REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: *Koome, CJ & P; Wanjala, Njoki Ndungu, Lenaola, Ouko, SCJJ.*)

PETITION NO. E045 OF 2024

-BETWEEN-

BENSON KHWATENGE WAFULA ..... APPELLANT

-AND-

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

-AND-

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST INTERESTED PARTY

THE BUNGOMA CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT.....2ND INTERESTED PARTY

ATTORNEY GENERAL.....3RD INTERESTED PARTY

(Being an appeal from the Judgment of the Court of Appeal at Nairobi (S. Gatembu Kairu, F. Tuiyott, & G. W. Ngenye- Macharia, JJ.A) delivered in Civil Appeal No. 264 of 2018 delivered on 22nd November, 2024)

Representation

Mr. Cyprian Wekesa & Mr. Edmund Wesonga for the Appellant

(*Wekesa & Simiyu Advocates*)

Ms. Fredah Mwanza & Ms. Angela Fuchaka for the Respondent

(*Office of the Director of Public Prosecution*)

Ms. Rosslyne Murugi & Ms Regina Jemutai for the 1st Interested Party

(*Rosslyne Murugi, Advocate, EACC*)

Mr. Stephen Terrell for the 2nd & 3rd Interested Parties

(*The Hon. Attorney General Chambers*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appeal dated 20th December 2024 was filed on 23rd December 2024 pursuant to Article 163(4)(a) of the Constitution. The appeal challenges the Court of Appeal's decision, which affirmed the High Court's decision. More particularly, the appellant challenges the respondent's decision to transpose him from a prosecution witness to an accused person in Anti-Corruption Case No. 1 of 2017, ***Republic Vs Godfrey Sifuna Wanyonyi & 7 others*** before the Chief Magistrates' Court in Bungoma.

B. FACTUAL BACKGROUND

[2] The appellant is an advocate of the High Court and was at all material times, the Company Secretary of Nzoia Sugar Company Limited (the company) and also one of the company's Integrity Assurance Officers (IAO) for the Ethics and Anti-Corruption Commission, the 1st interested party, since 2005. On 23rd April 2010, the appellant, in his capacity as the Company Secretary, was nominated to be one of the joint category "C" bank signatories to the company's bank accounts, limited for cheques of amounts below Kenya Shillings one million (Kshs. 1,000,000/-), and related to replenishing the company's petty cash, which facilitated company operations.

[3] Following complaints of misappropriation of funds by some of its employees, the 1st interested party undertook investigations into the alleged fraudulent use of the company's funds, amounting to Kshs. 11,212,711/-. The appellant recorded a statement with the 1st interested party on 15th June 2016, and initial investigations revealed that *Godfrey Sifuna Wanyoni,* together with *John Wanyonyi Simiyu, Kenneth Onyango Amwango, Ben Sitati Wakhungu, Robert Vincent Juma, Kenneth Wafula Wanjala,* and *Juliet Nuna Nganga* were suspects in the alleged fraud and would therefore be charged with various offences under the Anti-Corruption and Economic Crimes Act (Cap. 65, Laws of Kenya) (ACECA). The 1st interested party thereafter forwarded its investigation file with recommendations

to the respondent, who proceeded to charge the seven with various offences in Bungoma Chief Magistrate's Anti-Corruption Case No. 1 of 2017, ***Republic Vs Godfrey Sifuna Wanyonyi & 6 Others***. The appellant was at the time listed as a prosecution witness, his statement was shared with the accused persons at the time, and he was bonded severally to attend court.

[4] However, on 10th January 2018, while in his office, the appellant was arrested by officers attached to the 1st interested party. He was subsequently arraigned in court on 17th January 2018 in Bungoma Chief Magistrate's Anti-Corruption Case No. 1 of 2017, ***Republic Vs Godfrey Sifuna Wanyonyi & 6 Others*** where he was charged with the offence of wilful failure to comply with the law relating to management of public funds contrary to Section 48(1) of ACECA. The particulars of the offence were that, on diverse dates between 4th June 2014 and 26th March 2015, in Nzoia Sugar Company Limited, and being a person concerned with the management of public property, he wilfully failed to comply with the applicable law relating to management of public funds *to wit* Section 79(2)(b) of the Public Finance Management Act, (Cap 412A, Laws of Kenya) (PFM Act) by authorizing payments for fictitious claims from bank account number 01001054695600 in the name of Nzoia Sugar Company Limited held at National Bank of Kenya, Bungoma Branch thereby leading to a loss of public funds totalling a sum of Kshs. 7,793,366/-. Arising from the said charges, the appellant was suspended from his employment for 24 months pending the conclusion of the criminal trial culminating in the present appeal.

C. LITIGATION HISTORY

i. Proceedings in the Anti-Corruption & Economic Crimes Division of the High Court sitting at Nairobi

[5] Aggrieved by the decision of the respondent to transpose him from a prosecution witness to an accused person, the appellant filed **Miscellaneous Application No. 4 of 2018** dated 13th February 2018 in the Anti-Corruption and

Economic Crimes Division of the High Court sitting at Nairobi seeking orders that pending the hearing and determination of the Judicial Review proceedings, the court be pleased to issue an order of stay restraining his prosecution in Bungoma Chief Magistrate's Anti-Corruption Case No. 1 of 2017 ***Republic Vs Godfrey Sifuna Wanyonyi & 7 Others***, and further lifting his suspension from his employment arising therefrom; the court be pleased to issue an order of *certiorari* to bring into the court and quash, the decision of the 1st interested party recommending to the Office of Director of Public Prosecution (ODPP) that the appellant be charged with an anti-corruption offence; and the decision of the ODPP dated 11th December 2017 to charge him, and as manifested in the consolidated charge sheet in Anti-Corruption Case No. 1 of 2017 ***Republic Vs Godfrey Sifuna Wanyonyi & 7 others***, currently pending before the Chief Magistrate's Anti-Corruption Court in Bungoma.

