was valid. I held a contrary view; that extradition proceedings are neither civil nor criminal, but *sui generis*, involving treaties between nations for which reason only the AG can initiate the process, concluding that “the Authority to Proceed” was irregularly issued by the DPP.

[84] These are my reasons for holding this view. Bearing in mind that the entire extradition proceedings are still pending before the subordinate court, my conclusions in this appeal have been reached with circumspection.

[85] But first, I adopt the reasoning of the majority in Paragraph 35 of the reasons, that the Court’s jurisdiction under Article 163 (4) (a) of the Constitution has been properly invoked in accordance with our decision in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another***, SC Petition No. 3 of 2012; [2012] eKLR.

To start with, the following brief background is necessary for the proper context of the controversy, bearing in mind that the majority opinion carries a detailed background and submissions by the parties.

**B. BACKGROUND**

[86] Pursuant to Section 7 (1) of the Extradition Act, the AG received a request dated 26<sup>th</sup> May, 2011 from his counterpart, the Attorney General of Jersey, for the

extradition of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Apparently, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had been indicted for several offences relating to transactions undertaken in Jersey bank accounts held by themselves and Windward Trading Limited, a Jersey Company believed to be under the control of the 2<sup>nd</sup> respondent. In a nutshell, the charges relate to bribes allegedly received by the 1<sup>st</sup> and 2<sup>nd</sup> respondents from foreign businesses that had contracted with Kenya Power and Lighting Company (KPLC), which are believed to have been hidden in the aforementioned accounts. At the time of the alleged offences, the 1<sup>st</sup> respondent was the Minister of Energy while the 2<sup>nd</sup> respondent was the Managing Director of KPLC, a State Corporation under the 1<sup>st</sup> respondent's Ministry.

[87] The request was then forwarded by the AG to the Department of Public Prosecutions (the present-day ODPP), which at the time was a department under the office of the AG. About a month after his appointment into office under the 2010 Constitution, on 6<sup>th</sup> July, 2011 the DPP, issued the authority to proceed under Section 7(3) of the Extradition Act leading to commencement of extradition proceedings in the Chief Magistrate's Court at Nairobi, Misc. Applic. No. 9 of 2011.

## C. LITIGATION HISTORY

### *(i) In the subordinate court*

[88] Before the proceedings could begin, the 1<sup>st</sup> and 2<sup>nd</sup> respondents raised objections touching on the constitutional competency of the extradition proceedings, the determination of which they applied to be referred to the High Court for interpretation. Of relevance, the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged that the authority to proceed issued by the DPP was in contravention of Section 7(3) of the Extradition Act, under which only the AG could do so.

[89] In his three-pronged response to the objection, the DPP urged that following the promulgation of the current Constitution in 2010, Article 157 thereof, not only

established the ODPP as an independent office, but also divested the AG of all prosecutorial powers in criminal proceedings, and conferred them on the DPP. Consequently, extradition proceedings being criminal, authority to proceed could only be issued by the DPP. Finally, to conform with the Constitution, Section 7 (3) of the Extradition Act, as far as it pertains to who can issue the authority to proceed, should accordingly be construed.

**[90]** In a ruling delivered on 5<sup>th</sup> February, 2013, the subordinate court agreed with the DPP and dismissed the objections.

**(ii) In the High Court**

**[91]** Aggrieved by the decision of the subordinate court, the 1<sup>st</sup> and 2<sup>nd</sup> respondents invoked the High Court's supervisory jurisdiction under Article 165(6) and (7) of the Constitution in Constitutional Application No. 111 of 2013, where they asked the High Court to call for the record of proceedings in the subordinate court; set aside, vary or discharge the subordinate court's ruling; and to determine certain constitutional issues in respect of those proceedings.

**[92]** Subsequently, on 12<sup>th</sup> March, 2013 the application was consolidated with Constitutional Petition Nos. 320 and 321 of 2011 which were instituted earlier, at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, challenging the constitutionality of the extradition proceedings. It is at this juncture that the AG and the 5<sup>th</sup> respondent were joined as interested parties.

**[93]** The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintained that the extradition proceedings were unlawful for having been commenced by the DPP, a position the AG agreed with but argued, in addition that extradition proceedings are *sui generis* and not criminal; that they involve international relations between States, hence falling within the mandate of the Executive arm of Government; and therefore, the AG, as a member the Executive, is rightly placed to handle all matters relating to

extradition. Further, the AG explained that the only reason the ODPP had conduct of the extradition proceedings was historical; that as a department of the AG's office dealing with prosecution on behalf of the AG before the passage of the Constitution, the AG would forward all extradition matters to the DPP.

[94] The DPP, on his part, was in agreement with the subordinate court's conclusion on the issue and urged that the AG was estopped by his conduct of referring all previous extradition proceedings to the DPP from contending otherwise.

[95] The 5<sup>th</sup> respondent took a neutral stand on the contest between the two offices.

[96] By a Judgment dated 18<sup>th</sup> December, 2015 the High Court (*Lenaola, J.* as he then was) agreed with the subordinate court upholding its decision. In doing so, the High Court found that although extradition proceedings have elements of international law, the reference in the Extradition Act of 'accused' and 'convicted' persons as subject of surrender for extradition placed extradition within the realm of criminal law; and furthermore, that extradition proceedings continue to bear the criminal nature of the initial criminal proceedings in the requesting state.

**(iii) In the Court of Appeal**

[97] The determination of the High Court was challenged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the Court of Appeal, where parties reiterated their respective arguments, save for the 5<sup>th</sup> respondent who continued to maintain a neutral position.

[98] The Court of Appeal in a judgment dated 2<sup>nd</sup> March, 2018 allowed the appeal and held that extradition proceedings fell wholly within the ambit of international law and were *sui generis* in nature; that it is the AG, as opposed to the DPP, who

is empowered to issue the authority to proceed; and therefore, the extradition proceedings in issue were a nullity for the reason that the authority was issued by the DPP.

**(iv) In the Supreme Court**

[99] This time around, the DPP was aggrieved and filed this appeal contending that the Court of Appeal erred in its conclusion and has asked us to allow the appeal by setting aside the decision of the Court of Appeal and to declare that:

“ ...

- i. Extradition proceedings are criminal in nature.**
- ii. The power, responsibility and role to issue an authority to proceed under section 7(1) of the Extradition Act is vested in the DPP.**
- iii. The power, responsibility and role to issue an order under section 6 of the Extradition (Contiguous and Foreign Countries) Act is vested in the DPP.**
- iv. The AG has neither any responsibility nor role in extradition proceedings.**
- v. The DPP can competently request for and render mutual legal assistance in criminal matters under the Mutual Assistance Act, 2011.**
- vi. The Mutual Legal Assistance Act, 2011 in as far as it confers upon the office of the AG the general responsibility to deal with the**

***extradition and provision of mutual legal assistance, is inconsistent with the Constitution and Article 157(6) thereof and is therefore null and void to the extent of that inconsistency.***

***vii. Section 7(1) of the Extradition Act in as far as it retains the office of the AG as the competent authority is inconsistent with the Constitution and Article 157(6) thereof and is therefore null and void to the extent of that inconsistency.***

***4. An order that Chief Magistrate's Court Misc. Appl. No. 9 of 2011 be mentioned and directions of the hearing thereof be given.***

***5. Such other and further reliefs, directions and orders as the Honourable Court may deem fit to grant”.***

[100] For the reason that this dispute is anchored on the provisions of the Extradition Act, I will not determine any of the above grounds that concern other statutes like Extradition (Contiguous and Foreign Countries) Act and the Mutual Legal Assistance Act, though reference to them is inevitable in a dispute such as this.

