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REPUBLIC OF KENYA
THE JUDICIARY

SUPREME COURT OF KENYA
PRAXIDIS NAMONI SAISI & 7 OTHERS VERSUS DPP & 2 OTHERS
S.C. PET. NO 39 & 40 OF 2019
DATE OF JUDGMENT: 27TH JANUARY 2023
MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The Petitions of Appeal being Petition 39 of 2019 filed on 25th October 2019 and Petition 40 of 2019 filed on 29th October 2019 are dismissed with each party bearing its own costs. *Anti-Corruption Case No. 20 of 2015* before the Chief Magistrates' Court in Milimani to proceed and be heard on priority basis.

BACKGROUND

The Appellants filed appeals against the Court of Appeal decision that set aside the High Court decisions barring the DPP from prosecuting Anti-Corruption Case No. 20 of 2015 completely against the 1st Appellant and as far as it related to the 2nd to 8th Appellants in Count I on wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The Appellants also challenged the Court of Appeal's finding that the function of the High Court sitting in judicial review proceedings is not to consider the merits of the decision by a public body but rather to undertake a consideration of how the decision was made. The Court delineated the following issues for determination:

- i) Whether the character and scope of judicial review has evolved/changed post Constitution 2010? And if so, in what way?*
- ii) Whether the Court of appeal erred in holding that the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP as set out in the Constitution*
- iii) Whether the DPP violated the Appellants' rights and fundamental freedoms under Articles 10, 25(c), 27, 28, 29, 41 and 50 of the Constitution in preferring the charges contested by the Appellant?*
- iv) Who shall bear the costs of the Appeal?*

Issue 1: The Court found that, though the legal system has moved away from common law to codification in the Constitution and the Fair Administrative Actions Act, the main focus of judicial review is to examine the way in which a decision was made, rather than the decision itself. This is reinforced by the fact that while a court may consider some aspects of the decision's merit during a judicial review, it cannot make a decision on its own merit but must send it back to the original decision-making body or office for further review.

Issue 2: The Court agrees with the Court of Appeal's determination that the best way to determine whether the Appellants broke procurement laws and whether they participated in the tender process is through hearing testimony, cross-examination of witnesses and analysis of the evidence. Therefore, the Court concludes that the Court of Appeal did not make a mistake in stating that the High Court went beyond its authority by interrupting the DPP's mandate as outlined in the Constitution.

Issue 3: The Court finds that the DPP did not violate the Appellants’ rights and fundamental freedoms under Articles 10, 25(c), 27, 28, 29, 41 and 50 of the Constitution in preferring the charges contested by the Appellant. The trial Court is competent to resolve constitutional violations when challenged by an accused person, properly, during the trial

Issue 4: Each party to bear their own costs.