[6] The appellant also sought an order of *prohibition* directed at the ODPP and the Bungoma Anti-Corruption Court aforesaid, prohibiting them from prosecuting, sustaining, proceeding with, hearing, conducting, or in any manner dealing with or completing the trial in Anti-Corruption Case No. 1 of 2017 ***Republic Vs Godfrey Sifuna Wanyonyi & 7 others***, insofar as it relates to Count XII and the appellant; and, instituting or commencing any other criminal proceedings against him concerning the alleged loss of public funds amounting to Kshs. 7,793,366/-.

[7] In reply, the ODPP argued that the decision to prosecute was based on a report from the 1st interested party under Section 35 ACECA and Section 11(1)(d) of the EACC Act. It maintained that the issues raised by the appellant concerned the sufficiency of evidence, which falls within the jurisdiction of the trial court, not the High Court or any other superior court exercising judicial review or other constitutional jurisdiction. The ODPP further asserted that its prosecutorial mandate under Article 157 of the Constitution could not be interfered with by the

courts without any reason grounded in the Constitution. Additionally, it was not demonstrated that it acted unreasonably or violated the appellant's constitutional rights to justify judicial intervention.

[8] The 1st interested party, on the other hand, contended that, following complaints of misappropriation of public funds by some employees of the company, investigations were carried out and a report and recommendations forwarded to the ODPP. Further investigations were conducted with respect to some cheques and the company's Bank Account No. 01001054695600 held at National Bank of Kenya, Bungoma Branch. These findings were also submitted to the ODPP, who approved prosecution of the appellant for mismanagement of funds. The 1st interested party further argued that the judicial review orders sought could not be granted without seeking leave before the filing of the application. Furthermore, no violations of rights had been cited by the appellant. On the suspension of the appellant from employment, the 1st interested party maintained that the same was lawful under Section 62 of ACECA. It also asserted that there was no law against transposing one from a prosecution witness to a suspect, particularly in the face of new evidence that had been discovered by the investigating officer acting lawfully under Section 23(3) and (4) of ACECA as well as Section 118 of the Criminal Procedure Code (Cap 75, Laws of Kenya) (the CPC).

[9] The High Court *(Ongudi, J)* in a judgment delivered on 24th May, 2018 held that, despite procedural flaws, such as the appellant alternating between naming his proceedings a constitutional petition and a judicial review application, and failing to seek leave under Order 53 of the Civil Procedure Rules, the matter would be treated as a constitutional petition and determined on its merits in the interests of justice.

[10] On the *insufficiency of evidence,* the court determined that, while the appellant had all along been treated as a prosecution witness, the investigating officer in his replying affidavit explained how he later obtained evidence

incriminating the appellant in the offence that he was later charged with. Search warrants were also lawfully obtained from the magistrate's court under Section 23(3) and (4) of ACECA, Section 180 of the Evidence Act (Cap 80, Laws of Kenya), and Section 118 of the CPC. The learned Judge emphasized that such warrants are typically obtained *ex parte*, and that the appellant had failed to prove any malice or bias on the part of the investigating officer or even the ODPP. She, in addition, concluded that questions around the sufficiency or otherwise of evidence were in any event, best left to the trial court.

[11] On the alleged *defective charge*, the court held that the appellant had not shown the inability of the trial court to deal with the issue. As for his *suspension*, the court affirmed that it was lawful under Section 62 of ACECA, noting that the suspension was not permanent and any employment-related issues would be addressed after the conclusion of the criminal proceedings. Regarding the *stay of proceedings before the Bungoma Chief Magistrate's Court*, the court found no basis to stay the proceedings, the matter having already been fixed for hearing. In the end, the court found no merit in the petition before it and dismissed it with costs.

ii. Proceedings in the Court of Appeal

[12] Aggrieved by the decision of the High Court, the appellant moved the Court of Appeal vide ***Civil Appeal No. 264 of 2018,*** premised on 15 grounds which can be summarized as follows:

i. *The learned Judge failed to evaluate the bona fides of the alleged further investigations and evidence that resulted in transposing him from a prosecution witness to an accused person;*
ii. *The learned Judge failed to appreciate that there was no basis for charging him with the alleged offence, which was an abuse of the process of the court;*
iii. *That he would not have a fair hearing before the Magistrate's Court; and*

iv. *That the learned Judge failed to appreciate that it is unconstitutional, oppressive, and an abuse of the court process to charge the appellant with a non-existent offence.*

[13] The appellant therefore sought orders THAT:

i. *The appeal to be allowed;*
ii. *The judgment, orders, and decree of the Honourable Lady Justice Hedwig I. Ong'udi of 24th May 2018 be and are hereby set aside and in place therefore substituted with:*
    a. *an order of Certiorari to remove and bring to this Honourable Court, for the purpose of quashing, the decision of the 1st interested party to recommend to the respondent that the ex parte applicant be charged with the anti-corruption offence and the decision of the respondent to direct prosecution of the ex parte applicant Benson Khwatenge Wafula via the office of the Director of Public Prosecution's letter dated 11th December 2017 in the consolidated charge sheet in Anti-Corruption Case No. 1 of 2017,* ***Republic Vs Godfrey Sifuna Wanyonyi & 7 Others*** *before the Chief Magistrate's Anti-Corruption Court in Bungoma.*
    b. *an order of Prohibition prohibiting the respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in Anti- Corruption Case No. 1 of 2017, between* ***Republic Vs Godfrey Sifuna Wanyonyi & 7 others before the Chief Magistrate's Court in Bungoma*** *so far much as they touch or relate or however concern the 8th accused (the ex parte applicant herein) Benson Khwatenge Wafula in Count XII or in instituting any other charges in any other court against the ex*

parte applicant over the alleged loss of public funds totalling the sum of Kshs. 7,793,366/-.

c. *such other order(s) as the Honourable Court may make to meet the ends of justice in this appeal.*
d. *the appellant be awarded the costs of this appeal and the costs of the petition in the High Court.*

[14] In a judgment delivered on 22nd November 2024, the Court of Appeal *(Gatembu, Tuiyott & Ngenye, JJ.A),* recognized that the learned Judge of the High Court exercised judicial discretion in dismissing the appellant's petition, and thus took the view that the appellate court was limited in the circumstances in which it could intervene acknowledging that the issue left for their determination was *whether the appellant had made out a case* within the parameters set out by Madan, J.A. ***United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd Vs East African Underwriters (Kenya) Ltd*** [1985] KECA 130 (KLR). Relying on the Supreme Court in the case of ***Jirongo Vs Soy Developers Ltd & 9 others*** [2021] KESC 32 (KLR) on the applicable guidelines in the review of prosecutorial powers by the High Court, the appellate court was not persuaded that the circumstances in the present case fell within the ambit of interfering with prosecutorial powers of the DPP or that the learned Judge erred in declining the invitation by the appellant to do so. The court further held that the appellant did not demonstrate that the transposition from a prosecution witness to an accused person was malicious or that it violated his rights to a fair trial or was an abuse of power by the DPP.