#### **D. PARTIES SUBMISSIONS**

##### ***(i) The DPP's submissions***

[101] The DPP urged that contrary to the impugned judgment, extradition proceedings are criminal in nature and fall under his mandate, for the following reasons. The term “prosecution” is defined in the ODPP Act, 2013 to include extradition; that the preamble to the Extradition Act uses terms like ‘accused’ and

‘convicted’; that Section 9 of the Extradition Act requires that a magistrate presiding over extradition proceedings to exercise the same jurisdiction and powers as in a trial; and that there are other terminologies used in the Extradition Act like “fugitive”, “bail” and “committal order”, that point to the fact that extradition proceedings are indeed criminal proceedings. Therefore, by dint of Article 156 of the Constitution, which places criminal proceedings exclusively under the ODPP, extradition matters fall squarely under the ODPP.

**[102]** It was further submitted that the Court of Appeal erred in failing to appreciate the various stages of extradition that leaves no doubt that it is the ODPP that is responsible for extradition of fugitives; the first being receipt of a request from a foreign country through diplomatic channels; that it is the request that is received by the AG on behalf of the administrative or Executive branch of Government; that the AG must then decide whether the request meets the requirements of law; that it is in the second stage that the initiating organ, the DPP, issues the authority to proceed before commencing the proceedings in the Magistrates’ court; and that at the end of those proceedings, the court’s findings are forwarded back to the Executive for its final decision.

***(ii) The 1<sup>st</sup> respondent’s submissions***

**[103]** With regard to the definition of “prosecution” under Section 2 of the ODPP Act, the 1<sup>st</sup> respondent submitted that Clause 33 of the Bill originating the law at the legislative stage had expressly empowered the DPP to deal with extradition. However, the 1<sup>st</sup> respondent contended, at its 3<sup>rd</sup> reading in Parliament the clause was deleted; and therefore, the retention of the definition of “prosecution” to include extradition proceedings is, as correctly found by the Court of Appeal, an omission.

**[104]** The 1<sup>st</sup> respondent maintained that extradition proceedings are *sui generis* in nature, as the source of extradition law is a treaty which gives rise to reciprocal

obligations between the concerned States; that in our case it is the **London Scheme for Extradition within the Commonwealth, 2002** which gave rise to the Extradition Act; and that Article 132(5) of the Constitution places a duty on the Executive to deal with the country's treaty obligations.

**[105]** Furthermore, in the 1<sup>st</sup> respondent's opinion, the use of the words 'accused' and 'convicted' in the preamble of the Extradition Act cannot *per se* be the basis for concluding that extradition proceedings are criminal; that the surrender of an accused or convicted person by Kenya to the requesting State does not involve a trial; that the accused or convicted person in question is not accused or convicted in Kenya but in the foreign State; and that there is no determination of guilt or innocence in those proceedings.

**[106]** Lastly, the 1<sup>st</sup> respondent asked us to consider the provisions of Section 3(1), 8 (3)(b) and 11 of the Extradition Act and to conclude from it that the law confers on the AG various functions and powers that confirm the AG's central role in the extradition process.

***(iii) The 2<sup>nd</sup> respondent's submissions***

**[107]** The 2<sup>nd</sup> respondent associated himself with the 1<sup>st</sup> respondent's submissions, but added that extradition proceedings have four attributes. They are special international proceedings founded on international relations between States; that extradition of fugitives is an Executive or ministerial act; that they trace their existence wholly to treaty obligations between States; and finally, that comparative jurisprudence of states with similar legal systems as Kenya are clear that extradition proceedings are *sui generis* in nature.

**(iv) AG's submissions**

[108] The AG agreed with the foregoing submissions and the holding by the Court of Appeal in the interpretation of Section 7 of the Extradition Act. The AG submitted, in that regard that the Court of Appeal paid regard to the literal interpretation of the section, the legislative history as well as other statutes touching on international relations to discern the intention of the legislature.

[109] For example, the AG contended that the Court of Appeal properly considered the provisions of Articles 131, 132, 152, 156 and 157 of the Constitution as well as the Fourth Schedule to the Constitution to be satisfied that Kenya's principal foreign relations agent is the President.

[110] On the meaning of the term 'prosecution' in Section 2 of the ODPP Act which includes extradition, the AG argued that the section is only an interpretation clause which does not confer powers, duties or rights, but merely provides for peculiar interpretation of words as applied in the relevant legislation.

**D. ANALYSIS AND DETERMINATION**

[111] In paragraph 82 above, we have identified four issues that define the controversy in this appeal. To my mind, however the narrow issue right from the Magistrates' court, the High Court, the Court of Appeal, through to this Court is the validity of "the authority to proceed" issued by the DPP. The answer to this question will of necessity involve the construction of the Constitution and the Extradition Act in order to delineate the functions of the two offices in so far as issues of extradition are concerned. The answer will further depend on whether extradition proceedings in Kenya are criminal, civil, or *sui generis* in nature.

[112] I reiterate that this matter was triggered by a request from the Attorney-General of Jersey requesting assistance of the Government of Kenya in extraditing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to Jersey to face criminal trial.

[113] This request demonstrates how the international community derives substantial benefit from a borderless global world, and how such a world has to deal with the negative impact of globalisation on international crime. Because of recent developments in world politics, business, technology, and elaborate international travel networks, criminal networks have taken advantage and effectively utilised these opportunities to escape and frustrate law enforcement investigations or arrest.

[114] Today it is easy for crimes like drug trafficking, human trafficking, money laundering, terrorism and cyber crimes to be committed within one state and the effect felt in another or other states across the borders of the State where the offence is committed, hence the need for effective international and transnational criminal justice.

[115] Because “the authority to proceed” issued by the DPP is the issue at the heart of this dispute, it must be noted that there is no existing right to extradite a fugitive; that a sovereign State is not under any compulsion under international law to surrender a fugitive to another sovereign State. The right to do so must derive as an obligation, either from an existing bilateral or multilateral treaty or on the basis of reciprocity and common understanding in any form between the countries concerned.

[116] The extradition process is therefore governed by international and domestic law. It may also be regulated by general schemes such as the Commonwealth Scheme for the Rendition of Fugitive Offenders of 1990 (**the London Scheme for Extradition**).