[15] Distinguishing the instant case from that of ***Stanley Munga Githunguri Vs Republic*** [1986] KEHC 44 (KLR), the appellate court determined that there was no evidence that the DPP, with the sole mandate to prosecute, represented to the appellant that he would not be prosecuted. Furthermore, the appellate court

found that the evidence gathered upon further investigations informed the decision to charge the appellant, and concluded that the learned Judge correctly held that the sufficiency of evidence or defects in the charge sheet fell within the province and competence of the trial court in the criminal proceedings.

[16] Ultimately, the appellate court found no basis to interfere with the decision of the High Court and dismissed the appeal with costs to the 1st and 3rd interested parties.

iii. Proceedings in the Supreme Court

[17] Undeterred, the appellant has now filed the instant appeal challenging the decision of the Court of Appeal on the following seven grounds: that the learned Judges of Appeal;

i. *Erred in law in not determining, interrogating the central question before them and as pleaded by the appellant of whether there was no basis, explanation by the respondent in transposing the appellant to an accused person and at the same time retaining him as a prosecution witness in the absence of any new evidence having assured the appellant that it will not charge him;*
ii. *Erred in law in failing to make a determination that the transposition of the appellant to an accused person in the absence of any new evidence and while retaining the appellant as one of its prosecution witnesses was an abuse of the prosecutorial powers under Article 157(11) of the Constitution, 2010;*
iii. *Erred in law in presaging their appellate consideration of the appeal by failing to find and hold that the appellant's right to fair trial is irretrievably imperilled where he is required to give evidence as against his co-accused persons and at the same time defend himself against the charges in the same case and thereby going contrary to the ubiquitous theme in the*

constitutional architecture thus failing to uphold the letter and spirit of the Constitution;

iv. *Erred in law by failing to find and hold that the respondent by making the appellant one of its prosecution witnesses and bonding him to attend court on numerous occasions when the matter came up for hearing and the appellant's statement having been given to the accused person had assured the appellant that he will not be charged and rescinding on this assurance was contrary to legitimate expectation thus the learned Judges arrived at an erroneous conclusion that the respondent with the sole mandate to prosecute had not represented to the appellant that he will not be charged;*

v. *Erred in law in failing to find and hold that the so-called new evidence was in fact the opinion of the investigating officer supposedly made after reviewing the existing evidence on record without any further additional new evidence and could not be the basis of transposing and charging the appellant in the same case where he is retained as prosecution witness. The constitutional powers challenged at Article 157 of the Constitution 2010, belong to the respondent to the exclusion of everybody except the courts to review them, and it is an attempted usurpation by the 1st interested party to purport to give reasons to justify the respondent's decision that is challenged;*

vi. *Erred in law in failing to find and hold that the purported offence the appellant was charged under the stated provisions of the law is non-existent and the appellant cannot stand trial for a non-existent offence as purportedly done in the present case thus arriving at erroneous conclusion that they could not interfere with the decision of the High Court;*

vii. *Improperly exercised their jurisdiction, resulting in the violation of the appellant's right to equal protection and benefit of the law and a fair hearing.*

[18] Accordingly, the appellant seeks the following reliefs:

i. *The Petition of Appeal herein be allowed.*

ii. *The Judgment and Order of the Court of Appeal (Gatembu, Tuiyott and Ngenye, JJ. A) sitting at Nairobi delivered on 22nd November, 2024 in* ***Civil Appeal No. 264 of 2018****, be set aside and be substituted with:*

   a. *An order setting aside the judgment and decree of the High Court (H. Ong'udi J) of 24th May, 2018;*

   b. *An order of certiorari to remove and bring to this Honourable Court for the purpose of quashing the decision of the 1st interested party to recommend to the respondent that the appellant herein be charged with anti-corruption offence and the decision of the respondent to direct prosecution of the appellant via letter dated 11th December, 2017 in the consolidated charge sheet in* ***Anti-Corruption Case No. 1 of 2017*** *Republic Vs Godfrey Sifuna Wanyonyi & 7 others before the Chief Magistrates' Court in Bungoma; and*

   c. *An order of prohibition prohibiting the respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in* ***Anti-Corruption Case No. 1 of 2017*** *Republic v Godfrey Sifuna Wanyonyi & 7 others before the Chief Magistrates' Court at Bungoma so far as they touch or relate or however concern the appellant herein in count XII or in instituting any other charges in any other court against the appellant over the alleged loss of public funds totalling to Kshs. 7,793,336/-.*

iii. *The costs of this Appeal (Petition) and the costs of proceedings in the Court of Appeal and in the High Court be awarded to the appellant; and*

iv. *Such consequential and appropriate relief, further or other Order(s) as this Honourable Court may deem just and fit to grant.*

[19] In opposing the appeal, the respondent has filed an affidavit sworn by *Angela Fuchaka* dated 9th January 2025. The 1st interested party filed a Preliminary

Objection dated 3rd February, 2025 challenging this Court's jurisdiction to entertain the instant appeal as it does not involve the interpretation and application of the Constitution in terms of Article 163(4)(a) neither has it been certified as a matter of general public importance warranting the intervention of this Court under Article 163(4)(b) of the Constitution. The 1st interested party has also filed a replying affidavit sworn by Timothy Wahome on 23rd January 2025, opposing the appeal.

[20] The 2nd and 3rd interested parties, on their part, have filed Grounds of Opposition dated 7th February 2025, also challenging the Court's jurisdiction to entertain the appeal on the same premise as the 1st interested party. The appellant filed a further affidavit in rejoinder to the issues raised by the respondent.

D. PARTIES' SUBMISSIONS

i. The Appellant's Submissions

[21] The appellant's written submissions in support of the appeal and opposing the preliminary objection are both dated 21st February 2025.

[22] On *jurisdiction*, he argues that the instant appeal is brought as of right according to Article 163(4)(a) of the Constitution. He also urges that the constitutional questions as to the prosecutorial powers of the respondent under Article 157(6), the abuse thereof under Article 157(11), as well as violation of his right to a fair hearing under Articles 25(c) and 50 of the Constitution had been canvassed in the superior courts progressing through the normal appellate mechanisms to reach this Court by way of appeal.

[23] In challenging the *decision to transpose him from a prosecution witness to an accused person*, the appellant contends that this was done without any basis, explanation, or the presence of exceptional circumstances. He argues that the ODPP failed to file an affidavit before the High Court setting out any such exceptional circumstances or adducing fresh evidence to justify the change in

position. Moreover, the prosecution did not rebut the appellant's claim that he had been assured by the ODPP that he would be retained solely as a prosecution witness and would not face prosecution. He thus maintains that this assurance gave rise to a legitimate expectation, which in turn constituted a legal bar against the arbitrary institution of criminal proceedings based on the same facts, facts which, notably, had not been previously disclosed to him by the ODPP in the matter before the trial court.

[24] In the appellant's view, the Court of Appeal failed to interrogate whether there existed any basis or exceptional circumstances warranting the decision to charge the appellant, who had initially been retained as a prosecution witness, in the absence of any new or compelling evidence. This omission, he argues, precluded the court from properly assessing whether the ODPP's decision was consistent with Article 157(11) of the Constitution, the Guidelines on the Decision to Charge 2019, and the National Prosecution Policy.

[25] He posits that the Court of Appeal, instead, appeared to suggest that an assurance not to prosecute could only be deemed valid if reduced into writing, an assertion the appellant finds untenable. In so doing, he submits, the Court of Appeal disregarded the doctrine of estoppel by conduct, by failing to appreciate that the ODPP, through its actions, namely, declining to charge the appellant per the 1st interested party's recommendation, designating him as a prosecution witness, repeatedly bonding him to attend court in that capacity, and disclosing his witness statement to the co-accused persons without retracting it, had made a clear representation that the appellant would not be prosecuted. While relying on the case of ***Serah Njeri Mwobi Vs John Kimani Njoroge*** [2013] KECA 501 (KLR), he maintains that such conduct created a legitimate expectation, which ought to have precluded the subsequent institution of criminal proceedings against him.

[26] The appellant posits that, to depart from the previously established position, demonstrable through the respondent's conduct, without adducing any new evidence or establishing exceptional circumstances, amounts to an abuse of prosecutorial discretion and a violation of the safeguards enshrined under Article 157(11) of the Constitution. He cites the decision in ***Stanley Munga Githunguri Vs Republic*** *(supra)*, where the court underscored the impermissibility of arbitrary or capricious prosecutorial decisions.

[27] On the *limitation of his right to a fair trial*, the appellant contends that he has been charged with a non-existent offence, amounting to a grave violation of his constitutional rights as guaranteed under Article 50 of the Constitution, and as reaffirmed in ***Muruatetu & another Vs Republic; Katiba Institute & 5 others (Amicus Curiae)*** [2017] KESC 2 (KLR). He further asserts that his placement in the dual role of both a prosecution witness, expected to adduce evidence against his co-accused, including himself, and an accused person in the same proceedings, presents an inherently prejudicial and untenable situation. In addition, and according to him, his witness statement remains on record and has not been withdrawn, and his bond obligating him to attend court and testify on behalf of the prosecution remains in force. This confluence of roles, he submits, undermines the fairness of the trial process, offends the principles of equal protection and benefit of the law, and violates his inherent dignity, contrary to Articles 10, 27, and 28 of the Constitution. In the same vein, he faults the Court of Appeal for failing to pronounce itself on the legality of transposing a prosecution witness into an accused person, despite the High Court having addressed and made findings on the issue.

[28] With respect to *charging him with a non-existent offence*, the appellant contends that the charges preferred against him in ***Anti-Corruption Case No. 1 of 2017*** before the Chief Magistrate's Court in Bungoma do not disclose any cognizable offence in law. He submits that the alleged misappropriation of public

funds and resources in any event fell outside his scope of responsibility. Specifically, the funds said to have been fraudulently paid to third parties were managed through the cash and/or petty cash office, which was under the jurisdiction of the Chief Cashier and not the appellant. Consequently, he argues that, he cannot be held liable for the loss under Section 79(2)(b) of the PFM Act, as he bore no responsibility for the disbursement or utilization of the said funds.

[29] Moreover, the appellant relies on the statement of the 1st interested party's Investigating Officer, Mr. Timothy Wahome, who expressly acknowledged that all approvals and authorizations for the payment vouchers forming the subject of the criminal charges were made by the Finance Manager, one Godfrey Sifuna Wanyonyi.

[30] In light of the foregoing, the appellant submits that the superior courts erred in failing to make a finding that the alleged offence was incapable of legal existence, given that the statutory prerequisite under Section 79 of the PFM Act, namely, control or responsibility over the funds, was not satisfied in his case. In support of this position, he cites the case of ***Republic Vs Attorney General ex parte Kipng'eno Arap Ngeny*** [2001] KLR 612, where the court held that a criminal prosecution will not be sustained where the charge sheet does not disclose the commission of a criminal offence. Accordingly, the appellant prays that the appeal be allowed.

ii. The Respondent's Submissions

[31] In opposing the appeal, the respondent, ODPP, in its submissions, both dated 5th March 2025, submits as hereunder.

[32] On *jurisdiction*, the respondent urges this Court to be guided by the cases of ***Gatirau Peter Munya Vs The Independent Electoral and Boundaries Commission & 2 others*** [2014] KESC 38 (KLR) and ***Kidero & 4 others Vs Waititu & 4 others*** [2014] KESC 11 (KLR) on the principles for bringing an appeal under Article 163(4)(a) of the Constitution.