[117] I have noted earlier that the Extradition Act was enacted pursuant to the London Scheme for Extradition. In its long title the Act confirms that it is;

***“An Act of Parliament to make provision for the surrender by Kenya to other Commonwealth countries of persons accused or convicted of offences in those countries”.*** [*my emphasis*]

[118] It is emphasized that the Act is intended, *inter alia*, to deal with persons accused or convicted of offences in the requesting countries. The London Scheme allows each country within the Commonwealth to designate a Central Authority, whose responsibility is to make, receive and transmit requests for assistance and execute or arrange for the execution of such requests. Extradition proceedings and procedures will, therefore depend on the domestic legislation of each State. Some states have adopted purely administrative procedure, judicial or mixed procedures. Others have treated extradition as criminal proceedings and in some they are treated as *sui generis*.

[119] The nature and character of extradition proceedings remain unsettled despite its significance and centrality in international relations. Extradition hearings are multifariously understood from the legislative and jurisprudential divide among the nations of the world, with no uniform procedural and organisational system that is acceptable to all States. So that when borrowing jurisprudence from other jurisdictions, this fact must be borne in mind. Some principles, are however common to most municipal laws dealing with extradition.

[120] Because of this disparity, the ***United Nations Revised Manual on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters***, made pursuant to the United Nations Convention against Transnational Organized Crime at pg. 29, restates the proper channel under Article 5 as follows;

***“1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties.” [my emphasis]***

The following guidelines too are suggested to member states to consider in enacting legislation;

***“Commentary***

***Paragraph 1: Form of request and channels of communication***

***94. Paragraph 1 sets out the procedures for conveying extradition requests, supporting documents and communications. It is flexible to take account of the requirements and preferences of different States. The parties may define the channels of communication for treaty requests (communications may be transmitted through the diplomatic channel, between the ministries of justice or any other authorities designated by the parties). Each State should decide the appropriate ministry or agency that will be responsible for receiving and transmitting requests.***

***95. The authority chosen for this function need not be responsible for the execution or creation of the requests. It is responsible for receiving the requests from foreign States, working with such States on identifying and, if possible, addressing legal problems that may arise in the***

*making of such requests, forwarding them to an executing authority, following up on execution of the request, transmitting the results to the foreign State, ensuring rapid and effective communications for purposes of obtaining provisional arrest (see article 9) and, where extradition is granted, arranging for the person wanted to be transported to the requesting State. In the opposite case, this authority is responsible for transmitting requests to the foreign State and to pursuing execution of the request with the foreign State.*

*96. By deciding on the appropriate channel and advising other States as soon as possible, the parties will have an identified channel through which to pursue requests...The nature of extradition means that it is important that the chosen authority can execute its responsibilities speedily and efficiently. In many States, the designated channel is the Ministry of Justice, court or the office of the Attorney-General or equivalent, but this is a matter to be decided by each State." [my emphasis]*

[121] What is important to note from the foregoing is that, each member State has the freedom to designate the appropriate ministry or agency to be responsible for receiving and transmitting requests; the authority designated for this function need not but can be responsible for the execution or creation of the requests. The commentary notes that in many States, the designated channel is the *Ministry of Justice*, court or even the *office of the Attorney-General or equivalent*, but this is a matter to be decided by each State, it stresses.

[122] For instance in England, pursuant to the **Extradition Act 2003**, extradition has largely been characterized as criminal proceedings. I say largely because that position is not unambiguously held. The following cases demonstrate those that hold the view that they are criminal proceedings, starting with the old decision of the Court of Appeal in *Ex parte Alice Woodhall* (1888) 20 Q.B.D. 832. In that case the learned judges were categorical that such proceedings are in nature criminal. In 1942 the House of Lords approved this conclusion in the case of *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 at 156. In the latter, Lord Wright said, in part that:

***“The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal ‘cause or matter’... The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act ... to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter.”***

[123] Several years later in 1997, Lord Hoffman giving the sole speech in the House of Lords in *Regina v. Governor of Brixton Prison, Ex parte Levin*: HL 10 Apr 1997, unequivocally described extradition proceedings as criminal proceedings and explained that;

***“Finally, I think that extradition proceedings are criminal proceedings. They are of course criminal proceedings of a very special kind, but criminal proceedings nonetheless.” [my emphasis]***

[124] The emphasis seems to suggest that, the proceedings are not purely criminal. Secondly, Lord Hoffman’s views in the passage has been described as *obiter*. See the recent decision of the Supreme Court of England & Wales, the successor of the House of Lords rendered on 5<sup>th</sup> November 2014 in ***VB, CU, CM and EN v. Westminster Magistrates’ Court, The Government of Rwanda, The Crown Prosecution Service (Respondent) and CMK*** [2014] UKSC 59. In that ruling the court found that;

***“The appellants’ submission that extradition proceedings are not conventional criminal proceedings is correct, up to a point. They do not lead to conviction, but they are brought to obtain surrender for the purpose of trial abroad. They are an important aspect of enforcement of the rule of law worldwide. The jurisdiction of a magistrate in extradition proceedings is derived exclusively from statute: In re Nielsen [1984] AC 606, p 623D-E, per Lord Diplock. The 2003 Act prescribes that the district judge’s powers are the same “as nearly as may be” as those possessed by a magistrate on a summary trial and that the judge’s role is to ‘decide whether there is evidence that would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him’***

***Extradition proceedings are not a criminal trial. The person whose extradition is sought is not in peril of***

*conviction, and his guilt or innocence will not be decided. The issue is whether he should be surrendered to the Requesting State for the purpose of subsequent trial. The Requesting State is not prosecuting him before the English court; it is asking the UK to surrender him. The Crown Prosecution Service (CPS) generally acts as the advocate or agent of the Requesting State; that its principal role in England & Wales is to prosecute allegations of crime does not mean that it does not have this separate and different function in extradition proceedings. Its role in extradition proceedings is made clear by section 190 of the Extradition Act 2003 that amends section 3(2) of the Prosecution of Offences Act 1985, which ascribes various functions to the CPS, chief of which is to “take over the conduct of all criminal proceedings...” (with specified exceptions). The amendment made by section 190 of the Extradition Act inserts a new additional function, namely:*

*“(2)(ea) to have the conduct of any extradition proceedings”*

*That, however, is made subject to the specific exception that the CPS is not to do so when requested not to by the Requesting State. This makes clear the advocacy or agency role of the CPS in extradition proceedings...*

*But one cannot treat extradition proceedings as a part of a criminal prosecution in England and Wales. Even though, in the case of some (but by no means all) Part II territories, it may be necessary for the Requesting State*

***to establish a prima facie case, the proceedings are not a prosecution but, rather, concerned solely with the issue of surrender. Any prosecution is yet to come; it may or may not ensue and if it does it will not be under English rules...***

[125] There are profound lessons and parallels to be drawn, hence the *extenso* nature of this passage. First, amendments had to be introduced in the law to specifically and expressly make provisions for the role of CPS in matters of extradition. In addition, the case also stresses that CPS only plays advocacy or agency role for the requesting state, without prosecution in the strict meaning of the word.