[33] In response to the *allegation of abuse of prosecutorial powers*, the respondent maintains that its exercise of constitutional mandate under Article 157 of the Constitution is independent and does not require the consent or approval of any authority for the commencement of criminal proceedings. The respondent further asserts that its actions were guided by the *Guidelines on the Decision to Charge2019,* which expressly provides for circumstances under which an investigation file may be resubmitted for reconsideration of earlier decisions or charges. On that basis, the respondent contends that its decision to charge the appellant was made within the confines of its lawful discretion and does not amount to an abuse of prosecutorial power.

[34] On the question of *whether the appellant would be denied a fair trial,* the respondent contends that the appellant has failed to demonstrate any intention on the part of the respondent to compel him to testify against his co-accused while simultaneously defending himself against the same charges. The respondent maintains that, as a matter of law, an individual cannot simultaneously occupy the roles of witness and accused within the same criminal proceedings.

[35] Accordingly, the respondent argues that there is no evidentiary basis to support the claim that the appellant's right to a fair trial has been violated. In support of this position, the respondent cites the case of ***Anarita Karimi Njeru Vs Republic*** [1979] KEHC 30 (KLR), in which the court emphasized that a party alleging a violation of constitutional rights must specifically identify the right allegedly infringed and the particulars of the infringement. The respondent further asserts that the appellant is no longer a prosecution witness but remains an accused person and is therefore not expected to assume dual and conflicting roles within the proceedings.

[36] Regarding the *claim that the appellate court failed to find that the respondent violated the appellant's legitimate expectation arising from an alleged assurance that he would not be prosecuted due to his prior designation as*

a witness, the respondent contends that no such assurance, whether express or implied, was ever given. Consequently, the respondent maintains that the appellant's claim of a violated legitimate expectation is without merit.

[37] On the question of *whether the appellant was charged with a non-existent offence*, the respondent submits that the charge against the appellant is properly grounded in law, specifically under Section 45(2)(b) of ACECA, which criminalizes the failure to comply with legal provisions or prescribed procedures. In the present case, the appellant is alleged to have contravened Section 79(2)(b) of the PFM Act, and therefore, the offence disclosed is one recognized in law. The respondent further contends that any issues relating to the sufficiency or probative value of the evidence to be presented in support of the charge are matters for determination by the trial court upon full hearing, and not grounds for challenging the legality of the charge at the appellate stage. In its view, therefore, the appellant has prematurely invoked the jurisdiction of the High Court without first allowing the trial court to receive and assess the prosecution's evidence.

[38] Accordingly, the respondent submits that the appellant has failed to establish a sufficient basis for this Court to interfere with or set aside the impugned judgment of the Court of Appeal.

iii. The 1st Interested Party's Submissions

[39] In opposing the appeal, the 1st interested party in its submissions, dated 7th March 2025, submits as hereunder.

[40] On the Court's jurisdiction, the interested party submits that the judicial review remedies are discretionary, and appellate interference is only warranted where it is demonstrated that the trial court failed to exercise that discretion judiciously, or where there was a clear misapprehension of the law or applicable procedure. In its view, the appellant has not adduced any evidence to show that either the EACC, during the investigation process, or the ODPP, during the decision to prosecute, acted outside the scope of their constitutional or statutory

mandates. They further contend that the continuation of investigations was conducted within the confines of the law, and that investigating officers are empowered to seek warrants from the courts in the course of investigations, according to Section 118 of the CPC and Section 23(3) and (4) of ACECA.

[41] The 1st interested party also submits that the obligation to inform the appellant of the charges he faces and to afford him an opportunity to present his defence is a safeguard enshrined under Article 50(2)(c) of the Constitution, one which, in their view, the appellant has not demonstrated to have been violated. They further argue that the investigations were conducted lawfully, and that the the trial court is the appropriate forum for addressing issues relating to the sufficiency and probative value of the evidence. Accordingly, the 1st interested party maintains that the appellant has failed to establish any violation of his right to a fair trial or any other constitutional right, and therefore urges this court to dismiss the appeal.

iv. The 2nd & 3rd Interested Parties' Submissions

[42] Also opposing the appeal, the 2nd and 3rd interested parties in their submissions, both dated 13th March 2025, submit as hereunder.

[43] On their challenge to the Court's jurisdiction, they submit that the appeal fails to meet the threshold set out in ***Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** [2012] KESC 9 (KLR), and is therefore not properly before this Court. In their view, the interpretation and application of Article 157 of the Constitution, which the appellant seeks to invoke, are not aligned with the nature and context of the case as it was presented before the Court of Appeal.

[44] Concerning the *transposition of the appellant from a prosecution witness to an accused person*, they submit that the superior courts, in the exercise of their judicial discretion, found no evidence of malice or abuse of prosecutorial power on the part of the respondent, and that thesuperior courts held that the said transposition did not amount to a violation of the appellant's constitutional rights.

Accordingly, they urge that this Court should permit the proceedings before the trial court to proceed to their logical conclusion. This is particularly so because the superior courts were not seized of the evidentiary material that informed the decision to charge the appellant, and such evidence is now properly before a court of competent jurisdiction, which is best placed to determine the appellant's criminal culpability per the requisite legal standards.

[45] On the question of *whether the respondent abused its prosecutorial powers and violated Article 157(10) of the Constitution*, the 2nd and 3rd interested parties contend that the appellant's claim, that his act of signing cheques did not constitute approval for payments made to third parties via vouchers, and that responsibility for such payments lay elsewhere, is a matter that ought to be ventilated and tested before the trial court. They further assert that the present appeal effectively invites this Court to interfere with the respondent's constitutionally guaranteed independence in the absence of any demonstrable abuse of prosecutorial discretion. In their view, such interference undermines the respondent's express constitutional mandate to institute criminal proceedings against any person without the necessity of prior consent from any authority, as safeguarded under Article 157(10).