[126] Prior to this decision, the Supreme Court had another occasion to stress the character and nature of extradition proceedings, holding that they are not criminal. Writing for the Court, in ***Pomiechowski v. District Court of Legnica, Poland*** [2012] UKSC 20, [32], Lord Justice Mance made extensive reference to decisions emanating from European Commission on Human Rights, such as ***E.G.M. v. Luxembourg*** (Application No 24015/94) and ***H v. Spain and Kirkwood v. United Kingdom*** (Application No 10479/83), (1984) 37 DR 158, and arrived at the conclusion that the;

***“... examination of Strasbourg case-law shows that the Commission and Court have stood firm against any suggestion that extradition as such involves the determination of a criminal charge or entitles the person affected to the procedural guarantees provided in the determination of such a charge under article 6(1) or 6(3). The cases involved are all also cases involving the extradition of aliens... A claim to extradite him does not involve the determination of a criminal charge, and he is***

***not entitled to any full process of examination of his guilt or innocence, or to the procedural guarantees which would attend that. But he is entitled to a fair determination as to his common law right to remain within the jurisdiction...”***

[127] In contrast to our Extradition Act, Section 190 of the English Extradition Act 2003, amended the Prosecution of Offences Act 1985 to vest expressly as one of the functions of the Director of Public Prosecutions, the power to conduct extradition proceedings. That role, I have explained, has been interpreted by courts to mean that CPS only acts as the advocate or agent of the requesting state and not prosecution. The CPS presents to the court all the material the requesting state relies on in seeking the extradition of a fugitive.

[128] While the position in England and Wales on this question appears to be evolving, with courts at different stages appearing to have no single position on the question whether extradition proceedings are criminal or *sui generis* proceedings, the law in the United States of America is firmly settled; that extradition is *sui generis*, with unique rules of procedure. To begin with international extradition proceedings in the United States is regulated by Chapter 209, Paragraph 3181 of the U.S. Crimes and Criminal Procedure in addition to any treaty between the United States of America and another state. Secondly, the role of the committing court, which lends credence to the fact that extradition proceedings are *sui generis* was explained in the U.S. Supreme Court case of ***Collins v. Loisel***, 259 U.S. 309, 316 (1922) as follows;

***“As a matter of law, “[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, not whether the evidence is sufficient to justify a conviction.”***

[129] The successive decisions have remained on this course. See, for instance the ruling of the US Court of Appeals for the Second Circuit rendered in the ***United States v. Hecht***, 16 F.2d 955 (2d Cir. 1927), that:

***“Extradition proceedings are not in their nature criminal, even if the relator is a criminal; extradition is not punishment for crime, though such punishment may follow extradition.***

***Likewise, because of the status of extradition as a sui generis proceeding, the rules of evidence ordinarily used in criminal matters before US courts are also not applied in extradition matters.”***

According to Bassiouni, a leading authority on extradition law in his works ***International Extradition: United States Law and Practice*** 4 ed (Oceana Publications, New York 2002) at 66:

***“... extradition is deemed a sovereign act, its legal proceedings are deemed sui generis, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state.”***

See also ***Hooker v. Klein***, 573 F.2d 1360 (1978) and ***Jhirad v. Ferrandina***, 536 F.2d 478 (1976).

Nearer home in Namibia, the Supreme Court held in the case of ***S v. Koch***, (SA13/05) [2006] NASC 6 that:

***“Of importance now is the nature of an enquiry in terms of the Extradition Act. In this regard the parties were also ad idem that it is neither civil nor criminal in nature but that it is something sui generis which has to be dealt with by the dictates of its own provisions.***

...

***Although an enquiry for the extradition of a person strongly resembles a criminal trial it is neither that nor a civil matter. According to the cases it must be seen as sui generis. (See *Geuking v President of the Republic of South Africa and Others*, 2003 (1) SACR 404 (CC) at 416). The magistrate holding the enquiry is not called upon to find either guilt or innocence or to find what defences were or could be established on behalf of the person to be extradited. After the enquiry the magistrate must satisfy himself as to the requirements set out in sec 12(5) of the Act and if so satisfied he shall issue an order for the committal of such person to prison awaiting the decision of the Minister.”***

**[130]** The Philippines, Nigeria and South Africa are among several states that have treated extradition as *sui generis* proceedings. In the ***Government of The Unites States of America v. Hon. Guillermo Purganan*** [2002] PHSC 573, the Supreme Court of the Philippines expressed itself thus-

***“The process of extradition does not involve the determination of the guilt or innocence of an accused. His guilt or innocence will be adjudged in the court of the state where he will be extradited. An extradition proceeding is summary in nature while criminal proceedings involve a***

***full blown trial. Extradition is merely a measure of international judicial assistance through which a person charged with or convicted of a crime is restored to a jurisdiction with the best claim to try that person. The main aim of extradition proceedings in court is only to determine whether the extradition request complies with the Extradition Treaty and whether the person sought is extraditable.”***

[131] Extradition proceedings in Nigeria are similarly *sui generis* and strictly guided by the Extradition Act and Extradition Proceedings Rules. The requesting State and Nigeria’s Federal Ministry of Justice have the duty to ensure that certain extradition prerequisites are fulfilled. In ***George Udezor v. Federal Republic of Nigeria*** (2007) LCN/2249(CA) the Court of Appeal of Nigeria agreeing with the trial court, that the appellant was not standing trial before the trial court for the offence for which the extradition order was sought. Consequently, there was thus no legal requirement to follow full arraignment “rites” as in a criminal trial since what was before the trial court was a mere request for extradition, all the requirements for a valid arraignment in a criminal trial (or at least as near as possible) need not apply.

[132] Similarly, authorities emanating from South African courts too show that extradition has traditionally been treated as an aspect of international relations which placed the role of final determination of the proceedings on the Executive rather than on the judiciary or other role players in the criminal justice system, though an extradition enquiry is regarded as a judicial and not an administrative proceeding. The Constitutional Court in ***Minister of Justice v. Additional Magistrate, Cape Town***, 2001 2 SACR 49 (C) 61c.) explained why this is so. Going by the previous judicial pronouncements, the Court said;

***“[33] There can be no doubt that extradition proceedings are sui generis and that there are fundamental differences between extradition proceedings and criminal proceedings. It can therefore not be gainsaid that the DPP is not a party to extradition proceedings in the same way in which it participates in criminal proceedings. The role of the state representative in criminal proceedings is different to that in extradition proceedings...”***

**[133]** In arriving at this determination the court had in mind that the proceedings before the magistrate court are in the form of “an enquiry”, with a view to surrender the fugitive to the requesting foreign State. By section 17. (1) of their Extradition Act, the Attorney-General can delegate to any person including any public prosecutor the power to appear at any extradition enquiry held under the Act. It is on the basis of this authority that the DPP appears in extradition proceedings before South African courts. The role of the DPP in extradition proceedings are circumscribed; to present in evidence at the enquiry, any deposition, statement on oath or affirmation taken, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof.

**[134]** The magistrate’s role, in turn is to screen the material presented by the requesting state to determine whether or not there is sufficient evidence to warrant prosecution of the fugitive in the foreign state, with the decision to extradite him retained by the Executive branch of the requested state. See ***Geuking v. President of the Republic of South Africa and Others*** (CCT35/02) [2002] ZACC 29 and ***Tucker v. S*** (A437/17) [2018] ZAWCHC 24 confirming the position in South Africa that extradition proceedings are regarded as *sui generis* in nature.