[46] On the issue of *whether the appellant should stand trial before in* ***Anti-Corruption Case No. 1 of 2017*** *at Bungoma*, they contend that the appellant has failed to adduce any evidence demonstrating that he will be denied a fair trial or that the decision to charge him was actuated by malice or unlawfulness. They further assert that the decision to prosecute the appellant was undertaken in accordance with the law, grounded in evidence, and followed due procedure. They maintain that the 2nd interested party is a competent court, duly vested with jurisdiction to hear and determine the charges brought against the appellant. Moreover, they argue that the appellant bore a duty to exercise vigilance in safeguarding public funds under his care and control, and that the determination

of his criminal culpability is a matter properly before the trial court. In view of the foregoing, the 2nd and 3rd interested parties urge that the appeal before this Court be dismissed with costs.

E. ISSUES FOR DETERMINATION

[47] From the pleadings and the submissions of the parties, the following issues crystallise for our determination:

i. *Whether this Court has jurisdiction to hear and determine the appeal and if so;*
ii. *Whether the 1st respondent has the mandate to review its decision, and in particular to transpose a prosecution witness to an accused person.*
iii. *Whether the appellant's rights were violated.*
iv. *Whether the appellant is entitled to the relief sought.*

F. ANALYSIS AND DETERMINATION

i. Whether this Court has jurisdiction to hear and determine the appeal

[48] The respondent and interested parties challenge this Court's jurisdiction, contending that the petition does not involve the interpretation or application of the Constitution and does not therefore lie as of right in terms of Article 163 (4) (a). They argue in this regard that the issues raised before the High Court were purely judicial review in nature and that the judicial review proceedings did not constitute questions of constitutional application and interpretation. In addition, they argue that the appellant's reliance on Article 157 (10) of the Constitution as the basis for his appeal before us is a complete departure from the case presented before the superior courts below.

[49] Article 163 (4) (a) of the Constitution provides as follows:

"(4) Appeals shall lie from the Court of Appeal to the Supreme Court—
(a) as of right in any case involving the interpretation or application of the Constitution."

[50] This Court has pronounced itself on the principles established in the case of ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another SC*** Petition No. 3 of 2012 [2012] eKLR for an appeal to lie as of right as follows:

> ***"(28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4)(a)".***

[51] This Court has also previously set the guiding principles for bringing an appeal before it under Article 163 (4) (a) of the Constitution in ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & Others,*** S.C. Petition No. 2B of 2014; [2014] eKLR [Munya 2] where we rendered ourselves *inter alia* as follows:

> ***"i. a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***
>
> ***ii. the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them, and only cardinal issues of law or jurisprudential moment, deserve the further input of the Supreme Court;***

iii. the lower Court's determination of the issue on appeal must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

iv. an appeal within the ambit of Article 163(4)(a) is to be one founded on cogent issues of constitutional controversy…"

[52] The present case was filed as **Judicial Review Division Misc. Civil Application No. 62 of 2018.** In the introduction to the said application, the appellant cited the same as *" the humble petition of Benson Khwatenga Wafula, the exparte applicant…"* No leave was sought before filing the application as is required in traditional judicial review applications. The appellant's advocates, at the High Court, in addressing that issue submitted that such leave was not required since what was filed was a constitutional petition.

[53] The High Court recognized the constitutional dimensions of the application and, in paragraph 30 of its decision, resolved to treat the matter as a constitutional petition. The High Court also stated at paragraph 37 of its decision that it was considering the respondent's mandate under Articles 157 (10) and (11) of the Constitution. The Court of Appeal also addressed whether the respondent acted within the limits of Article 157 (11) and whether there was any basis for judicial interference in the circumstances.

[54] This Court in the case of ***Jirongo Vs Soy Developers Ltd & 9 Others*** (Petition 38 of 2019) [2021] KESC 32 (KLR) held that under Article 165 (3) (d) (iii) of the Constitution, where it is shown that the expectation of Article 157 (11) of the Constitution are not met, the High Court can properly interrogate any question arising therefrom and make appropriate orders.

[55] This Court has also, on numerous occasions, held that even in matters originating as judicial review applications, we can only assume jurisdiction if the

issues raised fall under the canopy of Article 163 (4)(a). That is why in ***Peninah Nadako Kiliswa Vs Independent Electoral & Boundaries Commission (IEBC) & 2 others,*** Petition No. 28 of 2013; [2015] eKLR, the Court set guiding principles which a party must comply with in appealing to the Supreme Court in a matter originating before the High Court by way of a judicial review application. It was stated in that regard that:

> ***"iii. where such an appeal under Article 163 (4) (a), the petitioner [appellant in this case] is to identify the particular (s) of constitutional character that was canvassed at both the High Court and the Court of Appeal…."***

[56] In the present case and for reasons above, we have no difficulty in finding that the High Court expressly considered the proceedings as a constitutional petition. Both the High Court and the Court of Appeal examined the scope and exercise of the respondent's mandate under Article 157 of the Constitution. In addition, the issues raised by the appellant implicate fundamental rights under Articles 25 and 50 of the Constitution. These constitutional provisions were actively canvassed and adjudicated upon by the superior courts. Accordingly, the appeal raises substantive questions involving the interpretation and application of the Constitution, and therefore falls within the ambit of Article 163(4)(a) of the Constitution.

ii. Whether the 1st respondent has the mandate to review its decision, and in particular to transpose a prosecution witness to an accused person

[57] The decision of the Office of the Director of Public Prosecutions to change a witness into an accused person raises important legal and constitutional issues, particularly in light of the prosecutorial discretion under Article 157 and the rights of individuals under Article 50 of the Constitution (right to fair trial).

[58] Article 157(6) & (10) of the Constitution grants the Director of Public Prosecution (DPP) powers to render a decision to prosecute criminal cases and the actual prosecution of the same by providing as follows:

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

[59] The powers granted to the DPP are, however, not limitless and must be exercised within the boundaries set by Article 157 (11) of the Constitution which states that:

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

[60] Section 32 (2) of the Office of the Director of Public Prosecution Act Cap. 6B also grants the DPP the power to require further information in relation to an investigation or prosecution of an offence. The Section states:

"(1) Without prejudice to the provisions of any other law, the Director may, in accordance with subsection (2), issue a directive in writing to any officer for purposes of obtaining information relevant to an investigation or prosecution of an offence.