**[135]** With that conclusion on the provision of Section 17 of the South African Extradition Act, and the foregoing analysis of comparative jurisprudence, it is

convenient at this stage to turn to the instant matter, and re-emphasize that, whether extradition is criminal or *sui generis* proceedings will depend on the construction of the laws of the requested country. Treaties may provide for the extradition of criminal fugitives between states concerned, but it is for municipal law that will determine whether the fugitive is to be surrendered in accordance with the extradition treaty.

**[136]** The Extradition Act is a short statute with only 13 substantive provisions. For the purpose of this appeal, I have identified the following Sections as being critical. To begin with, the key actor throughout the Act is the AG, mentioned 25 times. There is no reference whatsoever to the DPP. This can be explained by the symbiotic history of the two offices. Before the office of the DPP was delinked from the AG's office in 2011, it was the unit assigned by delegation of the AG's prosecutorial powers. Under Section 26 of the former Constitution the AG was, as he is under the present Constitution, the principal legal adviser to the Government of Kenya, with the power to institute and undertake criminal proceedings; take over and continue any criminal proceedings that have been instituted or undertaken by another person or authority; and to discontinue at any stage before judgment, any such criminal proceedings instituted or undertaken by himself or another person or authority.

**[137]** The powers of the AG could be exercised by himself in person or by officers subordinate to him acting in accordance with his general or special instructions. Officers subordinate to him were the Solicitor-General, the Deputy Public Prosecutor, the Assistant Deputy Public Prosecutor and all State Counsel. In addition, the AG, by the provisions of Section 85 of the Criminal Procedure Code, could appoint public prosecutors for Kenya or for any specified area thereof, and either generally for any specified case or class of cases. He could also appoint any advocate or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes

of any cases. All public prosecutors were subject to the express directions of the AG.

**[138]** When the request to extradite the 1<sup>st</sup> and 2<sup>nd</sup> respondents was received by the AG on 6<sup>th</sup> June, 2011, the ODPP had been created under the Constitution as an independent office. That office does not require the consent or act under the directions of any person or authority in the discharge of its functions. In January 2013 the ODPP Act was passed and commenced on 16<sup>th</sup> January, 2013. Therefore, when the question was raised as to which office between the AG and DPP was responsible for issuing “the authority to proceed” and a determination made by the extraditing court on 5<sup>th</sup> February, 2013, the office was in place. As a matter of fact, it is the creation of the office as a separate entity that prompted those arguments because Article 157 aforesaid and the ODPP Act, vested in the DPP all the functions previously exercised by the AG under Section 26 of the former Constitution as particularly set out in Paragraph 136 above; to institute and undertake criminal proceedings; to take over and continue any criminal proceedings; and to discontinue any criminal proceedings.

**[139]** Because at the heart of this dispute is the Extradition Act, it is to it that I now turn. And since the only issue revolves around the construction of Section 7 of the Act, it is apposite to set it out.

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

...

***(3) On receiving a request, the Attorney-General may issue an authority to proceed, unless it appears to him that a warrant of surrender in that case could not lawfully be made, or would not in fact be made, under this Act.***” [my emphasis]

[140] Section 7 is headed “Authority to proceed”. Extradition proceedings are commenced only upon the issuance of authority to proceed. For the umpteenth time, I repeat that the solitary question in the appeal is whether the written authority to proceed as highlighted above in the section ought to be issued by the AG in terms of the Act or whether, in view of the DPP’s present role under Article 157 of the Constitution, the authority to proceed can only be issued by the DPP. Approached differently, the issue appears to me to be whether extradition proceedings for which authority to proceed is the starting point, are criminal proceedings. If they are criminal proceedings then it must follow from the constitutional interpretation of Article 157, that the office with the exclusive authority and power to institute and undertake extradition proceedings should be that of the DPP. Whether or not the proceedings are criminal in character will as a consequence depend on the nature of the hearing.

[141] The High Court’s conclusion that the proceedings are criminal in character was based on the following factors. That the Preamble to the Extraction Act makes reference to “**two striking words**”, “accused” and “convicted”. According to the court, the words find their place in the criminal realm of the law. Secondly, the court was of the view that the chain of activities leading to extradition proceedings leaves no doubt that the proceedings can only be legitimately made before and by a court exercising criminal jurisdiction, “**a Court that has the jurisdiction to convict an accused person if proved, to the requisite standard, as having committed the offence with which he is charged**”. Thirdly, the next

phase after extradition proceedings are concluded will ordinarily lead to the fugitive being presented before a court of the requesting State. These, according to the court, entail consideration of criminal elements. Finally, by Section 9 (3) of the Extradition Act, for the purposes of extradition proceedings, the court exercises **“the jurisdiction and powers, as nearly as may be, as it has in a trial”**. The court interpreted this to be in reference to criminal proceedings within which a trial is conducted.

[142] Beginning with this last proposition, the **‘as nearly as may be’** qualification is significant. It is reflective of the fact that extradition hearings are related to criminal matters, yet apart from them. This is another way of saying that the proceedings are not in fact criminal. If they were, then why emphasize its closeness to a trial in the subordinate court. The phrase is restricted to the provisions of Section 9 only. Section 9 deals with matters such as presenting a person arrested before the court as soon as practicable; transfer of the proceedings by a magistrate who has no power to exercise jurisdiction under the Act to one who has jurisdiction; remanding or admitting an arrested person to bail; after being satisfied that the offence to which the authority to proceed relates is an extradition offence, and that the evidence presented by the requesting State would be sufficient to warrant his trial for that offence if it had been committed in Kenya, the court will commit the person arrested to custody to await his surrender, or discharge him if the court is not so satisfied. It is in respect only of the above matters that the court is expected to exercise the like jurisdiction and powers, as nearly as may be, as it would in a trial.

[143] It is my view that the person in extradition proceedings and in respect of whom extradition is sought has not been charged with an offence under any penal laws of Kenya; there is no complaint, or trial in the criminal procedure sense. Extradition proceedings are summary in character while criminal proceedings involve a full-blown trial, with witnesses and exhibits. The Criminal Procedure

Code is a statute that provides for the procedure to be followed in criminal cases. It recognizes that trials can be for offences under the Penal Code and under other laws; and that offences under the Penal Code will be inquired into, tried and otherwise dealt with according to the Code; and that offences under other laws will be tried by the court mentioned in those laws. Apart from the single reference to the word “extradited” in Section 29 in respect of instances where a police officer can arrest without warrant on suspicion of having committed an extraditable offence under the Extradition (Contiguous and Foreign Countries) Act or the Extradition (Commonwealth Countries) Act, the Criminal Procedure Code does not provide for the procedure of initiating and conducting extradition proceedings.

**[144]** The rules of criminal procedure are, in a sense, apart from those of extradition. The elaborate extradition-specific procedure contained in Part 11 of the Extradition Act are the applicable rules. The existence of a separate body of extradition-specific legislative and procedure apart from strict rules of criminal procedure is significant in proving the designation of extradition proceedings as *sui generis*. The hearing under the Extradition Act does not take the form envisaged in the Criminal Procedure Code. Part VI is specific to trials before the magistrate’s court where the process starts with the making of a complaint under Section 89; the proceedings do not entail the determination of a criminal charge and no charges are framed like in Section 137 of the Criminal Procedure Code; instead, the basis of the proceedings is an authority to proceed; the fugitive in extradition proceedings is not called upon to plead guilty or not guilty like in a criminal trial; extradition proceedings do not take the form of a prosecution case and defence case as extradition hearings do not lead to or follow a criminal prosecution. In terms of the quantum of evidence to be satisfied, the “beyond any reasonable doubt” standard remains the foundation of due process in criminal cases in this country. That, however is not the standard expected in extradition cases. Though the Extradition Act is silent on the standard of proof, Section 5 (4) of the London Scheme for Extradition provides that:

***“Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if –***

***a. such evidence is produced as establishes a prima facie case that the person committed the offence; ...” [my emphasis]***

This is the standard generally adopted in most of extradition cases. It was followed in Nigeria, in the case of ***Attorney General of The Federation v. Dion Kendrick Lee***, FHC/L/465C/2011 where the court held that:

***“Where the fugitive is wanted for trial, the Court shall ensure that there is a prima facie case made out by the requesting State.”***

[145] The role of the extraditing court is to determine whether there is sufficient evidence (read *prima facie*) to warrant the return of the fugitive to the requesting country. To arrive at its decision, the court is expected to satisfy itself that there is an overseas warrant issued by the requesting country in the case of a fugitive accused of an extradition offence; or to be satisfied that there is a valid certificate of conviction and sentence in the requesting country of a fugitive unlawfully at large after being convicted of an extradition offence in the requesting country. Above all, the court must equally be satisfied that the person named in the request is the same individual who is before it; and that the acts contained in the request constitute an extraditable offence in terms of Section 4 and falls within the description in the Schedule to the Act.

[146] For these reasons, an extradition hearing is not a plenary proceeding seeking to establish the guilt or innocence of the accused fugitive, and because of

this wide latitude is given to the subordinate court with regard to the production and admissibility of evidence. The rules of evidence in criminal trials do not apply, as the court is permitted to admit evidence in the form of affidavits, depositions or other pertinent documents, subject only to a requirement of authentication. The requesting country need not produce witnesses to prove the case for which the fugitive will stand trial, but should witnesses be required they can only testify in regard to matters that will assist the court to determine whether or not to remand the fugitive pending extradition but not as to his guilt or innocence.

[147] According to Section 16 of the Extradition Act, in any proceedings under the Act, including proceedings on an application for *habeas corpus*—

- “(a) a document, duly authenticated, that purports to be an overseas warrant shall be admissible in evidence;***
- (b) a document, duly authenticated, which purports to set out evidence given on oath in a designated Commonwealth country shall be admissible as evidence of the matters stated in it;***
- (c) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document received in evidence, in proceedings in a designated Commonwealth country shall be admissible in evidence;***
- (d) a document, duly authenticated, which certifies that a person was convicted on a specified date of an offence under the law of a designated Commonwealth country shall be admissible as evidence of the fact and date of the conviction.”***

The authentication of any document for purposes of evidence in extradition proceedings is either by the oath of a witness or by the official seal of a Minister, Secretary or other officer administering a department of the Government of the country concerned. It is the authenticated documents that form part of the evidence anticipated in extradition proceedings.

**[148]** It must follow by the same token that the fugitive equally has a right to present evidence in rebuttal of the evidence presented against him by, for instance, demonstrating that he is not the actual person sought by the requesting country, or that he served the sentence in question. What both sides, the fugitive and the State, cannot do, however, is to present inculpatory or exculpatory evidence since such evidence would have no bearing on the issue before the extraditing court, which is only concerned with the surrender to another country of a person accused or convicted of any offence in that country. Evidence tending to inculcate or exculpate the fugitive would have the effect of transforming purely extradition proceedings into a trial on the merits, as to the culpability or innocence of the fugitive which remains the domain of the requesting country. In other words, extradition proceedings are not to be converted into a dress rehearsal trial.

**[149]** Where the court has received an authority to proceed in respect of a fugitive arrested, and it is satisfied, after hearing any evidence tendered in support of the request for the surrender, that the offence to which the authority to proceed relates is an extradition offence, and if it is further satisfied that the evidence would be sufficient to warrant his trial for that offence if it had been committed in Kenya; or where the fugitive is alleged to have escaped after his conviction, that he has indeed been so convicted and escaped before sentence, and after receiving evidence on behalf of the fugitive, the court under Section 9(5) of the Extradition Act will commit the fugitive to custody to await his surrender, but if the court is not so

satisfied, or if the committal is prohibited, the court will discharge him from custody.

**[150]** Though the Extradition Act does not specifically provide how the evidence envisaged in Sections 9(5) and 16 is to be presented, I hold the view that it cannot be presented like evidence in a criminal trial, as explained in Paragraph 144 above, to justify the participation of the DPP. The AG is, by Article 156 of the Constitution the principal legal adviser to the Government. This position allows him to perform any functions conferred on him by an Act of Parliament; to represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party; and to promote, protect and uphold the rule of law and defend the public interest. The AG may also perform such other functions as may be assigned by the President. See Article 156 (4) to (6) of the Constitution.

**[151]** In addition, Section 5(1) of the Office of the Attorney-General Act delineates the AG's functions in the following manner:

**“5**

***1) In addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for—***

***(a) ...***

***(b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;***

**(c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies.** [my emphasis]

Bearing in mind my views expressed in Paragraph 132 above, that extradition proceedings are a product of international agreements between states which govern international relations, such proceedings fall within the scope of the national executive authority. International extradition is both a legal and political phenomenon, involving criminal law and political considerations.

[152] It must be emphasized that the President as head of the Executive branch of Government represents the interest of the people of Kenya in the global arena, as mandated in Article 132 that;

***“132. (5) The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries.”***

In that regard the President is required to submit a report to the National Assembly on the progress made in fulfilling the international obligations of the Republic. See Article 132 of the Constitution.

[153] The AG besides being the principal legal adviser to the Government, is a member of the Cabinet by dint of Article 152 (1) of the Constitution. As the Government's principal legal adviser, the AG's other functions include representing the Government in court in civil and other proceedings, except criminal proceedings. In the former capacity the AG is responsible for presentation to the court, on behalf of the Executive branch of Government, of “the authority to proceed”, and all the evidence the foreign country is relying on in the extradition proceedings. I reiterate that, given the nature of extradition proceedings, the

evidence envisaged is in the form of authenticated affidavits, depositions or other relevant documents. This process is neither civil nor criminal, at the end of which it is the ultimate responsibility and complete discretion of the AG pursuant to Section 11 of the Act, to issue a warrant which is an order directing the fugitive to be surrendered to the requesting country. In discharging this mandate, the AG may take into account factors such as competing requests from different countries, humanitarian considerations, or public policy with respect to Kenya's international relations. It is the Executive (read the AG) that ultimately and independently decides whether to deliver the fugitive to the requesting government.