(2) Where the Director has instituted or taken over, or is considering whether to bring or take over, a prosecution or appeal, revision or any other proceedings in relation to an offence or suspected offence, a directive may be made for—

(a) any specified information, document or material or a specified kind of information, document or material, or for all relevant information, documents and material, to be furnished to the Director; or

(b) the provision of assistance, including the carrying out of an investigation or further investigation of a matter, in relation to the offence or suspected offence.

(3) An officer to whom a directive is made under this section shall comply with it and keep the Director informed of the progress made in complying with the directive…."

[61] The Guidelines on the Decision to Charge, 2019, states that the standard required in deciding to charge is whether there is a reasonable prospect of conviction. The prosecutor must consider key evidence and certain minimum requirements of a file, which would apply depending on which test (the Two Stage Test or the Threshold Test) is applied.

[62] The Two Stage Test comprises an 'evidential test' (is there sufficient evidence to provide a realistic prospect of conviction?) followed by a 'public interest test (is it in the public interest to proceed with the prosecution?). The threshold test, on the other hand, is based on *prima facie* evidence of an offence and whether there is a reasonable prospect of additional evidence being available. The Guidelines also provide that, under the threshold test, there are instances where the prosecutor will overturn a decision not to prosecute or deal with a case by way of an out-of-court disposal. This is triggered by further evidence or information that comes to light. (See 4.6.3 The Guidelines on the decision to Charge, 2019).

[63] In a criminal case, a witness can potentially become an accused person through various circumstances, such as when their testimony reveals their own involvement in the crime or when evidence indicates their complicity. This can occur through different means, including a witness's own testimony, new evidence emerging during the trial, or a shift in the focus of the investigation. As per clause 4.6.3 of the Guidelines on the Decision to Charge, 2019, the decision to review any charges is based on the progress of investigations and when additional information comes to light. The review should, however, be grounded in credible, admissible evidence and conducted in good faith. While this practice is permissible, it must adhere to constitutional and procedural standards, including the right to a fair hearing.

[64] In ***Republic Vs Director of Public Prosecutions & 2 others; Ayoo (Exparte Applicant)*** (Judicial Review Miscellaneous Application E045 of 2022) [2023] KEHC 23733 (KLR) the High Court reviewed a situation where a witness

was converted into an accused person. The court emphasized that once the decision to charge is made, the individual becomes vulnerable to state power. The ODPP's decision was subject to judicial review, and the accused persons had a right to be informed of the evidence and to challenge the decision under Article 47 (Fair Administrative Action) and Article 50 (right to fair trial). The court found that the procedural rights of such a person include the right to receive reasons and information necessary for seeking review or defending against the charges.

[65] From our appreciation of the Director of Public Prosecution Act 2013 and the Guidelines on the decision to charge, it is our finding that, while the ODPP has lawful discretion to convert a witness into an accused person, such discretion must be exercised in good faith; it must be based on credible and admissible evidence; and the same must comply with the guidelines on the decision to charge, particularly the two-stage and threshold tests; and, the decision is subject to judicial review considerations under Article 47 of the Constitution. Any decision that derogates from these standards risks being declared unlawful, irrational or procedurally unfair.

[66] It is in the same context that the appellant urges the Court to scrutinize the exercise of prosecutorial discretion within the mandate of the respondent, arguing that there were no justifiable or exceptional circumstances warranting his transposition from a prosecution witness to an accused person. He submits that the facts which were deemed insufficient to charge him and only retain him as a prosecution witness were later interpreted, more than a year down the line, without any change of circumstances, and that what the 1st interested party terms as new evidence was a re-analysis of the existing evidence. He posits that the Court of Appeal, on its part, failed to interrogate the basis of the exceptional circumstances.

[67] He relies on the decision in ***Stanley Munga Githunguri Vs Republic*** [1986] eKLR to urge the Court that in the absence of any fresh evidence, the right

to change the decision and to prosecute has been lost. He also cites ***Ronald Leposo Musengi Vs Director of Public Prosecution & three Others*** [2015] eKLR, which determined that there was no factual foundation to charge a suspect, as the facts, existing three years earlier, were deemed insufficient to sustain a criminal charge. ***Serah Njeri Mwobi Vs John Kimani Njoroge*** [2013] eKLR is also cited to submit that the conduct of the respondent of enlisting him as a prosecution witness, curating his statement, sharing it with the defence, bonding him to attend court on numerous occasions, represented to him that he would not be charged with a related offence, and was clear evidence of the fact that there were no exceptional circumstances for sudden change by the respondent.

[68] It is acknowledged that prosecutorial discretion is generally accorded judicial deference and that courts will only interfere in the clearest and most exceptional of cases. As emphasized in ***Jirongo Vs Soy Developers Ltd & 9 Others (supra),*** this Court, citing the Supreme Court of India in ***RP Kapur v State of Punjab*** AIR 1960 SC 866, laid down guidelines to be considered by the High Court when reviewing prosecutorial powers. They are as follows:

> ***(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or***
>
> ***(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, eg want of sanction; or***
>
> ***(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or***

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

[69] In this case, without delving into the merits of the criminal charge, we have considered the justification provided for transposing the appellant from a witness to an accused person. According to the affidavit of Timothy Wahome sworn on 3rd April 2018, there had been an inadvertent omission during the collection of evidence to retrieve and file cheques which had been used to draw funds. This gap necessitated further investigations to procure evidence that had been used to draw the funds that were allegedly irregularly paid out in the form of fake claims. He therefore made an application to search accounts belonging to Nzoia Sugar Company Limited vide Bungoma Chief Magistrate's Court ***Misc. Application No. 102 of 2017***, which was granted and a warrant to investigate the account was issued. The further investigations established that the appellant had allegedly paid for the fictitious and/or fake claims, leading to the loss of public funds.

[70] The High Court, in appreciation of the above set of facts, held at paragraph 37 of its decision that it was the duty of the appellant to demonstrate that the respondent, in recommending that he be charged, acted unlawfully, maliciously or contrary to the laid procedures and written law. The Court of Appeal at paragraph 25 of its decision agreed with the decision of the High Court and held that the appellant did not demonstrate that the reclassification from a prosecution witness to an accused person was malicious or that it violated his rights to a fair trial or was an abuse of power by the ODPP.