[154] This decision is not made until all judicial proceedings are completed. It demonstrates the AG's broad discretion to deny extradition based upon the Executive's view of the facts and interpretation of the treaty. It is apparent from the Act that the AG generally conducts a *de novo* examination of the request and court proceedings; that he is not bound by the judicial record; and that he may consider other factors before making the final decision. For example, under Section 11 (3) the AG may not issue a warrant of surrender if it appears to him that it would be unjust or oppressive to surrender the fugitive concerned. He may also decide not to issue a warrant of surrender if the fugitive is accused or convicted of an extradition offence not punishable with death in Kenya, and could be or has been sentenced to death for that offence in the requesting country; or if another country, besides the country in consequence of whose request the fugitive was committed, has also made a request for his surrender under the Extradition Act or under the Extradition (Contiguous and Foreign Countries) Act. In his context the AG will have regard to all the circumstances of the case and in particular—

***“(i) the relative seriousness of the offences in question;  
and***

***(ii) the date on which each such request, requisition or application was made; and***

***(iii) the nationality or citizenship of the fugitive and his ordinary residence”***

[155] Again, where the AG is of the opinion that it would be dangerous to the life or prejudicial to the health of a fugitive to surrender him, he may, *in lieu* of surrendering him, order that he be held in custody at a place until such time as he can, without such danger or prejudice be surrendered. Further, a fugitive will not be surrendered if the AG is of the opinion that the request is politically motivated. See **Section 11(3)(4) and (5) of the Extradition Act.**

[156] At the conclusion of extradition proceedings, no judgment on the guilt or innocence of the fugitive is entered. Instead, the court can either commit the fugitive to custody to await his surrender, or discharge him from custody. A close reading of Extradition Act, appears to me to suggest that the decision of the extraditing court is final and is not subject to direct appeal to the High Court as is the case in criminal proceedings. This is in contrast with the Extradition (Contiguous and Foreign Countries) Act which under Section 21 (1) explicitly declares that **“the Chief Justice may make rules of court for appeals to the High Court under this Act”**. Although there is authority for stating that the requesting country may, if aggrieved, file its request afresh before a different court, I believe this course is questionable. My plain reading of the Act, a magistrate's decision in extradition may ultimately terminate the proceedings with no chance for appeal or review. Similarly, the accused fugitive appears to be precluded from taking a direct appeal, if dissatisfied with the extraditing magistrate's decision. But he may seek collateral relief under section 10 by applying to the High Court for *habeas corpus*. The only other instance where the High Court would intervene is where under Section 12, the High Court may discharge a fugitive who has been

committed to await his surrender but is not so surrendered within 2 months, or quash the warrant in a case where a warrant of surrender has been issued, and no action taken within 1 month. See **Section 12(1) (a) and (b) of the Extradition Act.**

[157] So that looking at the entire Extradition Act, with Section 7(1) as the axis, the obligation to issue authority to proceed is placed on the AG, as the designated channel so is the duty to present to the extraditing court the evidence in the form of affidavits and other depositions. It is the AG who is responsible for the designation of commonwealth countries subject to the Act.

[158] Like the Court of Appeal, I find no justification to place reliance on Section 7(1) of the Sixth Schedule of the Constitution, because it was never the case that the Constitution has assigned the responsibility in matters of extradition to the DPP which responsibilities were vested previously to the AG. I have explained the role of the Executive in international relations and some of the functions of the AG under the Constitution that are in tandem with the intention of the people of the Kenya to delineate these functions to the AG. Under the Constitution, the DPP is an independent office holder. He does not require the consent of any person or authority to institute criminal proceedings and further, in the exercise of his or her powers or functions, he does not do so under the direction or control of any person or authority. See **Article 157(10) of the Constitution.** If the DPP's arguments are to be upheld and considering the overarching functions of the AG under the Act, the former would be taking instructions from him, contrary to the Constitution.

[159] I have gone to this length, up to this stage to illustrate that the process is far from a criminal trial. Under normal circumstances the finality of judicial decisions cannot be changed by Executive fiat, as shown in the preceding paragraphs. The extraditing court may find a fugitive extraditable but the ultimate decision to

extradite him lies in the hands of the Executive. Contrary to the view held by the High Court in support of the position that the proceedings are criminal, extradition hearings do not determine a criminal charge and the words “accused and convicted” in the Preamble are only in reference to proceedings in the requesting state and not extradition proceedings before the extraditing court. They are designed to facilitate a criminal prosecution or the imposition of a sentence following a criminal conviction in a third country.

[160] As I return to the main issue, it should be obvious, from the foregoing analysis that the view I hold is that “the authority to proceed” issued by the DPP was irregular. Section 7 of the Extradition Act is expressed in clear terms that extradition process commences, is conducted before the court and finally determined by the AG, with no conflict of interest whatsoever, in my opinion. The extraditing court and the High Court have their respective special powers under the Act separate from those exercised by the AG. Of course, the High Court can review the ultimate decision of the AG. It bears repeating here that, the fact that the AG had at the time forwarded the request in question to the Department of Public Prosecutions which later became the ODPP did not and could not vest in the ODPP powers expressly donated to the AG. That could only happen through legislative action of amendment.

[161] As a matter of fact, attempts to formally relocate extradition functions to the DPP from the AG did not yield that desire. First of all, the published ODDP Bill contained Part III headed “**Cooperation with other Law Enforcement Agencies**”, under which clauses 33 and 34 proposed that;

**“33.**

- 1. All extradition proceedings instituted under this Act or any other law in force immediately before or after**

**the coming into effect of this Act shall, for all intents and purpose be deemed to be criminal proceedings.**

**2. Pursuant to the provisions of Article 157 (6) (a) of the Constitution it is the function of the Office to take steps to secure the extradition of any person required to answer to a charge or an offence, or to serve a sentence imposed, in Kenya or in any other requesting state in accordance with the law.**

**34.**

**1. The Office may provide mutual legal assistance in respect of a corresponding function of a corresponding law enforcement agency of other governments subject to the law applicable in Kenya.” [my emphasis]**

[162] These two clauses are significant as they provide the clearest intention of Parliament in so far as the office responsible for extradition matters are concerned. By stating in Clause 33(1) that all extradition proceedings that may be instituted under the ODPP Act, once passed or any other law in force before it or enacted after it are to be deemed to be criminal proceedings, is a confirmation that extradition has not always been treated as criminal proceedings.

Secondly, it is instructive for now to note that both Clauses 33 and 34 in their entirety were deleted from the Bill through amendment at the Committee of the whole House stage on 3<sup>rd</sup> January, 2013 and the amendment approved by the whole House and the Bill enacted into law. The relevant excerpts of the Hansard proceedings of that date clearly show the deliberate intention of the framers to retain the AG at the helm of extradition matters.

***“.....Ekwee David Ethuro (The Temporary Deputy Chairman)***

***Order, hon. Members! We will move on to the next item which is The Office of The Director of Public Prosecutions Bill, Bill No.69 of 2012. THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS BILL***

...

***Githu Muigai (The Attorney-General)***

***Mr. Temporary Deputy Chairman, Sir, I beg to move:- THAT, the Bill be amended by deleting Clause 33.***

...

***Githu Muigai (The Attorney-General)***

***Mr. Temporary Deputy Chairman, Sir, I beg to move:- THAT, the Bill be amended by deleting Clause 34.***

...

***Ekwee David Ethuro***

***Madam Temporary Deputy Speaker, I beg to report that a Committee of the whole House has considered The Office of the Director of Public Prosecutions Bill (Bill No.69 of 2012) and approved the same with amendments.***

***Githu Muigai (The Attorney-General)***

***Madam Temporary Deputy Speaker, I beg to move that the House does agree with the Committee in the said Report.***

***The Minister for Finance***

***(Mr. Githae) seconded.***

***(Question proposed) (Question put and agreed to)***

***Githu Muigai (The Attorney-General)***

***Madam Temporary Deputy Speaker, I beg to move that The Office of the Director of Public Prosecutions Bill (Bill No.69 of 2012) be now read the Third Time.***

***The Minister for Transport***

***(Mr. Kimunya) seconded.***

***(Question proposed) (Question put and agreed to) (The Bill was accordingly read the Third Time and passed)”.***

With that the attempt to transfer extradition functions to the DPP which was intended to be achieved by the introduction of Clauses 33 and 34 came a cropper. Obviously, Parliament though aware of the creation by the Constitution of the ODPP and its mandate in all criminal matters was satisfied with and deliberately retained the *status quo* in the AG's Chambers.

**[163]** Further to this initiative, it is to be noted that the Extradition Act has been subjected to three (3) amendment in 2010, 2012 and 2017, each time retaining Section 7 intact and without assigning the role of issuing authority to proceed under that section to the DPP. If indeed Parliament had been desirous of relocating those functions to the DPP, nothing would have been easier than to expressly do so in all these amendments subsequent to the creation of the ODPP.

**[164]** Looking at the language of the Extradition Act, the subsequent amendments to the Act and the enactment of the ODPP Act I cannot discern any intention to redistribute functions between the DPP and the AG in so far as extradition process is concerned.

[165] The object of interpretation of a statute or indeed any document is to determine the intention of the legislature or the parties. That intention must be determined by reference to the precise words used, their context, and, where identifiable, their aim and purpose. See the Supreme Court of India in **Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others** [1987] 1 SCC 424. This Court in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others**, SC Petition No. 26 of 2014; [2014] eKLR, explained this principle by observing that;

***“In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation”.*** [my emphasis]

The Court, for these reasons agreed that the object of the Court in interpreting legislation is to give effect, so far as the language permits, to the intention of the legislature. That intention can be discovered by adopting a purposive approach in the construction of the law, which will include examination of the records of Parliament, the Hansards.

[166] What I have attempted to achieve by setting out the debate in Parliament during the enactment of the ODPP Act and the three subsequent amendments to the Extradition Act, is to interrogate and understand the legislative intent. To borrow the perfect diction of the Indian Supreme Court in **Reserve Bank of India v. Peerless General Finance** (*supra*);

*“A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”*

The legislative intent in the scheme of all these, I am persuaded was to retain the entire extradition process in the AG’s domain, in the Executive arm of Government.

[167] If any further justification for this conclusion is required, the **Extradition (Contiguous and Foreign Countries) Act** is one of the answers. Under this Act, it is the Minister that has the authority to proceed with a requisition for surrender. It is the Minister and not the DPP who, by order under his hand, signify to a magistrate that a requisition has been made and require the magistrate to issue the warrant for the arrest and detention of the fugitive criminal.

[168] The other answer is the **Mutual Legal Assistance Act, 2011** whose scope is limited to requests for legal assistance from any requesting state or international

entity to which Kenya is obligated on the basis of a legal assistance agreement and to regulate the rendering of legal assistance to any requesting state, unless otherwise regulated by agreement. There are two main bodies established under the Act. Section 5 creates the **Central Authority**. The office of the Attorney-General is designated as the Central Authority, with far-ranging functions. It is interesting to note that Section 6(2) defines legal assistance to mean mutual legal assistance in criminal matters. The second body is the **Competent Authority** defined by Section 2 to mean;

***“the Attorney-General of the Republic of Kenya, any criminal investigation agency established by law, or any other person designated as such by the Attorney-General by notice in the Gazette.”***

[169] A request for legal assistance from Kenya can only be made by the Competent Authority. But the request may be initiated by any law enforcement agency, or prosecution or judicial authority. Apart from this role, which is limited to initiating a request with the ultimate decision to make the request remaining with the Competent Authority, the DPP has no other role.

[170] The only other observation to make in this regard is that this Act is not concerned with issues of arrest, detention or extradition, but with mutual legal assistance to be given and received by Kenya **“in investigations, prosecutions and judicial proceedings in relation to criminal matters”**.

[171] Under the **International Crimes Act** requests for assistance are transmitted to the **Attorney General or the Minister** responsible for foreign affairs. See Section 21.

[172] Part IIIA- Reciprocal Protection Arrangements with Foreign Countries of the **Witness Protection Act**, grants the Director of the Agency **in consultation**

**with the Attorney-General** the power to admit witnesses from foreign countries on reciprocal basis.

[173] Heavy weather was made of the definition of the word “prosecution” under Section 2 of the ODPP Act to include extradition, as the basis of the DPP’s mandate to initiate and process extradition cases. It is common ground that other than the definition of the word “prosecution” to include “extradition proceedings”, the word extradition or phrase extradition proceedings is not used anywhere else in the statute. The legislature is presumed to act intentionally and purposely. In this case, the missing link can only be explained by the history of law-making as set out earlier, where Clauses 33 and 34 of the ODPP Bill were deleted. The definition which appears to have been retained, I believe by omission, in the statute cannot *per se* convert extradition proceedings to criminal prosecution proceedings, and place it within the sphere of the DPP’s functions.

#### **E. CONCLUSION**

[174] It is reasonable to conclude that whilst extradition hearings resemble criminal proceedings they are apart from them. They are accurately described as *sui generis* because they are unlike any other type of judicial proceeding. They are neither accusatorial nor civil law inquisitorial, nor even an amalgam of both. They do not have the characteristics of a criminal trial. They are also clearly not orthodox civil proceedings. For this reason, there cannot be any justification for the involvement of the DPP whose docket is purely prosecution of crimes within Kenya. Yet extradition is concerned with whether or not the person whose extradition is sought may be extradited in accordance with the provisions of the extradition treaty, international law and municipal law. It is not a criminal proceeding. Even if the potential extraditee is a criminal fugitive, an extradition proceeding is not by its nature and character criminal, for it is not punishment for a crime, even though such punishment may follow extradition. Its object is to

prevent the escape of a person accused or convicted of a crime and to secure his return to the state from which he fled, for the purpose of trial or punishment.

**[175]** To finally answer the narrow question in this appeal, like the Court of Appeal, I hold the view that “the authority to proceed” issued on 6<sup>th</sup> July, 2011 by the DPP was irregular. He has no such powers or even to institute and process extradition proceedings under the Extradition (Commonwealth Countries) Act. I would, for all the reasons stated, have affirmed the decision of the Court of Appeal and dismissed this appeal.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of July, 2022.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

.....  
**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**