[71] In our assessment, the affidavit sworn by Timothy Wahome provides a sufficient legal foundation for the changes made. The 1st interested party also acted within the framework of Section 23(3) and (4) of ACECA, which vests investigators with the powers and privileges of police officers during investigations. This must

be read together with Section 118 of the Criminal Procedure Code, which empowers the magistrate's court to issue search warrants where necessary.

[72] Further, the Office of the Director of Public Prosecutions (ODPP) Act and the Decision to Charge Guidelines empower the respondent to direct further investigations and, where necessary, revise a charging decision based on new evidence. On that basis, the subsequent institution of criminal proceedings is legally justified.

[73] Although there was a notable delay of approximately one year, six months before the charges against the appellant were laid, we find no evidence to suggest that the respondent's conduct created a legitimate expectation that the appellant would remain a prosecution witness. The facts reproduced above show that the change was informed by the outcome of further investigations that uncovered additional material sufficient to warrant the revised decision. As previously stated, a prosecution witness may be converted into an accused person at any stage of the criminal process. This Court in ***Khalid & 16 others Vs Attorney General & 2 others*** [2019] KESC 93 (KLR) held that the DPP, *inter alia*, is *"not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial."* Continued investigations may lead to a witness being transposed to an accused person as happened in this case.

[74] We are therefore satisfied that the 1st interested party was entitled to conduct the additional investigations that would inform the DPP's decision in relation to any pending criminal proceedings. The appellant has not adduced any evidence to suggest that the renewed investigative efforts were driven by malice. We also reject the assertion that the initial decision to treat the appellant as a prosecution witness closed the possibility of a subsequent reassessment. The additional evidence demonstrated a new angle of interpretation of the case consistent with the prosecutorial guidelines on the decision to charge.

iii. Whether the appellant's rights were violated

[75] Article 50 (2) of the Constitution guarantees every accused person the right to be informed of the charge with sufficient detail, to adequate time and facilities to prepare a defence, and not to be compelled to give self-incriminating evidence.

[76] The appellant in this case contends that his transposition from a prosecution witness to an accused person in the course of the proceedings violated his right to a fair trial under Article 50 of the Constitution. He argues that he has been placed in an untenable position where he has to play the dual roles of being a prosecution witness and also being an accused person, where he is expected to defend himself against the very same charge in the same case. He further submits that the charges levelled against him are based on a non-existent law.

[77] In reply, the respondent submits that, upon deciding to charge the appellant, the Director of Public Prosecutions filed an amended charge sheet before the court, clearly designating the appellant as an accused person rather than a witness. At the time of this procedural shift, the appellant had not testified before the court, and therefore, the DPP's decision to charge him did not amount to a revocation of any testimony already given. Further, once the DPP reclassified the appellant as an accused person, it followed that he could no longer be called as a prosecution witness against his co-accused. Instead, he would only be expected to testify in his defence should the matter proceed to that stage.

[78] In occasions where the prosecution seeks to transpose a prosecution witness into an accused person, the court must carefully consider the constitutional implications of such a move. It is particularly important to recognize that the individual, having initially participated in the proceedings as a neutral party, may have disclosed potentially self-incriminating evidence without the benefit of legal safeguards available to an accused person. This places them at a material disadvantage. The court must therefore weigh such circumstances against the necessity, timing, and manner in which the Director of Public Prosecutions (DPP) seeks to effect the change. The overriding question is whether the action is

procedurally fair, constitutionally compliant, and free from arbitrariness or abuse of court process. A failure to meet these standards would render the prosecution's conduct inimical to the right to a fair trial under Article 50 of the Constitution.

[79] On our part, and flowing from what we have stated above, we note that, in the submissions by the ODPP, the appellant at the trial court is occupying the position of an accused person, not a prosecution witness. He therefore has sufficient opportunity to prepare his defence and to present his case, and the assertion that he is confused as to his exact role is therefore unsubstantiated. As to whether any prior statements he made while under consideration as a witness might prejudice his trial, at the outset we do not find any procedural unfairness, malice or arbitrariness on the part of the ODPP whilst making the reclassification, and the timing is also not prejudicial to the appellant's case since the main trial is yet to commence. We also agree with the findings of the superior courts below: that this is a matter best evaluated and determined by the trial court and flowing our guidance and caution above, it is best placed to assess the evidentiary and procedural implications arising from the appellant's reclassification.

[80] As to whether the charges the appellant is facing are defective for being based on non-existent laws, we agree with the determination of the High Court, affirmed by the Court of Appeal, that there are well-settled provisions in the Criminal Procedure Code which deal with the issue of defective charge sheets. We are also persuaded by the decision in ***Thuita Mwangi & 2 Others Vs Ethics and Anti-Corruption Commission & 3 Others*** [2013] eKLR that the issues of competency of charge sheets are perfectly within the jurisdiction of a trial court. Further, in ***Peter Ngoge Vs Francis Ole Kaparo & 5 Others,*** Sup. Ct. Petition No. 2 of 2012 [2012] eKLR regarding this Court's jurisdictional limits, we settled the guiding principle that the chain of courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal

issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court.

iv. Whether the appellant is entitled to the reliefs sought

[81] Having concluded that the respondent and 1st interested party acted well within their respective mandates in the transposition of the appellant from a witness to an accused person, and that his rights were not violated by such actions, we find that the appellant is not deserving of the orders sought in his Petition of Appeal.

[82] As for costs, noting the long history of this matter, and the issues involved and guided by this Court's decision in ***Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others,*** SC Petition No. 4 of 2012; [2014] eKLR, we deem it fair to order each party to bear their costs of this appeal.

[83] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

a) ***The Petition of Appeal dated 20th December 2024 and filed on 23rd December 2024 is hereby dismissed.***
b) ***Each party shall bear their costs of the appeal.***
c) ***We hereby direct that the security for costs deposited in the appeal be refunded to the appellant.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **11th** day of **July,** 2025.

.....

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

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA