



# OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS



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**Guidelines on Prosecution of  
Corruption and Economic  
Crimes**

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# Contents

<b>ACRONYMS AND ABBREVIATIONS</b> .....	<b>iii</b>
<b>FOREWORD</b> .....	<b>v</b>
<b>ACKNOWLEDGEMENT</b> .....	<b>vi</b>
<b>CHAPTER ONE: INTRODUCTION</b> .....	<b>1</b>
1.1. Background .....	1
1.2. The Office of the Director of Public Prosecutions (ODPP) .....	2
1.3. Exercise of Prosecutorial Powers and Functions of the DPP .....	2
1.4. Purpose and Principles of the Guidelines .....	2
1.5. Application .....	3
1.6. The Legal and Institutional Framework in the Prosecution of Corruption and Economic Crimes .....	3
1.7. Prosecution of Corruption and Economic Crimes .....	4
<b>CHAPTER TWO: INTER-AGENCY COLLABORATION AND NETWORKS</b> .....	<b>5</b>
2.1. Cooperation and Collaboration .....	5
2.2. National Council on the Administration of Justice (NCAJ) .....	5
2.3. Multi-Agency Team (MAT).....	5
2.4. Ethics and Anti-Corruption Commission (EACC) .....	6
2.5. Directorate of Criminal Investigations (DCI) .....	6
2.6. Witness Protection Agency (WPA) .....	7
2.7. Asset Recovery Agency (ARA) .....	7
2.8. Prosecution Guided Investigations .....	7
2.9. Offering legal advice and guidance before charge .....	8
2.10. Offering legal advice and guidance after charge .....	8
2.11. Resolution of disputes .....	8
<b>CHAPTER THREE: THE ROLES OF A PROSECUTOR</b> .....	<b>9</b>
3.1. The Prosecutors' roles in the justice system: .....	9
3.2. The Duty of a Prosecutor .....	9
3.3. Resolution of Disputes .....	13
3.4. Fidelity to Guidelines .....	13
<b>CHAPTER FOUR: THE DECISION TO CHARGE CORRUPTION AND ECONOMIC CRIMES</b> .....	<b>14</b>
4.1. General Principles on The Decision to Charge .....	14
4.2. Standards Required on the Decision to Charge .....	14
4.3. The Evidential Test .....	14
4.4. The Public Interest Test .....	16
4.5. Threshold Test .....	18
4.6. The process of decision-making in corruption and economic crimes.....	18
4.7. Decision not to Charge/Alternative to Prosecution .....	19
4.8. Review of the decision to charge .....	19
4.9. Alternatives to Prosecution/Trial .....	20
4.10. Diversion as an alternative to Prosecution .....	21
4.11. Plea Agreements.....	21
<b>CHAPTER FIVE: CHARGES</b> .....	<b>22</b>
5.1. Charges .....	22
5.2. Multiplicity of Charges and/or Joinder of Offenders .....	23

5.3.	Registration of the Charge Sheet .....	23
5.4.	The Offences of Corruption and Economic Crimes .....	24
5.5.	Review of Charges .....	28
5.6.	Amendments of charge sheets .....	28
<b>CHAPTER SIX: DISCLOSURE OF EVIDENCE .....</b>		<b>29</b>
6.1.	Disclosure .....	29
6.2.	The requirements of disclosure .....	29
<b>CHAPTER SEVEN: THE TRIAL PROCESS .....</b>		<b>32</b>
7.1.	Trial Preparations .....	32
7.2.	Arraignment/Plea Management .....	32
7.3.	Bail and Bond Applications .....	35
7.4.	Pre-Trial Case Management Conference .....	36
7.5.	Opening Statement .....	37
7.6.	Conduct of the Prosecution Case .....	37
7.7.	Adjournments .....	39
7.8.	Close of prosecution's case .....	40
7.9.	Role of a Prosecutor during defense hearing .....	40
7.10.	Final Submissions .....	41
7.11.	Victims .....	41
7.12.	Mitigation and Sentencing .....	42
7.13.	Criminal Forfeiture .....	43
7.14.	Teleconferencing and Video Conferencing .....	44
7.15.	Confessions .....	45
<b>CHAPTER EIGHT: REVISIONS, APPEALS, JUDICIAL REVIEW &amp; CONSTITUTIONAL PETITIONS .....</b>		<b>46</b>
8.1.	Revision .....	46
8.2.	Appeals .....	47
8.3.	Appeals from Subordinate Courts to the High Court .....	47
8.4.	Appeals on plea of guilty .....	48
8.5.	Appeals by the Accused .....	48
8.6.	Appeals from the High Court to the Court of Appeal .....	49
8.7.	Appeals against sentence .....	50
8.8.	Appeals to the Supreme Court .....	51
8.9.	Judicial Review .....	52
8.10.	Constitutional Petitions .....	53
8.11.	Conservatory Orders/Stay of Proceedings .....	54
8.12.	Bail Pending Appeal .....	55
<b>CHAPTER NINE: REPORTS .....</b>		<b>56</b>
9.1.	Introduction .....	56
9.2.	Case file registers .....	56
9.3.	Engagements with investigative agencies .....	56
9.4.	Reports during the Trial .....	57
9.5.	Reports at the Conclusion of the Trial .....	57
9.6.	Quarterly reports .....	58
9.7.	Annual Reports .....	58
9.8.	Monitoring, reporting and review .....	58
<b>ANNEX 1: PRE-TRIAL CONFERENCE FORM .....</b>		<b>59</b>
<b>ANNEX 2: COURT ATTENDANCE NOTE .....</b>		<b>61</b>

# ACRONYMS AND ABBREVIATIONS

ACECA	Anti-Corruption and Economic Crimes Act
ACM	Active Case Management
ARA	Assets Recovery Agency
CA & PS	County Affairs and Prosecution Services
CBOs	Community-Based Organizations
CEC	Corruption and Economic Crimes
CMS	Case Management System
CPC	Criminal Procedure Code
CS	Corporate Services
CSOs	Civil Society Organizations
CSRC	Communication Strategy Review Committee
CUC	Court Users Committee
DCI	Directorate of Criminal Investigations
DPA	Data Protection Act
DPP	Director of Public Prosecutions
DTC	Decision to Charge
EACC	Ethics and Anti-Corruption Commission
EACCMA	East African Community Customs Management Act
EO & IC	Economic, Organized and International Crimes
FRC	Financial Reporting Centre
HOD	Head of Department
HRD	Human Resource Department
HRM	Human Resource Manager
ICH	Information Clearing House
ICT	Information Communication Technology
KAP	Knowledge, Attitudes, Practices
KPI	Key Performance Indicators
KRA	Kenya Revenue Authority
M&E	Monitoring and Evaluation
MAT	Multi-Agency Team
MLA	Mutual Legal Assistance
MoU	Memorandum of Understanding

NCAJ	National Committee on Administration of Justice
NIS	National Intelligence Service
NPS	National Police Service
OAG	Office of Attorney General
OCM	Office of Change Management
ODPP	Office of the Director of Public Prosecutions
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
PTI	Prosecution Training Institute
RFI	Request for Information
SLO	State Law Office
SOPs	Standard Operating Procedures
SPP	Secretary of Public Prosecutions
UCMS	Uadilifu Case Management System
UNODC	United Nations Office on Drugs and Crime
WPA	Witness Protection Agency

# FOREWORD



Corruption and economic crimes undermine the very foundations of our economies, distort markets, and erode the trust of citizens in public institutions. They perpetuate inequality, inhibit economic growth, and foster a climate of impunity. Addressing these issues requires a robust, consistent, and transparent approach to prosecution—one that is grounded in the principles of justice, accountability, and the rule of law. This document, the “Guidelines on Prosecution of Corruption and Economic Crimes, 2025” is a critical tool in our collective effort to combat these insidious threats by providing people-centered, impartial, innovative, efficient and effective prosecution services.

In keeping with our mandate of providing tools and guidance to the prosecutor towards a world class prosecution service, and with the technical support of the United Nations Office on Drugs and Crime (UNODC) through the European Union-funded Programme for Legal Empowerment and Aid Delivery in Kenya, the ODPP has developed these Guidelines on Prosecution of Corruption and Economic Crimes, 2025.

Developed with input from legal experts, practitioners and stakeholders, these Guidelines are intended to provide uniformity and accountability in the prosecution of corruption and economic crimes. They are curated in response to the unique nature of prosecuting corruption cases and the attendant consequences and replace the Prosecution Guidelines for Corruption and Economic Crimes, 2015. In addition, the Guidelines aim to provide general guidance to prosecutors on the necessary actions and considerations at various stages of a prosecution, ensuring that both public interest and the administration of justice are upheld.

By adhering to these Guidelines, prosecutors will reinforce public confidence in ODPP's commitment to eradicating corruption and economic crimes through effective and prompt prosecution. As we move forward in this endeavor, let us remain vigilant and steadfast in our pursuit of justice, continually assessing and refining our approach to meet the evolving nature of these crimes. Our collective resolve to uphold the rule of law and providing high quality prosecutorial service to all will be crucial in achieving lasting progress.

In conclusion, I extend my appreciation to all those who have contributed to the development of these Guidelines. Their efforts are instrumental in our ongoing mission to combat corruption and economic crimes effectively. Together, through the application of these Guidelines, we can strengthen the fight against corruption, restore public confidence, and pave the way for a more just and equitable society.

A handwritten signature in black ink, appearing to be 'RM Ingonga', written in a cursive style.

**Renson Mulele Ingonga, CBS, OGW**  
**Director of Public Prosecutions**

# ACKNOWLEDGEMENT



The development of the “ Guidelines on Prosecution of Corruption and Economic Crimes, 2025” is a significant milestone in our ongoing fight against corruption and economic crimes. The Guidelines set out what is expected of all prosecutors in the prosecution of corruption and economic crimes.

On behalf of the Office of the Director of Public Prosecutions (ODPP), I wish to convey our sincere appreciation to the United Nations Office on Drugs and Crime (UNODC) for the partnership and support that facilitated the development of these Guidelines through the provision of technical expertise and financial assistance provided under the PLEAD II programme that is funded by the European Union in Kenya. Special acknowledgment goes to Mr. Samuel Kimeu, the UNODC consultant, for his resourcefulness and advice, together with the technical contribution of Ms. Joy Matara, Ms. Vicky Tardon and Ms. Mary Wangeci of UNODC.

I recognize and convey my sincere gratitude to the ODPP management under the able stewardship of the Director of Public Prosecutions, Mr. Renson M. Ingonga, CBS, OGW, for their direction and personal commitment in guiding the development of these Guidelines.

I wish to acknowledge the contribution of our internal and external stakeholders for their invaluable input throughout the process. Their views, critique and contributions have tremendously enriched the content of these Guidelines.

Finally, I wish to appreciate the ODPP technical team consisting of Mr. Joseph Riungu, OGW, Ms. Mercy Gateru, OGW, Mr. Zachary Omwega, Ms. Grace Murungi, OGW (formerly ODPP), Mr. Bonny Okemwa, Ms. Susan Keli, Ms. MaryAnne Mwangi, Ms. Evah Kanyuira, Ms. Hellen Mutellah, Ms. Terry Kahoro, Ms. Faith Mwila, Ms. Eunice Oloo (formerly ODPP), Mr. Wesley Nyamache, Mr. Lucas Tanui, Ms. Diana Irungu, Mr. Willy Momanyi, Ms. Nora Otieno, Mr. Joash Atandi, Ms. Nancy Jepchumba, Mr. Alex Gituma, Ms. Miriam Ngari, Mr. Mark Kimutai, Ms. Charity Wawira, Ms. Claire Murithii, Ms. Angela Asiago, Ms. Rebecca Wangusi, Ms. Joyce Khadondi and Ms. Mary Korir.

To all those who contributed either directly or indirectly to the successful preparation of the Guidelines and have not been mentioned in this acknowledgement note, I say thank you. I hope to have you on board as we implement the Guidelines.

It is my hope that this Guidelines will contribute immensely to effective, efficient and expeditious dispensation of justice and eliminating corruption in Kenya.

A handwritten signature in black ink, appearing to be 'Alloys Kemo'.

**Alloys Kemo, OGW**  
**Ag. Secretary Public Prosecutions**

# CHAPTER ONE

## INTRODUCTION

### 1.1. Background

- 1.1.1. Corruption is a serious phenomenon that is prevalent in Kenya and manifests itself in various forms. It undermines economic development, weakens democracy and the rule of law, disrupts social order and destroys public trust in governance, thus enabling organized crime, terrorism and other threats to human security to flourish. Therefore, there is an inherent public interest in prosecuting corruption offences.
- 1.1.2. Over time, corruption has mutated, and the commission of offences has become complex, making it difficult to detect and prosecute successfully. This is attributed to, among others, increased use of technology, improved literacy rates, and ease of movement making the world a global village.
- 1.1.3. Following the promulgation of the 2010 Constitution, prosecution was de-linked from the Office of the Attorney General (OAG) and the mandate to prosecute was thereafter placed on the Director of Public Prosecutions (DPP).
- 1.1.4. Further, the implementation of the 2010 Constitution introduced devolution of services and thus high-level corruption also devolved to the counties resulting in a substantial rise in corruption cases in the counties.
- 1.1.5. A number of institutional policy guidelines were developed to operationalize the mandate of the Office of the Director of Public Prosecutions (ODPP) including the Corruption and Economic Crimes Prosecution Guidelines, 2015 (herein after referred to as the 2015 Guidelines).
- 1.1.6. However, there have been substantial structural, operational and regulatory reforms that have occurred at the ODPP since then, such as the enhanced ODPP presence in all 47 counties, development and implementation of the Decision to Charge Guidelines, Plea Bargaining Guidelines and Diversion Policy and Guidelines – thus, necessitating a review of the 2015 Guidelines.
- 1.1.7. The **Guidelines on Prosecution of Corruption and Economic Crimes, 2025** are therefore meant to strengthen the 2015 Guidelines and expand the scope to address the contemporary and evolving nature of economic crimes.

The Guidelines also align with Article 30(3) of the United Nations Convention Against Corruption encouraging State Parties to employ discretionary legal powers under the domestic law to be exercised to maximize the effectiveness of

law enforcement measures in respect of corruption and economic crimes and with due regard to the need to deter the commission of such crimes.

This provision underlines the need for uniformity and accountability in the prosecution of corruption and economic crimes.

## **1.2. The Office of the Director of Public Prosecutions (ODPP)**

1.2.1. The ODPP and its constitutional and statutory mandate is provided for under Article 157 of the Constitution of Kenya, 2010 and the ODPP Act, 2013.

## **1.3. Exercise of Prosecutorial Powers and Functions of the DPP**

- i. The powers of the DPP may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
- ii. The DPP and officers subordinate to him or her, exercise prosecutorial powers independently.
- iii. All Prosecutors and anyone appointed by the DPP as a Public Prosecutor shall have a duty to comply with all the guidelines and instructions issued by the DPP in respect of prosecutions.

1.3.1. The DPP in exercise of his or her powers and functions shall not require the consent of or be under the direction or control of any person or authority in exercising the state powers of prosecution.

## **1.4. Purpose and Principles of the Guidelines**

1.4.1. The purpose of these Guidelines is to ensure that the principles and practices as to prosecution of corruption and economic crimes in Kenya are underpinned by unified standards. They are intended to give general guidance to Prosecutors on what ought to be done or taken into consideration at the different stages of a prosecution so that a fair, transparent, reasoned, predictable and consistent policy underlines the prosecution process.

1.4.2. More specifically, the purpose of these Guidelines is to:

- i. Provide guidance for the conduct of prosecutions in cases of corruption and economic crimes, including whether prosecution should be commenced, the charges to be proffered and whether proceedings should be continued or discontinued.

- ii. Establish standards of conduct and practice that the courts as well as the general public in Kenya expect from those persons whose duties include prosecution of cases of corruption and economic crimes.
- iii. Enhance collaboration and coordination between the investigative agencies and the ODPP.

## **1.5. Application**

- 1.5.1. These Guidelines shall be applied in the prosecution of corruption and economic crimes.
- 1.5.2. The Guidelines shall be applied together with such general and/or specific prosecution guidelines as the Office of the Director of Public Prosecutions may issue from time to time and any international guidelines as the ODPP may subscribe to.
- 1.5.3. The Guidelines are to be interpreted and applied in such a manner as to give effect to any relevant provisions in the Constitution of Kenya, legislation and any binding case law.

## **1.6. The Legal and Institutional Framework in the Prosecution of Corruption and Economic Crimes**

- 1.6.1. The following are some of the key legal instruments in the prosecution of corruption and economic crimes in Kenya:
  - i. The Constitution of Kenya, 2010
  - ii. Office of the Director of Public Prosecutions Act, 2013
  - iii. Anti-Corruption and Economic Crimes Act, No. 3 of 2003
  - iv. Public Officer Ethics Act, No. 4 of 2003
  - v. Leadership and Integrity Act, No. 19 of 2012
  - vi. Anti-Bribery Act, No. 19 of 2023
  - vii. Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009
  - viii. Public Procurement and Asset Disposal Act, No. 33 of 2015
  - ix. Witness Protection Act, No. 16 of 2006
  - x. Public Finance Management Act, No. 18 of 2012
  - xi. The Penal Code (Cap 63)
  - xii. Victim Protection Act, 2014
  - xiii. The Evidence Act, CAP 80
  - xiv. Criminal Procedure Code (CPC), CAP 79

1.6.2. The following are the key State institutions that play instrumental and facilitative roles in the fight against corruption and economic crimes; -

- i. Office of the Director of Public Prosecutions
- ii. Ethics and Anti-Corruption Commission
- iii. Judiciary
- iv. National Police Service
- v. Directorate of Criminal Investigations (under the National Police Service)
- vi. Kenya Revenue Authority
- vii. Assets Recovery Agency
- viii. Financial Reporting Centre
- ix. National Intelligence Service
- x. Witness Protection Agency

## **1.7. Prosecution of Corruption and Economic Crimes**

1.7.1. In order to effectively and efficiently execute its mandate, the ODPP is divided into thematic departments so as to be responsive to emerging and complex crimes. One such department is the department of Economic, Organized and International Crimes. The Department consists of various Divisions among them is the Anti-Corruption and Economic Crimes Division.

1.7.2. The Anti-Corruption and Economic Crimes Division has the mandate to advise on files and prosecute cases related to corruption and economic crimes. Implementation of the Constitution led to the decentralization of ODPP services to the regions, counties and sub counties. These 2025 Guidelines will therefore standardize prosecution of corruption and economic crimes cases across the country.

# CHAPTER TWO

## INTER-AGENCY COLLABORATION AND NETWORKS

### 2.1. Cooperation and Collaboration

The fight against corruption and economic crimes requires collective efforts from all actors in the criminal justice system. There is a need for ODPP to cooperate and collaborate with other actors in the system. The ODPP therefore works with various agencies in order to ensure effective and efficient prosecution of corruption and economic crime cases.

### 2.2. National Council on the Administration of Justice (NCAJ)

2.2.1. The ODPP is a member of the National Council on the Administration of Justice (NCAJ), which has established the NCAJ Anti-Corruption Committee as part of its reform agenda to identify the challenges in the fight against corruption and make recommendations for the efficient administration of justice in relation to corruption related offences. In this regard, the Committee has developed 'Guidelines to Expedite the Trial of Corruption and Economic Crimes Cases in Special Magistrates' Courts in Kenya'.

2.2.2. The ODPP is a member of the Court Users Committee (CUC) for the Anti-Corruption and Economic Crimes Division of the High Court. Membership of the CUC mirrors that of the NCAJ Council and ensures an accountable, coordinated, efficient, effective and consultative approach in the delivery of justice.

### 2.3. Multi-Agency Team (MAT)

The ODPP is part of a Multi-Agency Team (MAT) established to enhance coordination and collaboration among law enforcement agencies in the fight against corruption and organized crimes. It brings together several agencies including the Office of the Attorney General (OAG), the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), the National Intelligence Service (NIS), the Financial Reporting Centre (FRC), the Assets Recovery Agency (ARA), and the Kenya Revenue Authority (KRA).

2.3.1. MAT is involved in the investigation of complex corruption and economic crimes, including money laundering and other organized crimes. This is to ensure that the investigations are concluded expeditiously and that the collected evidence meets the required evidentiary threshold.

- 2.3.2. In addition, MAT provides a platform for information-sharing among the agencies, as well as, to hold each other accountable in their roles in the fight against corruption.
- 2.3.3. Investigative agencies under MAT submit investigative files to the DPP for review and directions.
- 2.3.4. The role of the DPP under MAT is to provide guidance to the investigations and ensure the evidence has a reasonable prospect to sustain a conviction in court.

## **2.4. Ethics and Anti-Corruption Commission (EACC)**

- 2.4.1. The EACC is established under the Ethics and Anti-Corruption Commission Act, 2011, pursuant to Article 79 of the Constitution.
- 2.4.2. Its functions are, among others; to develop and, promote standards and best practices in integrity and anti-corruption for State officers; investigate and recommend to the DPP for prosecution, cases of corruption, bribery, economic crimes or violation of codes of ethics prescribed in law, and institute and conduct proceedings in court for recovery or protection of public property, or for freezing or confiscation of proceeds of crime related to corruption.
- 2.4.3. The EACC reports to the DPP the results of the investigations pursuant to the provisions of section 35 of the Anti-Corruption and Economic Crimes Act (ACECA).
- 2.4.4. On receipt of the investigation reports together with the inquiry files, the DPP considers the evidence and makes a decision to charge or not to charge. The DPP thereafter communicates the decision to the EACC for further action.

## **2.5. Directorate of Criminal Investigations (DCI)**

The DCI is established under Section 28 of the National Police Service Act of 2011. Its primary function is to investigate serious crimes, such as; dealing in narcotics, human trafficking, money laundering, terrorism, economic crimes, banking fraud, tax-related offences, organized crime, cybercrime, among others. DCI conducts forensic analysis on cases they investigate and share findings and recommendations to the DPP. In addition, the DCI shall execute the directions given to the Inspector General of The National Police Service by the Director of Public Prosecutions under Article 157(4) of the Constitution.

## 2.6. Witness Protection Agency (WPA)

The WPA is established under the Witness Protection Act of 2006. Its main goal is to provide special protection to individuals who have important information and are facing potential risk or intimidation due to their cooperation with law enforcement agencies in prosecution of cases. The ODPP has partnered with the WPA to identify and refer such witnesses for protection.

## 2.7. Asset Recovery Agency (ARA)

The ARA is established under section 53 of the POCAMLA, 2009. It is mandated to combat money laundering, terrorist financing and proliferation financing through identification, tracing, freezing, seizure and confiscation of proceeds of crime.

## 2.8. Prosecution Guided Investigations<sup>1</sup>

2.8.1. The objective of both the Investigator and the Prosecutor is to ensure that those who commit crimes are prosecuted fairly and efficiently. To better achieve this, the Prosecutor and investigator need to work together throughout the process. The Prosecutor may provide legal guidance to the investigation agency during the evidence collection phase and after the file has been submitted to the DPP. Any guidance given must be provided in writing and should be within the DPP's mandate.

2.8.2. Prosecutors will work closely with Investigators to provide guidance to investigative agencies in the spirit of inter-agency collaboration to ensure that the evidence collated can sustain a case in court. However, the Prosecutor must remain objective and impartial when evaluating evidence at the time of making a decision to charge.

2.8.3. For every investigation file, the ODPP shall keep a confidential file which shall contain the summary of all communications from investigative agencies, the briefs by counsel, the instructions thereon, and any other correspondence relating to the file. Classification shall depend on the sensitivity of each file and correspondences shall be subject to legal professional privilege.

*In giving directions for investigations, the Prosecutor shall indicate all available information regarding the following:*

- *Source of the allegation;*
- *Whether previous complaints have been made over the matter;*
- *Whether there has been a previous investigation or investigations are on-going; and*
- *The nature and seriousness of the allegation.*

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<sup>1</sup> The ODPP Guidelines on the Decision to Charge, 2019

## **2.9. Offering legal advice and guidance before charge**

- 2.9.1. In the spirit of inter-agency collaboration, Prosecutors may be called upon to offer legal advice and guidance before the charge. Requests for advice may be formal or informal. The advice shall be in writing. The Prosecutor shall record the advice given and the information upon which it was based in the ODPP correspondence file. Where necessary, Prosecutors will consult their supervisors before giving advice.
- 2.9.2. The advice given to investigation officers should be consistent with the National Prosecution Policy, Code of Conduct and Ethics for Public Prosecutors, the General Prosecution Guidelines and any other guidelines in force.
- 2.9.3. If, in the opinion of the Prosecutor, an informal request made is of a nature that should be dealt with formally, a Prosecutor should direct the investigation officer to make a formal request or submit the investigation file.

## **2.10. Offering legal advice and guidance after charge**

- 2.10.1. In all cases, a pre-trial conference must be held between the prosecution and the investigator to ensure that the matter is ready for each hearing. In the majority of cases, the Prosecutor will assess trial-readiness under the Active Case Management (ACM) mechanism.
- 2.10.2. A written Pre-trial Conference Form (Annex 1) shall be completed to confirm trial readiness and any anticipated difficulties and placed in the ODPP file.
- 2.10.3. The Prosecutor shall, where necessary, give written instructions to the investigator requesting for additional evidence or further areas of investigations to be covered.

## **2.11. Resolution of disputes**

- 2.11.1. The Prosecutor is encouraged to maintain a harmonious relationship with other agencies and to amicably resolve disputes that may arise with other agencies, always bearing in mind that the ultimate decision to prosecute lies with the Director of Public Prosecutions.
- 2.11.2. Where a dispute arises in respect to advice or directives given by a Prosecutor, the Prosecutor shall prepare a detailed brief on the issues arising for determination by the immediate supervisor who shall then seek to resolve the dispute in the spirit of interagency collaboration and cooperation.

# CHAPTER THREE

## THE ROLES OF A PROSECUTOR

### 3.1. The Prosecutors' roles in the justice system:

The Prosecutor plays a key role within the framework of the criminal justice system. This chapter sets out a number of fundamental principles that will guide Prosecutors in the execution of their functions. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently, and expeditiously, and respect and protect human dignity and uphold human rights while;<sup>2</sup>

- i. Making and reviewing the decision to charge.
- ii. Preparing charges. In this regard, it should be noted that the selection of the charges to be preferred against an accused person is an integral part of the decision to prosecute.
- iii. Instituting criminal proceedings against accused persons.
- iv. Prosecuting bail and other applications.
- v. Providing legal advice to the Inspector-General of the National Police Service and other investigative agencies.
- vi. Conducting criminal trials.
- viii. Prosecuting Appeals, Revisions and Judicial Review Applications and Constitutional Petitions in the Appellate Courts.
- viii. Negotiating Plea Agreements with an accused person or their representative and invoking Alternative Criminal Prosecution Mechanisms where appropriate
- ix. Referring witnesses for protection under the WPA in special circumstances.
- x. Seeking compensation and recovery of proceeds of crime.
- xi. Making appropriate submissions to court on sentencing.

### 3.2. The Duty of a Prosecutor

Prosecution of Corruption and Economic Crimes is crucial to ensure no one benefits from crime. It is the solemn duty of the prosecutor to deter crime by discharging their responsibilities in a professional and ethical manner that is consistent with the powers conferred upon the ODPP. In the execution of the ODPP's mandate, critical factors such as the independence of Prosecutors in decision-making must be borne in mind. Further, Prosecutors must act in concert with other players in the criminal justice sector such as investigators, witnesses,

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2 Guidelines on the Role of Prosecutors | OHCHR

and judicial officers, among others. This solemn duty requires the highest levels of integrity as articulated below:

### **3.2.1. Duty to Professionalism and Diligence**

- 3.2.1.1. Prosecutors have a duty to perform their roles in accordance with the highest standards. They should prepare thoroughly and methodically for trials. Prosecutors must familiarize themselves with the requirements of their dockets.
- 3.2.1.2. A Prosecutor has an obligation to assist in the timely and efficient administration of criminal justice.
- 3.2.1.3. A Prosecutor should strive to ensure continuous skills development including keeping abreast with developments in the law.
- 3.2.1.4. Prosecutors should perform their duties consistently and expeditiously by ensuring maximum utilization of court time by;
  - i. Preparing to assist the trial Magistrate on matters of fact or law in relation to opening statements, or during any stage requiring submissions.
  - ii. Providing guidance and advice to investigators during the course of trial, including undertaking pre-trial with witnesses in preparation for hearing.
  - iii. Ensuring the relevant witnesses and exhibits are available in order for the case to proceed without unnecessary delays;

### **3.2.2. Duty of Honesty and Integrity**

A Prosecutor must exhibit high levels of honesty and integrity. Prosecutors should assist the court with relevant legal authorities applicable to the case and must not knowingly cite as authority any overruled court decision or repealed statute.

### **3.2.3. Duty to make an Independent Decision**

- 3.2.3.1. The Constitution of Kenya provides that the DPP shall not require the consent, control or direction of any persons or authority for the commencement of criminal proceedings and in the exercise of their powers or functions.
- 3.2.3.2. Prosecutors act independently of political influence, sectional interest, or inappropriate influence from any quarter.

### **3.2.4. Duty of Accountability**

- 3.2.4.1. Prosecutors have a duty to operate within the confines of the law in the exercise of prosecutorial discretion. In case of any breach of the law or professional conduct, the ODPP may impose appropriate legal sanctions in accordance with the law and the Code of Conduct and Ethics for Prosecutors.

- 3.2.4.2. The greater duty of exercising prosecutorial discretion must at all times be informed by the National Prosecution Policy and when in doubt, a Prosecutor should consult their superiors.

### **3.2.5. Duty to Present Evidence**

It is the duty of a Prosecutor to present all evidence with scrupulous fairness and disclose exculpatory and inculpatory evidence.

### **3.2.6. Duty of Impartiality**

- 3.2.6.1. Prosecutors should perform their duties without fear, favour or prejudice. They should be consistent, independent and without bias as to the nature of the offence, race, ethnic origin, sex, religion, or political affiliation in performing their roles.
- 3.2.6.2. The decision to charge an accused person should only be based on admissible and reliable evidence. Prosecutors should be satisfied that there is sufficient evidence, that is, evidence that would provide a realistic prospect of conviction against each suspect on each charge.

### **3.2.7. Duty to the Court**

- 3.2.7.1. Prosecutors are officers of the court and constitute an integral part of the machinery for the administration of criminal justice.
- 3.2.7.2. A Prosecutor has a duty to respect and uphold the independence of the Judiciary.
- 3.2.7.3. Prosecutors should avoid publicly criticizing the conduct of judicial officers, especially in reference to cases which they have been prosecuting. They have a duty to be honest in the conduct of cases before court and must not deceive the court by making statements which they know to be false or suppress evidence.

### **3.2.8. Duty to interact with the accused persons or their representative**

- 3.2.8.1. A Prosecutor has a duty to treat the accused person with dignity and respect.
- 3.2.8.2. Where the accused person is represented, a Prosecutor should only discuss the case with Defense Counsel. But where the accused is not represented, the Prosecutor may only talk to the accused in relation to ensuring he/she has had disclosure of evidence. All other matters should be discussed through the presiding judicial officer when the court is in session. Where the prosecution needs any information from the accused, it should be sought in the presence of the investigation officer.

3.2.8.3. A Prosecutor shall not make unjustified attacks on the character of the accused person or any witnesses during cross-examination

3.2.8.4. A Prosecutor has a duty to ensure that an accused person is tried without unreasonable delay.

### **3.2.9. Duty to Raise Objections**

3.2.9.1. A Prosecutor has a duty to raise objections where necessary with due decorum in the course of criminal proceedings.

### **3.2.10. Duty of the Prosecutor to Keep Records**

3.2.10.1. The Prosecutor has a duty to keep up to date records of all the matters assigned. They should ensure accurate records of pleadings, correspondence, court attendance notes (Annex 2), meeting notes and diaries are maintained.

### **3.2.11. Duty to be Fair**

The Prosecutor has a duty of fairness and impartiality according to law. The principal areas to take keen interest include:

- i. Disclosure: Prosecutors must ensure there is compliance with the disclosure obligations under the constitution, statute law and case law;
- ii. Prosecuting: Prosecutors represent the public and the public interest. Presenting the prosecution case requires professionalism, objectivity and detachment that is also cognizant of the reasonable needs of any victims of the crimes;
- iii. Personal Interest: The Prosecutor must not display what could appear to be a personal interest in the outcome of a matter and must act with regard to the overarching values of fair trial;
- iv. Accuracy: The Prosecutor must not argue any proposition of fact that is not an accurate and fair interpretation of the evidence or knowingly advance any proposition of law that does not accurately represent the law.

### **3.2.12. Duty to Avoid Conflicts of Interest**

- i. The Prosecutor must not allow themselves to be subjected to internal or external influences, such as; inducements, pressures, threats or interference. Further, they must not participate in, or seek to influence Prosecutorial decisions in regard to any case in which he/she may be called as a witness, has family, social or other relationships that may improperly influence their conduct.
- ii. The Prosecutor should remain detached and objective in the conduct of a prosecution and guard against personal prejudices from influencing their prosecutorial decisions.

### **3.3. Resolution of Disputes**

- 3.3.1. The Prosecutor is encouraged to have a harmonious relationship with other agencies and to amicably resolve disagreements, always bearing in mind that the ultimate decision to prosecute lies with the Director of Public Prosecutions.
- 3.3.2. A Prosecutor shall escalate all disputes that relate to a guidance or instruction to their immediate supervisors. The Prosecutor shall compile and submit a comprehensive report outlining the matters in question for review to the supervisor, who will endeavor to amicably settle the dispute in the spirit of interagency collaboration and co-operation.

### **3.4. Fidelity to Guidelines**

- 3.4.1. The DPP and other Prosecutors appear in the criminal courts as the representatives of the Republic of Kenya. Consequently, Prosecutors must act in accordance with these guidelines.
- 3.4.2. Failure to abide by these guidelines amounting to violation of the ODPP Code of Conduct shall result in disciplinary action against the defaulting Prosecutor. Nevertheless, such non-compliance shall neither form a basis for any proceedings howsoever in any court against any defaulting officer or the ODPP nor shall it be used to question the procedural correctness of any prosecution in any court.
- 3.4.3. The Guidelines are meant to guide prosecutors in the exercise of their day-to-day activities in the prosecution of corruption and economic crime cases. The Guidelines shall not override any laid down laws.

# CHAPTER FOUR

## THE DECISION TO CHARGE CORRUPTION AND ECONOMIC CRIMES

### 4.1. General Principles on The Decision to Charge

- 4.1.1. The decision to charge is the determination by the DPP as to whether evidence gathered by the investigative agencies is sufficient to warrant the institution of prosecution proceedings against a suspect in a Court of law<sup>3</sup>.
- 4.1.2. Prosecutors shall exercise prosecutorial discretion independently and in accordance with the law and having due regard to the guidelines and policies currently in force.
- 4.1.3. The exercise of prosecutorial discretion includes, but is not limited to, deciding whether to initiate, continue or discontinue a prosecution, selection of charges and acceptance of pleas.
- 4.1.4. When making such decisions, the Prosecutor shall not be influenced by irrelevant considerations such as personal, political interests, and media pressure.

### 4.2. Standards Required on the Decision to Charge

- 4.2.1. The decision to charge shall be guided by the evidential and public interest test. The Test for Prosecution is met when both the evidential and public interest tests are satisfied.
- 4.2.2. The evidential test must be satisfied before the Public Interest Test is considered. The Prosecutor shall carefully analyze and evaluate the evidence availed in order to make an appropriate decision.

### 4.3. The Evidential Test

The Evidential Test means the assessment used to ensure that there is sufficient admissible evidence to provide a realistic prospect of conviction against a suspect on each charge. A realistic prospect of conviction means that a court which is objective, impartial and reasonable, properly directed and acting in accordance with the law, is more likely than not to convict the accused.

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3 The ODPP Guidelines on the Decision to Charge, 2019; guide 3.1.1

In determining sufficiency of evidence to prosecute, the Prosecutor shall identify all the elements for each offence, the fact supporting the elements of the offences, the applicable substantive and procedural law including legal precedents.

In addition, the Prosecutor shall address the following factors:

#### **4.3.1. Relevance**

Relevant evidence tends to prove or disprove a matter in issue. The Prosecutor shall assess the relevance of evidence in relation to the elements of the offence.

#### **4.3.2. Admissibility**

Admissibility is the quality of evidence that makes it capable of being legally admissible in court. In determining the admissibility of evidence, the Prosecutor shall assess:

- i. Admissibility of evidence under existing law and procedure e.g. admissibility of electronic evidence<sup>4</sup>, evidence obtained from foreign jurisdictions or the use of digital evidence and copies.
- ii. The likelihood of the evidence being challenged by the defence and disallowed by the court e.g. illegally obtained evidence; photocopies of public documents, illegally obtained confessions and hearsay.

#### **4.3.3. Reliability**

The Prosecutor shall determine whether the evidence is capable of being regarded as trustworthy or accurate; - consider the consistency of the evidence and witnesses over time.

In all cases, the Prosecutor shall assess the contradictions within the evidence to determine if they undermine the prosecution case.

#### **4.3.4. Credibility**

Credibility entails an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides.

The Prosecutor should consider whether there are any reasons to doubt the credibility of the evidence e.g. the motivation of the witness, or where a witness has previous convictions for dishonesty.

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4 Sections 65 and 106B of the Evidence Act Cap 80 Laws of Kenya

#### **4.3.5. Availability**

The Prosecutor shall consider the capacity of evidence to be legally valid and available at the point of tendering it in court. For example;

- i. Where the witnesses are foreigners, assess the probability of their physical attendance, or to testify via live video link and the value of their evidence weighed against other evidence in the case.
- ii. Where documents are unavailable and/or destroyed, such as call data records or obsolete computer systems, and which may affect the weight of the case, the prosecutor should seek further directions from the supervisor. Where the documents are destroyed, (destruction bound by timelines such as bank documents), the Prosecutor should call for and produce a certificate of destruction.

#### **4.3.6. Strength of Rebuttal Evidence<sup>5</sup>**

Rebuttal evidence is evidence or arguments introduced to counter, disprove, or contradict the opposing party's evidence or argument, either at trial or in a brief reply.

If it is offered to disprove or contradict the evidence presented by the prosecution, it may include considering the accused's testimony, reliability of their confession and consideration of unexamined material in the possession of the police as well as any material that may be obtained through reasonable lines of inquiry.

### **4.4. The Public Interest Test**

The public interest test shall be considered once the Prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. The Prosecutor must exercise their discretion as to whether a prosecution is required in the Public Interest.

The Prosecutor should consider the following factors in determining public interest;

#### **4.4.1. Seriousness of the offence**

Generally, corruption and economic crimes are serious in nature, and it is in public interest that a Prosecutor makes a decision to charge where there is sufficient evidence. The punishment imposed by law in corruption and economic crimes should inform the Prosecutor as to the seriousness of the offence. Prosecutors

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<sup>5</sup> The ODPP Guidelines on the Decision to Charge, 2019; guide 3.2.1.6

should consider the punishment in line with public interest. Where the punishment is severe it is in public interest for a prosecution to ensue.

#### **4.4.2. Loss of public funds**

The greater the loss of public funds the more likely it is that a prosecution will be required in the public interest. The Prosecutor must consider the amount of public funds involved in the alleged corrupt conduct and where the same is substantial the more likely that prosecution will ensue in public interest.

#### **4.4.3. Impact on the Society**

The greater the impact of the offence(s) on the community, the more likely prosecution is to be recommended. The prevalence of an offence in a community may cause particular harm to that community, increasing the seriousness of the offence. Government policy regarding certain offences may be a good indicator of the need for prosecution in such offences e.g. corruption cases

#### **4.4.4. Culpability of the suspect**

The Prosecutor shall, among others, assess the following factors in determining the suspect's culpability:

- i. The suspect's level of involvement in commission of the offence.
- ii. The extent to which the suspect has benefited from criminal conduct.
- iii. Where the suspect is in a position of trust or authority in relation to the victim.
- iv. The prudence of applying state resources to prosecute the case.

#### **4.4.5. Whether prosecution is the proportionate response**

In considering whether prosecution is proportionate to the likely outcome, a Prosecutor should consider the prudence of applying state resources to prosecute the case.

The consideration of prosecution as a proportionate response should not be the sole determinant of public interest.

Similarly, in cases involving multiple suspects, prosecution may be reserved for those bearing the greatest responsibility in order to avoid excessively long and complex proceedings.

#### **4.4.6. Whether sources of information require protection**

The Prosecutor shall be more cautious when proceeding with a prosecution where disclosure of details may reveal and invite harm to sources of information, on-going investigations, international relations or national security. It is essential that such cases be kept under continuous review.

#### **4.4.7. Whether there are Alternatives to Prosecution**

Upon reaching a decision to charge, the Prosecutor must consider the appropriateness of employing alternatives to prosecution. Where an alternative charge or lesser charge might be acceptable, this should be indicated in the review with reasons.

### **4.5. Threshold Test**

In exceptional circumstances the Prosecutor may apply the threshold test to charge a suspect based on prima facie case and a reasonable prospect that additional evidence will be available. This must be done in consultation with the supervisor<sup>6</sup>.

### **4.6. The process of decision-making in corruption and economic crimes**

- 4.6.1. Files forwarded by the investigative agencies will be received at the designated central intake facility in line with the Central Case Intake Practice Directions.
- 4.6.2. Once received, a file will be registered in the ODPP Central Case Intake Register and forwarded to the relevant Head of the Department (HOD) dealing with Corruption and Economic Crimes who shall then allocate to a Prosecutor in the Division to analyse the evidence and recommend on decision to charge. The Prosecutor shall submit a brief to the HOD within the timelines provided.
- 4.6.3. For complex files, the HOD shall appoint a "case team", to analyse and consider the decision to charge. The case team shall analyze the evidence and make recommendations within the timelines provided by the HOD depending on the complexity of the case.
- 4.6.4. The HOD shall convene a case conference where the case team shall make a presentation on their recommendations with reasons therefore and communicate in writing to the DPP for final directions on the decision to charge.

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<sup>6</sup> The ODPP Guidelines on the Decision to Charge, 2019; guide 3.3

- 4.6.5. The following are the possible outcomes after review of the inquiry files;
- i. A concurrence with the recommendation to charge the suspects
  - ii. A recommendation to carry out further investigations on identified areas.
  - iii. A recommendation for administrative action where evidence available is insufficient to sustain a charge and
  - iv. A recommendation to close the file.
- 4.6.6. The decision to charge in corruption and economic crimes shall be made by the DPP.
- 4.6.7. Where a decision to charge has been made by the DPP, the file shall be referred back to the team to prepare a charge sheet and fill the prescribed forms as provided for under the Decision to Charge Guidelines (Appendix 1 and Appendix 3) for approval by the HOD. A prosecution file shall then be opened at the registry.
- 4.6.8. The decision to charge shall be communicated to the investigative agencies within the prescribed time.

#### **4.7. Decision not to Charge/Alternative to Prosecution**

- 4.7.1. Where the Prosecutor finds that the evidential and public interest tests have not been met, the Prosecutor shall give reasons as to why a decision not to charge is appropriate and the same shall be forwarded to the DPP through the HOD for consideration and directions. Upon consideration the DPP shall make a decision.
- 4.7.2. Where the DPP upholds the decision of the Prosecutor not to charge, the investigative agency shall be notified of the decision and reasons for the decision. Where necessary, the DPP may give a public statement on reasons for their decision not to charge.

#### **4.8. Review of the decision to charge**

The DPP may review a decision to charge or not to charge under the following circumstances:

- i. Where there is discovery of new and additional evidence that supports charging.
- ii. Where re-evaluation of the original decision reveals there was a mistake of law and/or fact, and it is in the interest of fair administration of justice and to inspire confidence in the criminal justice system.
- iii. Where a critical witness is no longer available to testify e.g. on account of death and the Prosecution entirely relies on such witness, reluctance/hostility of critical witnesses to testify

- iv. Where rebuttal evidence is presented and authenticated by way of further investigations and the effect of the evidence is to exonerate the suspects.

## 4.9. Alternatives to Prosecution/Trial

**Alternatives to prosecution** can be applied to cases where a prosecutor has sufficient evidence to charge an offender, but prosecution may not be in the public interest. In such cases the Prosecutor decides not to charge, but instead, refers the offender to processes alternative to criminal prosecution. Examples include: administrative remedies, asset forfeiture, confiscation and pre-charge diversion.

**Alternatives to trial:** Where a case satisfies the two-stage test and the suspect is charged, but during the course of prosecution, the accused person admits to the charges and agrees to an alternative to prosecution as a means of punishment. Examples include: Plea negotiation, compensation and/or diversion after charge.

### 4.9.1. Overriding provisions on Alternatives to Prosecution

4.9.1.1. Alternatives to prosecution should be applied at the earliest opportunity available.

4.9.1.2. The Prosecutor who makes the initial decision to apply alternatives to prosecutions shall identify the alternative to be applied and state reasons as to why that decision should be applied. Thereafter, the Prosecutor shall seek advice from the DPP through the supervisor before communicating the decision to the investigating agency. The decision shall be recorded on ODPP form 1A.<sup>7</sup>

4.9.1.3. A matter dealt with through alternatives to prosecution shall be considered concluded when a report of compliance with the terms is filed with the ODPP.<sup>8</sup>

*The ODPP Guidelines on the Decision to Charge provide that a matter dealt with through alternatives to prosecution shall be considered concluded upon the submission of a compliance report to the DPP.<sup>8</sup>*

*The Prosecution Counsel handling the case will be responsible to prepare the compliance report and submit. The report should be addressed to the DPP through the Head of Department. Indicate in the report whether the accused person has complied with the terms provided in the respective alternatives to prosecution.*

<sup>7</sup> The ODPP Guidelines on the Decision to Charge, 2019; guideline 3.4

<sup>8</sup> The ODPP Guidelines on the Decision to Charge, 2019; guideline 3.5

#### **4.10. Diversion as an alternative to Prosecution<sup>9</sup>**

Bearing in mind the seriousness of corruption and economic crimes, diversion can only be applied or considered in exceptional circumstances and at the discretion of the DPP.

#### **4.11. Plea Agreements**

4.11.1. After an accused person has been charged and at any time before judgment, the Prosecutor and the accused person or his or her representative may negotiate and enter into an agreement in respect of:

- i. Reduction of a charge; or
- ii. The withdrawal of a charge; or
- iii. A stay of other charges

4.11.2. A plea agreement entered into between the Prosecutor and the accused person or legal representative may provide for the payment by the accused of any restitution or compensation. The Prosecutor should include a payment schedule for compensation monies where payment is to be made in more than one installment.

4.11.3. Plea negotiations and agreements shall be in compliance with the ODPP Plea Bargaining Guidelines<sup>10</sup> as read together with Sections 137A - O of the Criminal Procedure Code and the Criminal Procedure (Plea Bargaining) Rules.<sup>11</sup>

4.11.4. When an offer for a plea agreement is made by an accused person, the Prosecutor shall consult with the Investigating Officer on the viability, contents and terms for consideration. The DPP may extend an invitation to all relevant parties for a meeting to discuss the contents and terms of the agreement.

Once a plea agreement is negotiated and agreed, the Prosecutor shall seek the concurrence of the DPP through the HOD before executing agreements.

4.11.5. The plea agreement shall thereafter be registered in court and the accused proceed to plead to it.

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9 The ODPP-Diversion-Policy and Diversion-Guidelines and Explanatory Notes

10 The ODPP Diversion-Guidelines and Explanatory Notes

11 Criminal Procedure Code (Plea Bargaining Rules).

# CHAPTER FIVE

## CHARGES

### 5.1. Charges

- 5.1.1. Once the decision to charge has been made the Prosecutor shall proceed to select and frame the appropriate charges that adequately and appropriately reflect the alleged offence to enable the court to deal with the matter fairly and expeditiously according to the law.
- 5.1.2. Article 50(2) of the Constitution requires that the accused must be informed of the charge with sufficient detail to answer it.
- 5.1.3. The Prosecutor shall take into consideration the charges proposed by the investigator but shall make an independent decision on the charges to be preferred in view of the available evidence and the law.
- 5.1.4. The framing of charges must be consistent with the provisions of Sections 134 to 137 of the Criminal Procedure Code (CPC). The Prosecutor must take into account any relevant change in circumstances as the case progresses and be proactive in seeking an amendment to the charge sheet if it is in the interests of justice to do so.
- 5.1.5. In framing the charges to be preferred against a suspect, the Prosecutor should consider the following:
  - i. An offence known in law<sup>12</sup>
  - ii. The number of counts
  - iii. The number of accused persons
  - iv. Reflect the seriousness and extent of the alleged offence
  - v. Sequence in a manner that presents the case in court in a clear and concise manner
  - vi. Consider the offence that reflects the appropriate sentence: and
  - vii. Allow suitable ancillary orders to be made in appropriate cases such as confiscation orders where an accused person has benefitted from the criminal conduct.

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<sup>12</sup> See *Sigilani Vs R* (2004) 2 KLR 480

- 5.1.6. In drafting the charges, the Prosecutor shall ensure that:
- i. The applicable provisions of the law are correctly quoted in the charge sheet;
  - ii. The particulars of the charge sheet are comprehensive enough to disclose the offence.
  - iii. The law or the applicable section of the law is valid and has never been repealed or declared unconstitutional; and
  - iv. The evidence at hand supports the charge.

## **5.2. Multiplicity of Charges and/or Joinder of Offenders**

- 5.2.1. The Prosecutor must comply with Sections 135 to 136 of the CPC in relation to joinder of persons and charges.
- 5.2.2. Charges for any offences may be included in the same charge sheet provided those charges are: founded on the same facts or transactions, form or are part of a series of offences of identical or similar character.

## **5.3. Registration of the Charge Sheet**

- 5.3.1. To enhance efficient and expeditious disposal of criminal cases it is recommended that Charge Sheets drawn in the appropriate format be registered through the Uadilifu Case Management System (UCMS). The system has been integrated with the Judiciary's e-filing system and has capabilities to track and monitor the status and progress of files.
- 5.3.2. The Prosecutor drafting the charges, shall sign, stamp and place their initials and rank on the charge sheet. A copy of the charge sheet will then be registered in the ODPP Case Management System and filed in court in line with the Guidelines on Central Case Intake.
- 5.3.3. Depending on whether the accused is in the custody of investigative agencies or free, the Prosecutor will guide the investigative agencies on when the accused person should be arraigned.
- 5.3.4. Where the charge is to be registered before a special magistrate in other stations other than Nairobi, the HOD or the Head of the Anti-Corruption Division will communicate with the Regional Head on the place where the charge will be registered and also communicate with the investigative agency to provide the duplicate file and arraign the accused in court for the purpose of plea taking.
- 5.3.5. The prosecutors should appraise themselves of emerging changes in the law

## 5.4. The Offences of Corruption and Economic Crimes

The following are some of the key corruption and economic crime offences

5.4.1. The offences under the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) include:

- i. Failing to comply with a notice to furnish a written statement of property (Section 26)
- ii. Failing to comply with a notice to provide information (Section 27)
- iii. Failing to comply with a notice to provide records (Section 28)
- iv. Unlawful Disclosure of details of an investigation (Section 33)
- v. Impersonating an Investigator (Section 34)
- vi. Secret inducements for advice (Section 40)
- vii. Deceiving Principal (Section 41)
- viii. Improper benefits to Trustees for Appointments (Section 43)
- ix. Bid Rigging (Section 44)
- x. Fraudulent/Unlawful acquisition of public property (Section 45)
- xi. Fraudulently making payment/excessive payment from public revenue (Section 45 (2) (a))
- xii. Failure to comply with law or applicable procedure (Section 45 (2) (b))
- xiii. Engaging in unplanned project (Section 45(2) (c))
- xiv. Abuse of Office (Section 46)
- xv. Dealing with suspect property (Section 47)
- xvi. Attempts, Conspiracies, etc. (Section 47A)
- xvii. Obstruction (Section 66 (1) (a))
- xviii. Deceiving (or knowingly misleading) a person (or an investigator) acting under ACECA (Section 66 (1) (b))
- xix. Destruction of Evidence (Section 66 (1) (c))
- xx. Concealing/Altering/Removing evidence (Section 66 (1) (c))
- xxi. Making false accusations to Ethics and Anti-Corruption Commission (Section 66 (1) (c))

5.4.2. Offences under the Leadership and Integrity Act, 2012

- i. Failure to declare operation or control of a bank account outside Kenya (Section 19)
- ii. Acting for foreigners (Section 20)
- iii. Obstructing or hindering any persons under the Act (Section 46)

5.4.3. Offences under the Anti-Bribery Act, 2023

- i. Giving a bribe (Section 5)
- ii. Receiving a bribe (Section 6)
- iii. Bribery of Foreign Public Official (Section 8)

- iv. Failure to have in place procedure for prevention of Bribery (Section 9)
- v. Bribery by a private entity of private entity to prevent bribery (Section 10)
- vi. Knowingly assisting in the commission of activities intended to enable bribery (Section 13)
- vii. Failing to report suspicious or actual instances of bribery (Section 14)

#### 5.4.4. Offences of corruption under the Penal Code Cap 63

- i. False claim by a person employed in the public service (Section 100)
- ii. Abuse of Office (Section 101)
- iii. Giving false certificate by a public officer (Section 102)
- iv. Personating a person employed in the public service (Section 105)
- v. Willful destruction of evidence (Section 116)
- vi. Breach of trust /Fraud by a person employed in the public service (Section 127)
- vii. Neglect of official duty by a public officer (Section 128)
- viii. Giving false information to a person employed in the public service (Section 129)
- ix. Resisting arrest (Section 253)
- x. Conspiracy to defraud (Section 317)
- xi. Obtaining registration by false pretense (Section 320)
- xii. Making a false statement with intent to defraud (Section 329)
- xiii. Fraudulent false accounting (Section 330)
- xiv. False accounting by a public officer (Section 331)
- xv. Forgery (Section 345-348 as read together with Section 349)
- xvi. Uttering a false document (Section 353)
- xvii. Making a document without authority (Section 357)
- xviii. Personation (Section 382)

#### 5.4.5. Offences Under the Conflict of Interest Act, 2025

- i) Conflict of interest in decision making (Section 10)
- ii) Failure to declare any direct pecuniary interest or benefit in proceedings before Parliament or county assembly (Section 11)
- iii) Granting of preferential treatment by a public officer (Section 12)
- iv) Misuse of official information (Section 13)
- v) Undue influence (Section 14)
- vi) Offers of outside employment (Section 15)
- vii) Acceptance or request of gifts and other benefits (Section 16)
- viii) Complimentary treatment (Section 18)
- ix) Contracts with public entities for the supply of goods, works or services (section 19)
- x) Acquisition of interest in partnerships and private companies (Section 20)
- xi) Conflict in recruitment (Section 21)
- xii) Collusion by public officers to conceal conflict of interest (Section 22)

- xiii) Engagement in prohibited gainful employment (Section 23)
- xiv) Soliciting for contributions from the public (Section 26)
- xv) Prohibitions after leaving office (Section 27)
- xvi) Failure to submit information (Section 38)
- xvii) Submission of false or misleading information (Section 39)

5.4.6. Offences under the Public Finance Management Act, 2012

- i. Offences by Public Officers (Section 196 and 198)
- ii. Offences of Financial Misconduct (Section 197)

5.4.7. Offences under Public Procurement Asset Disposal Act, 2015

- i. Inappropriate influence on evaluations (Section 65)
- ii. Fraudulent Procurement Practice (Section 66)
- iii. Formation of a contract without ensuring it is signed (Section 135(4) as read with Section 135(7))
- iv. General Offences (Section 176)

5.4.8. Proceeds of Crime and Anti-Money Laundering Act, 2009

- i. Money laundering (Section 3)
- ii. Acquisition, possession or use of proceeds of crime (Section 4)
- iii. Failure to report suspicion regarding proceeds of crime (Section 5)
- iv. Financial promotion of an offence (Section 7)
- v. Tipping off (Section 8)
- vi. Misrepresentation (Section 9)
- vii. Malicious reporting (Section 10)
- viii. Failure to comply with the provisions of this Act (Section 11)
- ix. Conveyance of monetary instruments to or from Kenya (Section 12)

5.4.9. The Public Private Partnership Act, 2021

- i. General offences (Section 84)

5.4.10. Tax Procedures Act

- i. Offences relating to registration or licensing (Section 90)
- ii. Offences relating to PINs (Section 91)
- iii. Offences by tax agent (Section 92)
- iv. Failure to maintain documents (Section 93)
- v. Failure to submit tax return or other document (Section 94)
- vi. Failure to pay tax (Section 95)
- vii. False or misleading statements (Section 96)

- viii. Fraud in relation to tax (Section 97)
- ix. Offences relating to recovery of tax (Section 98)
- x. Offences relating to enforcement powers (Section 99)
- xi. Obstruction of authorized officer (Section 100)
- xii. Aiding or abetting an offence (Section 101)
- xiii. Offences by officers and staff of the Authority (Section 102)
- xiv. Offences by employees, agents, and companies (Section 103)

#### 5.4.11. Value Added Tax Act

- i. Offences relating to registration (Section 37)
- ii. Unauthorized access to or improper use of tax computerized system (Section 40)
- iii. Interference with tax computerized system (Section 41)
- iv. Failure to keep records (Section 43)

#### 5.4.12. East African Community Customs Management Act (EACCMA)

- i. Offences in respect of Customs areas, etc. (Section 15)
- ii. Conspiring to contravene provisions of this Act (Section 193)
- iii. Offences with violence, etc. (Section 194)
- iv. Removing or defacing Customs seals (Section 195)
- v. Inducing another to commit offence (Section 196)
- vi. Offence to warn offender (Section 197)
- vii. Offence to assume character of officer (Section 198)
- viii. Master of vessel, etc., used for smuggling commits an offence (Section 199)
- ix. Offences related to prohibited, restricted, and uncustomed goods (Section 200)
- x. Payment of duty in addition to fine (Section 201)
- xi. Offence to import or export concealed goods (Section 202)
- xii. Offence to make or use false documents (Section 203)
- xiii. Offence to refuse to produce documents, etc. (Section 204)
- xiv. Offence to interfere with Customs gear (Section 205)
- xv. Uncustomed goods found to be reported (Section 206)
- xvi. Goods offered on pretense of being smuggled (Section 207)
- xvii. Aiders, abettors, etc. (Section 208)

#### 5.4.13. Excise Duty Act

- i. Offences relating to licensing and excise control (Section 39)

#### 5.4.14. National Government Constituency Development Fund Act

- i. Misappropriation of funds or assets from the fund (Section 55)

## 5.5. Review of Charges

5.5.1. After filing of the charges, it may become necessary for the review of the same under the following circumstances:

- i. Discovery of new evidence
- ii. Recanting of witnesses
- iii. Death of an accused person
- iv. Orders from a superior court that affect the case in the lower court
- v. Public interest
- vi. Humanitarian grounds
- vii. Change in circumstances of the case

## 5.6. Amendments of charge sheets

5.6.1. Section 214 of the Criminal Procedure Code allows a Prosecutor to move the court to amend the charge sheet before the close of the Prosecution case.

### ***Procedural Requirements on amendments of charge sheets***

*The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. **Sigilani –vs- Republic (2004) 2 KLR, 480***

*Section 214 (1) provides that a charge sheet can be amended at any stage of the trial but before the close of prosecution case. When a charge is amended/alterd after the close of prosecution case, it leads to acquittal of the accused.*

*The amendment can be done by either the prosecution or the magistrate.*

*The discretion by the magistrate should be exercised judiciously and not to be prejudicial to the accused. Upon amendment of the charge sheet, the accused person shall be called to plead to the new/alterd charges and given an opportunity to recall any of the witnesses who had testified for further cross examination. **Jason Akumu Yongo v Republic [1983] eKLR***

*The amendment should not be prejudicial to the accused person.*

# CHAPTER SIX

## DISCLOSURE OF EVIDENCE

### 6.1. Disclosure

6.1.1. Disclosure is the process of providing the accused person or the accused person's representative with all evidence in the Prosecutor's possession. This includes providing copies of, or access to, any material which the prosecution intends to rely on during trial. Such evidence should also include any exculpatory evidence.

6.1.2. The duty to disclose is anchored in Article 50(2) of the Constitution of Kenya 2010 which provides for the rights of every accused person to a fair trial.

- i. Article 50(2)(c) of the Constitution of Kenya<sup>13</sup> provides the rights of an accused person to have adequate time and facilities to prepare a defense.
- ii. Article 50(2)(j) of the Constitution of Kenya provides for the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

6.1.3. In addition, Chapter 5 of the ODPP Decision to Charge Guidelines, 2019<sup>14</sup> and Clause 3.1 (a) in the Legal Notice No. 1340 dated 29th February 2016 on Active Case Management on Criminal Cases in Magistrates Court and High Court of Kenya<sup>15</sup> provides for the duty to disclosure.

#### 6.1.4. Objectives of disclosure

- i. To ensure that the accused person is guaranteed a fair trial.
- ii. To ensure that there is execution of the fair administration of justice.
- iii. Enhance expeditious disposal of cases.

### 6.2. The requirements of disclosure

6.2.1. The Prosecutor is under a duty to disclose both inculpatory and exculpatory evidence at the earliest opportunity, however, disclosure can be done during the pre-trial period and throughout the trial. Materials to be disclosed include statements of both prosecution witnesses and suspects, documentary evidence, expert reports, digital and electronic evidence among others<sup>16</sup>.

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13 The Constitution of Kenya, 2010

14 The ODPP Guidelines on the Decision to Charge, 2019

15 Active Case Management-Guidelines NCAJ

16 See *Dennis Edmond Apaa & 2 Others v Ethics and Anti-Corruption Commission & Another*; [2012] KEHC 1352 (KLR)

- 6.2.2. The Prosecutor should not disclose correspondence between investigative agencies and ODPP including the report under Section 35 of ACECA, and internal legal opinions by the Prosecutor. However, correspondence between the investigative agencies and other institutions which form part of the evidence to be adduced during trial, should be disclosed. For example, letters to and from the registrar of companies, registrar of persons, land registry, government printer among others.
- 6.2.3. Notwithstanding the foregoing provisions on disclosure, a Prosecutor is not obliged to disclose such matters that may jeopardize national security, the safety of witnesses or public interest<sup>17</sup>. The prosecution has a duty to disclose both inculpatory and exculpatory evidence obtained in the course of investigations, regardless of whether they intend to use it or not.
- 6.2.4. The Prosecutor should endeavor to view the unused material collected during the course of investigations and assess the relevance of the said material.
- 6.2.5. The Prosecutor has no obligation to serve documents which are not in the possession of the Investigating Officer which were not collected during the course of investigation.
- The duty to disclose is a continuous process that continues throughout the trial process and not a one-off event<sup>18</sup>.
- 6.2.6. When the Prosecutor establishes that there is new evidence or evidence that was omitted at the pre-trial stage, the Prosecutor shall seek leave of court at the earliest opportunity to introduce the additional evidence.
- 6.2.7. The Prosecutor shall ensure that the lead investigating officer paginates all documentary evidence. In addition, the Prosecutor shall ensure that the Lead Investigating Officer prepares and supplies the defense with an inventory of the documentary evidence to be adduced at the trial and that the same is filed in court.
- 6.2.8. The Prosecutor should ensure that the inventory itemizes documents/evidence being disclosed by describing the document, the number of pages and the page it appears in the bundle of documents.
- 6.2.9. The Prosecutor should be aware of all documents in the investigator's possession before the same are disclosed to the defence.

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17 *Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others* (Petition 104 of 2019) [2021] KEHC 390 (KLR) (Constitutional and Human Rights) (26 November 2021) (Ruling)

18 See *Director of Public Prosecutions v Peter Aguko Abok and 35 others* [2020] KEHC 4727 (KLR)

6.2.10. The Prosecutor in liaison with the Lead Investigating Officer shall guard against non-disclosures which may result in a mistrial on the grounds that the accused rights to a fair trial as provided for under Article 50(2)(c) and 50(2)(j) of the Constitution were violated and could vitiate the entire trial.

Prosecutors must ensure that they familiarize themselves with practice directions on disclosure issued by the DPP and the courts from time to time.

# CHAPTER SEVEN

## THE TRIAL PROCESS

### 7.1. Trial Preparations

- 7.1.1. The trial process begins with the registration of a charge sheet and concludes either with an acquittal or, in the case of a conviction, with sentencing.
- 7.1.2. The Prosecutor, in consultation with the Investigating Officer, should go through the charge sheet before the same is filed in court to ensure that it complies with Sections 134-137 of the CPC as regards drafting of the charge sheet.
- 7.1.3. The Prosecutor shall adequately prepare for trial by;
- i. Ensuring that the charge sheet contains an offence known in law and that the particulars set out the ingredients of the offence.
  - ii. Ensuring that the charge sheet is drafted comprehensively and correctly and that the statement and the particulars of the offence are in accordance with the statutory provisions.
  - iii. Approving the charge sheet by signing, indicating the rank of the Prosecutor and appending the ODPP stamp.
- 7.1.4. Once the charge sheet is approved, the Prosecutor files it in court through the ODPP Case Management System and one is issued with a case number through the Judiciary e-filing platform.
- 7.1.5. Prosecutors have a duty to uphold the rights of arrested persons at all times. However, where a suspect is in custody and the investigations are not likely to be completed within 24 hours, the Investigating Officer may release the suspect on police bond, or in very exceptional circumstances, make an application for extension of time to complete the investigations.

### 7.2. Arraignment/Plea Management

#### 7.2.1. Plea taking

- 7.2.1.1. Plea taking is the process of reading charges to an accused person and to which they are required to respond as to their guilt or otherwise.
- 7.2.1.2. A plea is the unequivocal response of the accused person to the charge.

- 7.2.1.3. The charge should be read to the accused person in a language that is understood, with the statement of the offence and the particulars clearly bringing out the elements of the offence<sup>19</sup>.
- 7.2.1.4. Where the accused person does not understand the language of the court, the Prosecutor should bring it to the attention of the court for an interpreter to be available.
- 7.2.1.5. Types of Pleas;
- i. Plea of guilty;
  - ii. Plea of not guilty;
  - iii. Autrefois acquit and
  - iv. Autrefois convict

## **7.2.2. Proceeding Upon a Plea of Guilty**

- 7.2.2.1. Where an accused person pleads guilty, the facts of the case shall be presented by the prosecution to bring out the elements of the offence.
- 7.2.2.2. The Prosecutor is also required, where necessary, to ensure that the exhibits are produced for the accused person to admit whether the facts are true.
- 7.2.2.3. Where the accused person admits the facts, a plea of guilty is entered and the accused person is convicted and sentenced forthwith.
- 7.2.2.4. At the sentencing stage, the Prosecutor has a duty to guide the court on the appropriate sentence to be imposed pursuant to the relevant statute e.g. Section 48 of ACECA, Section 18 of the Anti-Bribery Act, Section 106 of the Tax Procedures Act, Section 16 of POCAMLA among others.
- 7.2.2.5. Where the accused person denies the facts, the court shall enter a plea of not guilty and the court shall issue further direction as to the hearing and disposal of the case.

## **7.2.3. Proceeding Upon a Plea of Not Guilty**

Where the accused person pleads not guilty, refuses to plead, remains silent, or fails to enter an unequivocal plea, the court shall enter a plea of not guilty and issue further directions as to the hearing and disposal of the case<sup>20</sup>.

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<sup>19</sup> [Adan Vs Republic 1973 EA445](#)

<sup>20</sup> see Section 207 (3) & 207 (4) of the [Criminal Procedure Code \(CPC\)](#).

#### **7.2.4. Proceeding Upon a plea of autrefois convict and autrefois acquit**

- 7.2.4.1. When the accused person pleads that he has been previously convicted (autrefois convict) or acquitted of the same offence (autrefois acquit), the court shall first try whether the plea is true or not.
- 7.2.4.2. If the court holds that the facts alleged by the accused do not prove the plea, or if it finds that it is false, the accused shall be required to plead to the charges.
- 7.2.4.3. This procedure is in accordance with Section 207(5) of CPC.
- i. Where the accused person alleges autrefois convict or autrefois acquit he must provide evidence to prove that he/she has previously been acquitted or convicted on the same facts, and of same offence, by a court of competent jurisdiction, and this is only on the balance of probabilities.
  - ii. In preparation for the trial, the Prosecutor shall direct the Investigating Officer to investigate the defense raised by the accused person.
  - iii. Once the Prosecutor receives the report from the investigator and finds that the averments by the accused person are not true, the accused person will then be required to plead to the charge.
  - iv. If the Prosecutor finds the averments to be true, the Prosecutor shall seek further directions from the DPP and inform the court accordingly.

*The autrefois convict/acquit may be proved, or established by evidence rendering comparison between the later charges and some previous charges possible i.e.*

- *Comparison of charges where possible, by the trial court on the invitation and initiative of the accused.*
- *By tendering evidence of a conviction or an acquittal, in form of a ruling or judgement relating to that offence, provided the person named in the ruling or judgement, as having been convicted or acquitted of the offence, is the person whose conviction or acquittal of the offence, is to be proved.*
- *By tendering and reference to court records, by the clerk of the court, or another officer having custody of the record of the court, where such conviction or acquittal took place, - with sufficient proof of the identity of the person convicted or acquitted.*
- *By adducing such other evidence showing all such questions as to identity of the accused, date, and facts as are necessary to enable him to show that he is being charged with an offence, which is either the same or substantially the same, as the one in respect of which he has been acquitted or convicted*

## 7.3 Bail and Bond Applications

### 7.3.1. Bail application

- 7.3.1.1. All accused persons are entitled to be released on bail or bond on reasonable conditions pending trial in accordance with Article 49(1)(h) of the Constitution. However, where there are compelling reasons, the court may deny an accused person bail or bond<sup>21</sup>.
- 7.3.1.2. Where there are compelling reasons for opposition to bail/bond, the Prosecutor should direct the Investigating Officer to prepare an affidavit disclosing the compelling reasons in support of the application. The said affidavit must be prepared and availed to the Prosecutor at least one (1) day prior to the date scheduled for plea.

### 7.3.2. Grounds for opposing bail

- 7.3.2.1. The Prosecutor must be satisfied that there are compelling reasons for opposing bail which include;
- i. The accused person is a flight risk, which may include instances where the accused person has no community ties, no family ties, or no fixed abode, or has previously absconded<sup>22</sup>.
  - ii. The accused person is likely to interfere with witnesses or the conduct of investigations as the case may be<sup>23</sup>.
  - iii. The accused person's character, antecedents, associations, and community ties predispose him/her to commit an offence whilst out on bail/bond.
- 7.3.2.2. It ought to be noted that the court holds discretion as to whether or not to grant bail.

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21 [The Constitution of Kenya, 2010; Article 49 \(1\) \(h\), the Bail and Bond Policy Guidelines and Criminal Procedure Code \(CPC\). Section 123A](#)

22 [Erick Amazani vs. Republic \(2010\) eKLR](#)

23 [Republic v Joseph Wambua Mutunga & 3 Others \[2010\] Eklr](#)

## 7.4. Pre-Trial Case Management Conference

7.4.1. The Prosecutor shall request and prepare for a pre-trial case management conference within 14 days, or any other timeline set by the trial courts, after a plea of not guilty has been recorded. The pretrial conference shall address the following:

- i. Identify and address any issues which the court needs to dispense with before the case progresses further, such as amendment of charge sheet, execution of warrants of arrest and issuance of summons among others.
- ii. Confirm that the contents of the document supplied during the disclosure are complete and properly serialized.
- iii. Confirmation of the number and availability of witnesses, including experts, and submission of a schedule for the appearance of witnesses during trial, and estimating where possible, the duration of the trial.
- iv. Confirmation of the number of witnesses and/or evidence outside the jurisdiction of the court and seek the necessary orders.
- v. Confirmation of the mode of presentation of evidence, whether oral, documentary, or electronic. In the event that the prosecution will require assistance in presenting its evidence through the use of technology, appropriate orders shall be sought.
- vi. Identify and inform the court of any accused persons or witnesses that may require special arrangements during trial.
- vii. Notify the Court of protected witnesses, if any, and protection orders thereof.
- viii. Inform the court whether the parties are amenable to plea bargaining arrangements and any other alternatives to prosecutions.
- ix. Upon conclusion of the pre-trial process, a pre-trial conferencing order will be issued by the court.

7.4.2. As soon as the date for trial has been set by the court, the Prosecutor should arrange with the Investigating Officer for witness summons and other arrangements necessary for the trial and accordingly deal with any failure to comply with properly served summons.

7.4.3. The Prosecutor should also liaise with the Investigating Officer to hold a pre-trial conference with the witnesses and where possible, familiarize witnesses with the court environment, the roles of the various court participants, and elementary court procedures.

## **7.5. Opening Statement**

- 7.5.1. The opening statement is made at the commencement of a hearing, providing an overview of the entire case and what the Prosecutor seeks to prove during trial. The Prosecutor shall be cautious to avoid giving evidence.
- 7.5.2. The opening statement may address the following:
- i. The summary of the facts of the case and what the prosecution intends to prove;
  - ii. The elements of each charge;
  - iii. The evidence the prosecution intends to adduce;
  - iv. The number of witnesses, including any expert witnesses, who shall be called to testify.

## **7.6. Conduct of the Prosecution Case**

- 7.6.1. The Prosecutor in collaboration with the Investigating Officer should prepare a witness schedule to ensure proper sequencing of witnesses in a manner that builds the prosecution's case.
- 7.6.2. The Prosecutor shall schedule a pre-trial conference with the witnesses prior to the hearing of the case.
- 7.6.3. The Prosecutor shall ensure the Investigating Officer bonds witnesses and present them for trial.
- 7.6.4. The Prosecutor shall lead the prosecution witnesses to tender their evidence, followed by cross-examination by the accused person or the defense counsel. The Prosecutor may then re-examine the witnesses where necessary.
- 7.6.5. The Prosecutor must lead the witnesses in adducing the relevant evidence in their statements and must be thorough to ensure that the necessary exhibits are marked for identification for purposes of production by the relevant witness.
- 7.6.6. The Prosecutor should ensure that the accused persons are properly identified by the witnesses.
- 7.6.7. The Prosecutor should endeavor to anticipate the objections that are likely to be raised by the defense and prepare appropriate responses.

- 7.6.8. The Prosecutor should maintain in the prosecution file a record of all evidence produced in court.
- 7.6.9. Where a trial magistrate has been transferred before the conclusion of a case, the Prosecutor shall act in compliance with the provisions of section 200 of the CPC<sup>24</sup>. The Prosecutor should then consider the facts of the case and make a decision whether to proceed from where the magistrate stopped or concede to an application by the defense to recall witnesses.
- 7.6.10. Where a witness has been threatened or intimidated, the Prosecutor should:
- i. Seek appropriate in-court protective measures such as; holding proceedings in camera or closed sessions; using pseudonyms, or withholding of statements until such time as the protection measures for the witness have been put in place;
  - ii. Apply to the Witness Protection Agency (WPA) for assessment of the witness to ascertain whether they qualify to be placed under the Witness Protection Programme in accordance with Section 4 of the Witness Protection Act;
  - iii. Liaise with WPA to ensure that all security and protective measures are put in place for the safe appearance of the protected witness during the pretrial sessions and the hearing of the case;
  - iv. Ensure that the witness testifies at the earliest opportunity and is not unnecessarily delayed in court.
- 7.6.11. Where a witness is a prisoner and has testified or is lined up to testify against a fellow prisoner, the Prosecutor may apply in court for the witness to be transferred to another prison for the safety of the witness.
- 7.6.12. The Prosecutor shall ensure all items that can contribute materially to proving the facts in issue shall be tendered as exhibits in court. They include;
- i. Documentary exhibits
  - ii. Expert Reports and opinions
  - iii. Electronic exhibits in form of flash disc, compact disc
  - iv. Electronic gadgets e.g. recording gadgets, audio-visual gadgets
  - v. Movable and immovable assets
- 7.6.13. The original exhibits should be in the custody of the Investigating Officer until formally produced in court.

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24 Section 200(3) of the CPC [Criminal Procedure Code \(CPC\)](#).

- 7.6.14. The Prosecutor shall ensure compliance with the provisions of the Evidence Act as relates to the production of the evidence. Such evidence may include;
- i. Electronic certificates under Section 65(8) and Section 106B of the Evidence Act for computer printouts and electronic evidence.
  - ii. Proper certification of public documents under Section 80 of the Evidence Act.
  - iii. A photographic print certificate under Section 78 of the Evidence Act where photographs are used as exhibits.
- 7.6.15. The Prosecutor should ensure that the evidence adduced before the court demonstrates a proper chain of custody by way of inventories, correspondence, and proper handing over notes among others.
- 7.6.16. It is crucial for the Prosecutor to ensure that all exhibits are properly identified, marked, and tendered with consecutive numbers; and further that all documents lodged and produced in court constitute part of the Court record.
- 7.6.17. Once exhibits are produced in court, they become the property of the court and remain so unless either party makes an application for their release.

## **7.7. Adjournments**

- i. It is in the interest of justice that a case be concluded expeditiously and within a reasonable time.
- ii. Section 4 (4) of the ACECA requires the Court to as far as practicable, hold the trial on a day-to-day basis until completion. The Prosecutor must be adequately prepared for such directions.
- iii. As far as practicable, adjournments should be avoided after a case has been allocated a hearing date. The Prosecutor should ensure they prepare to proceed at the hearing by confirming the availability of witnesses and exhibits to be used at the trial.
- iv. A Prosecutor or the defense is entitled to seek adjournment on merited grounds. An application for adjournment by the defense should be opposed where the Prosecution is of the opinion that such application is intended merely to delay/defeat the course of justice.

## **7.8. Close of prosecution's case**

- 7.8.1. At the close of the prosecution's case, the Prosecutor shall prepare and file submissions on a case to answer demonstrating that the prosecution has established a prima facie case to warrant the accused person being placed on their defense. Such submissions should include;
- i. A description of the criminal offence and its elements;
  - ii. A summary and analysis of the evidence that has been adduced at the trial;
  - iii. A justification of how the evidence proves a prima facie case against the accused;
  - iv. Highlight relevant case law and relevant statutes that fit the nature and circumstances of the case.
- 7.8.2. Where the accused person is acquitted under Section 210 of the CPC the Prosecutor shall apply for copies of typed and certified proceedings and the ruling for purposes of lodging an appeal where applicable.

## **7.9. Role of a Prosecutor during defense hearing**

- 7.9.1. Once the accused person has been put on their defense, the court shall explain to the accused person the provisions of Section 211 of the CPC. The Prosecutor shall then ensure that the record reflects compliance with the said Section.
- 7.9.2. Where the accused person opts to give sworn evidence, the Prosecutor has a right to cross-examine both the accused person and any witnesses they may call in their defense.
- 7.9.3. Where the accused person either opts to give unsworn evidence or opts to remain silent, the Prosecutor has no right to cross-examine the accused person. However, the Prosecutor has the duty to assist the court throughout the defense, where applicable.
- 7.9.4. The Prosecutor can apply to adduce rebuttal evidence, where in their defense, the accused person adduces evidence introducing a new matter which the Prosecutor could not have reasonably foreseen<sup>25</sup>.

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25 Criminal Procedure Code (CPC). Section 212

## 7.10. Final Submissions

7.10.1. At the close of the defence case, the Prosecutor is required to prepare and file final submissions demonstrating that the prosecution has proved its case beyond reasonable doubt and the court should convict the accused person under Section 215 of the Criminal Procedure Code. The submissions should cover:

- i. A statement of the criminal offence and its elements;
- ii. A summary and analysis of the evidence that has been adduced at the trial, both in the prosecution and defence hearing;
- iii. An analysis of the evidence proving the offence;
- iv. Any relevant comments on the trial, including comments on witnesses and exhibits;
- v. Relevant authorities and the applicable statutes that fit the nature and circumstances of the case.

*Note that the Prosecutor addresses the court first. For guidance on the order in which different parties address the court, see Sections 210, 211 and 213 of the Criminal Procedure Code.*

## 7.11. Victims<sup>26</sup>

7.11.1. Victims of crimes in the criminal justice system are to be treated with courtesy, empathy and dignity and their privacy protected.

*Article 50 (9) of the Constitution of Kenya, 2010 provides that “Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”*

*Accordingly, Parliament enacted the Victims Protection Act, Cap 79A (2022). Noteworthy Section 2 thereof which defines a victim was declared unconstitutional in Petition E400 of 2021 because it restricted the definition to natural persons.*

### **Definition of Victim in relation to Crime:**

*“Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.<sup>27</sup>*

*“Victim” means any person (not limited to natural persons) who suffers injury, loss or damage as a consequence an offence (Adapted from the Victim Protection Act read together with the finding in Petition E400 of 2021)*

*In protecting the interests and welfare of victims of crime, the following legal provisions are material:-*

- i. *Criminal Procedure Code (Plea Bargaining Rules). 2018, Rule 7, Rule 48 (ii)*
- ii. *Criminal Procedure Code (CPC). Section 137 D*

26 Victims Protection Act

27 United Nation's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

- 7.11.2. The key means of observing these principles are through the provision of information to ensure that victims understand the process and know what is happening at each stage.
- 7.11.3. Prosecutors should seek to protect the victim's interests as best as they can whilst fulfilling their duty to the Court in the conduct of the prosecution on behalf of the Republic.

## 7.12. Mitigation and Sentencing

### 7.12.1. Mitigation

- i. Mitigation is a right accorded to a convicted person to submit reasons to the court why the court should be lenient during sentencing.
- ii. Where an accused person is convicted on a plea of guilty but gives an explanation that negates the facts of the case during mitigation, it is the duty of the Prosecutor to guide the court to enter a plea of not guilty.
- iii. The Prosecutor should challenge any significant assertions made in mitigation that are inaccurate or misleading.

Prosecutors should familiarize themselves with the [Sentencing Policy Guidelines](#) and the [Criminal Procedure Bench book](#).

### 7.12.2. Sentencing

Sentencing is the process by which a court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence. The Prosecutor should assist the court during the sentence hearing by submitting on:

- i. The penalty prescribed for the offence, including any confiscation orders and/or mandatory fines applicable, for example, Section 48 of ACECA provides for a mandatory fine equal to two times the amount of the benefit or loss whereas Section 18(2) of the Anti-Bribery Act also provides for a mandatory fine equal to five times the amount of the benefit or loss.

#### *Consultations by prosecutor.<sup>28</sup>*

*Before entering into a plea agreement with an accused person, the prosecutor shall—*

- a. consult with the Investigating Officer of the case;*
- b. give due regard to the nature of and the circumstances relating to the case, the personal circumstances of the accused, the interests of the community; and*
- c. unless the circumstances do not permit, afford the victim or the victim's legal representative an opportunity to make a representation to the prosecutor regarding the terms of the agreement. (2) Despite the provisions of subrule (1), the prosecutor shall maintain the sole discretion on whether or not to enter into a plea agreement with the accused person.*

*(Criminal Procedure (Plea Bargaining) Rules, 2018, Rule 7 (1))*

28 [Victims Protection Act](#)

- ii. The previous character and convictions, if any, of the accused person.
- iii. Any aggravating or mitigating facts disclosed by the evidence.
- iv. Evidence of the impact of the offence on the victims and the society at large.
- v. Any applicable principles from the Courts, and any relevant authority or legislation that may assist in determining the appropriate sentence including the Sentencing Policy and Guidelines<sup>29</sup>.
- vi. Where applicable have a victim impact statement

*Prosecutors should emphasize to the Court the importance of abiding by the provisions of Sections 48 of ACECA and section 18 of the Anti-Bribery Act with regards to the mandatory nature. If possible, the Prosecutor can help the Court with the calculations to arrive up the correct amount of fine due and any interests to be imposed where applicable.*

## **7.13. Criminal Forfeiture**

- 7.13.1. Criminal forfeiture involves appropriating the property of the accused person as forfeited to the government, authorized by the law. It serves as a complementary punishment, preventing offenders from benefiting from their criminal activities and acting as a deterrent. Criminal forfeiture orders are issued upon conviction and in accordance with the enabling legislation.
- 7.13.2. In appropriate cases, the Prosecutor shall make an application for compensation orders at conviction or soon thereafter in accordance with Section 54 of ACECA.
- 7.13.3. The Prosecutor should promptly bring to the court's attention any property linked to the offence that is subject to forfeiture, before sentencing and shall include any third-party interest in such property.
- 7.13.4. Where an order for forfeiture is granted against the accused person, the said order becomes final at sentencing.
- 7.13.5. Any interests asserted by an interested party are heard and if proved, the Court then must carve out that interest from the final order of forfeiture<sup>30</sup>.
- 7.13.6. The Prosecutor shall, upon conclusion of criminal proceedings under any law, where an order for forfeiture has been issued against a person, take any further proceedings or steps that may be required to recover the amount or enforce the recovery, forfeiture or order<sup>31</sup>.

<sup>29</sup> Sentencing Policy and Guidelines

<sup>30</sup> Peterson Njue Njeru Vs Mararal Senior Resident Magistrate & Another [2010] Eklr

<sup>31</sup> ODPP Act, Cap. 6B, Section 18

7.13.7. Where the procedure for forfeiture is not specifically provided for in the relevant forfeiture legislation(s), the prosecutor shall be guided by the provisions of Section 389 of the CPC.

## **7.14. Teleconferencing and Video Conferencing**

7.14.1. The Prosecution will make an application for a witness to give oral testimony virtually in the following circumstances:

- i. Where a witness is abroad and securing such a witness would be expensive and occasion undue delay;
- ii. Where the party is a protected witness;

7.14.2. The Prosecution in consultation with the investigative agency must ensure that Mutual Legal Assistance (MLA) processes are complied with for witnesses outside the country or where a witness within Kenya makes an application to testify by way of video link the witnesses are available to give evidence.

*Other circumstances where oral testimony may be given virtually are: -*

- a. Where a party makes an application, and*
- b. Where the Court in its own motion so directs*

*Section 77 of the CPC*

7.14.3. Where a witness in Kenya has applied to testify via video link, they shall give their evidence at the nearest court, the ODPP office or the investigative agencies offices.

7.14.4. In cases involving witnesses testifying from abroad, the Prosecution shall liaise with the Court for purposes of conducting a test run, seven (7) days before the hearing date, involving all parties in the hearing to ensure their preparedness.

7.14.5. The Prosecution shall ensure that a pre-trial session has been undertaken with witnesses outside Kenya through a video link, or any other online platform, or where practicable physically at the jurisdiction where the witnesses are stationed.

7.14.6. Proceedings through video conferencing shall be similar to other Court proceedings and parties shall be expected to maintain the same degree of formality and etiquette as if they were in a physical courtroom.

7.14.7. The Prosecution shall follow up with the Court to ensure that the link through which the parties shall use for purposes of the trial has been shared by the court two (2) days before the trial.

7.14.8. The Prosecution shall follow up with the Court to ensure that special measures have been put in place in cases where vulnerable and protected witnesses are involved to ensure confidentiality.

- 7.14.9. The Prosecution shall ensure that the original documents to be relied on by the witness are scanned and saved in a folder in a computing device, external drive or the cloud for ease of access during the hearing.
- 7.14.10. The Prosecution shall ensure the scanned documentary evidence is served on the Defence and shared with the witnesses before the hearing.
- 7.14.11. The original document shall be produced upon verification and proof of its contents by the witness.
- 7.14.12. The Prosecution shall follow up either orally or in writing on certified true copies of the transcripts of the virtual proceedings.

## **7.15. Confessions**

A Prosecutor intending to produce a confession shall be guided by Section 25A (2) of the Evidence Act Cap. 80 and the Evidence (Out of Court Confessions) Rules 2009 and judicial decisions.

# CHAPTER EIGHT

## REVISIONS, APPEALS, JUDICIAL REVIEW & CONSTITUTIONAL PETITIONS

### 8.1. Revision

8.1.1. Criminal revisions are proceedings commenced in the High Court to review a decision, ruling, finding or order of the lower court that is incorrect, illegal or improper in law. They are governed by Article 165(6) and 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code.

#### 8.1.2. Guiding principles

8.1.2.1. The High Court is empowered to call for and examine the record of any criminal proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

8.1.2.2. Parties do not have an automatic right to be heard when the High Court is exercising its powers of revision. However, the High Court may require parties to appear before it and address the issues leading to the revision. An order will not be made in a revision to the prejudice of an accused person unless there is an opportunity of being heard.

8.1.2.3. Where there is a right of appeal, a revision shall not be entertained at the insistence of a party who could have appealed.

8.1.2.4. The Prosecutor should in appropriate cases seek the intervention of the High Court in its revisionary powers to correct errors in criminal proceedings before Subordinate Courts. This is to ensure that the record of proceedings is correct, complete and accurate.

#### 8.1.3. Factors to consider

8.1.3.1. The Prosecutor may commence criminal revision proceedings in the High Court and in so doing may consider the following factors;

- (a) Where the Trial Court has-
  - i. Made an incorrect, improper or irregular decision
  - ii. Made or recorded an illegal sentence
  - iii. Improperly exercised its discretion
  - iv. Made an error apparent on the face of the record

(b) The likelihood and impact of the High Court reversal of the impugned ruling.

#### **8.1.4. Decision to seek revision**

A decision to seek Revision should be made in consultation with a supervisor. However, where time does not allow, the Prosecutor should apply for certified copy of the proceedings, ruling, order or directions and immediately file an application in the High Court. The Application may be by way of a letter or a Notice of Motion detailing the grounds and reasons for revision and relief sought.

## **8.2. Appeals**

8.2.1. Appeals are proceedings undertaken by either the Prosecution or the Defense with a view to have a decision made in respect of conviction, sentence or interlocutory orders or acquittal, reconsidered by a higher Court. Appeals from the Magistrate's Court are lodged in the High Court whilst those emanating from the High Court are lodged in the Court of Appeal. The Prosecutor has a duty to assist the appellate court to reach a just conclusion.

8.2.2. Appeals from the Subordinate Court to the High Court are governed by Article 50 (2)(q) and 165(6) of the Constitution and Sections 347 to 379 of the Criminal Procedure Code.

8.2.3. The Prosecutor's decision to appeal shall be made upon establishing whether:

- i. There is a proper basis in law; or
- ii. There is a proper factual basis; or
- iii. The sentence is proportionate to the crime.

## **8.3. Appeals from Subordinate Courts to the High Court**

8.3.1. Appeals emanating from the special magistrates' court shall be handled by the High Court.

8.3.2. There is established specialized Anti-Corruption and Economic Crimes Division of the High Court that deals with appeals emanating from subordinate courts handling corruption related cases. In Nairobi, a specialized division of the High Court handles appeals arising from the Anti-Corruption Courts. However, High Courts outside Nairobi have jurisdiction to hear all appeals, including those related to economic crimes, as provided under section 11 of the High Court (Organization and Administration) Act No. 27 of 2015 and Article 165 of the Constitution.

***The factors a prosecutor may consider when deciding to appeal an acquittal, refusal, or dismissal include:***

- 1. The determination of whether the case involves a matter of law or fact, and that the appeal must be based on an acquittal, a refusal to admit a complaint or formal charge, or a dismissal of a charge by a subordinate court.*
- 2. Whether the appeal is arguable and has a high chance of success.*

***The factors a prosecutor may consider when deciding to pursue a review by the Court of Appeal include:***

- 1. Whether the acquittal involved a point of law of exceptional public importance and whether it is in the public interest for the Court of Appeal to determine this point.*
- 2. In cases concerning sentences passed by the High Court, the Director of Public Prosecutions must assess whether a review of the sentence would serve the ends of justice, potentially leading to an enhancement or maintenance of the sentence.*

*Under Article 163 of the Constitution of Kenya a prosecutor may consider pursuing an appeal to the Supreme Court if the case from the Court of Appeal involves the interpretation of the Constitution, as appeals in such cases are allowed as of right.*

- 8.3.3. A Prosecutor should be conversant with any practice directions issued from time to time on the hearing of anti-corruption and economic crime appeals and applications at the High Court.

## **8.4. Appeals on plea of guilty**

No appeal shall be allowed in any case where an accused person has pleaded guilty and has been convicted by a Subordinate Court, except as to the extent of legality or severity of the sentence and where the plea was unequivocal or not properly recorded<sup>32</sup>.

## **8.5. Appeals by the Accused**

- 8.5.1. An accused person who has been convicted after a full trial by a Subordinate Court has a right to appeal to the High Court on a matter of fact and/or law.

The DPP may oppose any appeal lodged by an accused person in the Court of Appeal. However, the Prosecution may concede an appeal against a conviction where it is meritorious to do so and with the consent of a supervisor or the DPP.

- 8.5.2. Where an accused person has been acquitted on a trial by a Subordinate Court, or formal charge, or an order dismissing a formal charge has been made by a Subordinate Court, the Prosecutor may appeal to the High Court only on a matter of law and fact.

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32 Adan Vs Republic 1973 EA445

8.5.3. An appeal to the High Court must be lodged within 14 days after the date of the order or sentence appealed against. However, the High Court may allow an appeal beyond the fourteen days on reasonable grounds upon an application for leave to file an appeal out of time.

8.5.4. Procedure of Appeals arising from the proceedings in the Subordinate Court:

- i. Make an oral application before the trial court for supply of certified typed proceedings and judgment. Additionally, before the lapse of the 14 days make a written request to the Court Administrators for the same. Any subsequent reminders on issue of certified typed proceeding shall be in writing
- ii. Petition of Appeal to be lodged in the High Court within 14 days from the date of sentence.
- iii. It is the obligation of the High Court to give notice to the appellant or their advocate and to the respondent or their advocate of the time and place for the hearing of the appeal. Additionally, the High Court must furnish the respondent or their advocate with a copy of the proceedings and the grounds of appeal. (See Section 353 of the CPC).
- iv. Where the Petition of Appeal has been filed and the certified proceedings are not ready, the Prosecutor should bring the issue to the attention of the Deputy Registrar when the matter comes up for direction before the High Court.<sup>33</sup>  
The Prosecutor shall serve the Respondent/ defence counsel and thereafter await directions from Court on how the matter will proceed.

*Where the accused person files a Petition after exhausting the appeal options or not filing an appeal to the Court of Appeal under Article 50(6) of the Constitution, the Prosecutor is required to confirm that the evidence presented in the Petition was not previously available and that it is compelling, following the exercise of due diligence. If the evidence does not meet these criteria, the Prosecutor shall oppose the Review.<sup>34</sup>*

## 8.6. Appeals from the High Court to the Court of Appeal

8.6.1. An appeal shall lie from a decision of the High Court as a second appeal in accordance with Sections 379 and 379A of CPC.

33 s. 350 – 354 of the Criminal Procedure Code (CPC).

34 *Kibisu v Republic* [2018] KESC 34 (KLR) (28 February 2018) (Ruling)

- 8.6.2. For a second Appeal the Prosecutor should note that an appeal from a Subordinate Court shall be on matters of law only<sup>35</sup>. Prosecutors should note that:
- i. Severity of sentence is a matter of fact.
  - ii. No second appeal lies against sentence except where the sentence was enhanced by the High Court or the Subordinate Court had no power to pass the sentence.
  - iii. The Prosecutor should lodge appeals against sentence where it is plainly lenient or illegal.
- 8.6.3. The DPP may oppose any appeal lodged by an accused person in the Court of Appeal. However, the Prosecution may concede an appeal against a conviction where it is meritorious to do so and with the consent of a supervisor or the DPP.
- 8.6.4. Procedure of Appeals in the Court of Appeal.

The procedure of Appeals at the Court of Appeal is guided by the Appellate Jurisdiction Act, Cap 9 and the Court of Appeal Rules<sup>36</sup>.

- i. Upon delivery of ruling/judgment lodge a Notice of Appeal in the High Court.
- ii. A written request for typed proceedings and judgements/ruling to the Deputy Registrar.
- iii. Within 60 days of the Notice of Appeal, the Registrar prepares the Record of Appeal and ensure it is served on the Parties in the Superior Court.
- iv. Upon receipt of the Record of Appeal, the Appellant shall lodge a copy of Memorandum of Appeal in the Court of Appeal Registry.
- v. Parties are expected to file written submissions as directed by the Court.

## **8.7 Appeals against sentence**

- 8.7.1. Appeals against sentence ensure that there is consistency and maintenance of adequate, just and proportionate standards of punishment for crimes. Appeals by the prosecution must be based only on consideration of matters reflected in the Court records.
- 8.7.2. Where the Appellant appeals only against sentence, the Prosecutor may oppose the appeal where the Prosecutor is convinced it is the fit and proper sentence for the offence.

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35 Karani Vs Republic 2010 Eklr

36 The Court of Appeal Rules, 2022 and Court of Appeal Criminal Appeals and Applications Practice Directions 2020

## 8.8. Appeals to the Supreme Court

- 8.8.1. The procedure of filing an appeal at the Supreme Court is provided for in Article 163(4) the Constitution, Supreme Court Act and the Supreme Court Rules<sup>37</sup>.
- 8.8.2. Appeals to the Supreme Court from the decisions of the Court of Appeal lie only on questions of interpretation and application of the Constitution or in a matter which the Supreme Court or Court of Appeal certifies as being a matter of general public importance.
- 8.8.3. In the interpretation of any law touching on the Supreme Court Appellate jurisdiction, the guiding principle should be that only cardinal issues of law or of jurisprudential value will deserve the further input of the Supreme Court.
- 8.8.4. An application for certification to appeal to the Supreme Court shall in the first instance be lodged in the Court of Appeal and only an Application for the denial of certification will be filed in the Supreme Court.
- 8.8.5. When handling an appeal from a subordinate court, the High Court may determine that additional evidence is needed and must record its reasons for this decision. The High Court can take the evidence itself or instruct a subordinate court to do so. If the evidence is taken by a subordinate court, it must be certified to the High Court, which will then continue with the appeal. Generally, the accused or their advocate should be present when this additional evidence is taken, unless the High Court directs otherwise. Any additional evidence gathered is treated as though it was taken during the original trial in the subordinate court.<sup>38</sup>

*The principles for adducing additional evidence are<sup>39</sup>: -*

- a. That the evidence that is sought to be called must be evidence which was not available at the trial.*
- b. That it is evidence that is relevant to the issues.*
- c. That it is evidence that is credible in the sense that it is capable of belief.*
- d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.*

<sup>37</sup> The Supreme Court Rules, 2020

<sup>38</sup> Criminal Procedure Code (CPC). Cap 75, Sec. 358; Nega Weldeghiorghis Ghebremariaam & another v Director of Public Prosecutions & another [2021] Eklr

<sup>39</sup> LO v Republic [2019] KEHC 6768 (KLR)

## 8.9. Judicial Review

- 8.9.1. Judicial Review proceedings relate to the procedure in decision making processes of public bodies including the ODPP. This procedure is provided for under Article 23(3), 47, and 165 of the Constitution, the Fair Administrative Action Act, and Order 53 of the Civil Procedure Rules.
- 8.9.2. The ODPP is ordinarily cited in Judicial Review proceedings as a Respondent in instances where an Applicant is challenging the investigation processes, decision to charge and claims of abuse of Prosecutorial powers.

*Before the enactment of the Constitution of Kenya, 2010, there was a distinct divide between public and private law. Judicial review of administrative actions was considered a remedial offshoot of administrative law, a key component of public law. The jurisdiction to entertain judicial review applications was vested in the High Court, which provided three remedies: certiorari, prohibition, and mandamus. These remedies were grounded in common law and the practice of judicial review in Kenya was heavily influenced by the United Kingdom, codified under Order 53 of the Civil Procedure Rules.*

*The legal framework for judicial review was two-fold: Sections 8 and 9 of the Law Reform Act formed its substantive basis, while Order 53 of the Civil Procedure Rules provided procedural guidance. However, the promulgation of the Constitution of Kenya, 2010, brought significant changes, expanding the scope and grounding judicial review remedies within constitutional provisions. For instance, Article 23, read with Article 22, recognizes judicial review as a remedy for enforcing fundamental rights and freedoms. Similarly, Article 47 establishes the right to fair administrative action, defining it as expeditious, efficient, lawful, reasonable, and procedurally fair.*

*The Fair Administrative Action Act, 2015, enacted to give effect to Article 47, defines administrative actions broadly to include powers and decisions by authorities or quasi-judicial bodies that affect legal rights or interests. Despite this shift, the Law Reform Act and Order 53 remain relevant in Kenya's judicial review framework. Interestingly, the Fair Administrative Action Act did not explicitly reference the Law Reform Act in its transitional and consequential provisions, raising questions about the interplay between the two statutes.*

*Under the current constitutional dispensation, Articles 22, 23, and 47 of the Constitution significantly expand the scope and applicability of judicial review:*

### *Article 22: Enforcement of the Bill of Rights*

- *Provides individuals the right to institute proceedings when their constitutional rights or fundamental freedoms are violated, threatened, or infringed.*

### *Article 23: Authority of Courts to Enforce Rights*

- *Empowers courts to grant appropriate reliefs, including judicial review orders, to enforce fundamental rights and freedoms.*

### *Article 47: Right to Fair Administrative Action*

- *Introduces the constitutional right to administrative actions that are expeditious, efficient, lawful, reasonable, and procedurally fair.<sup>40</sup>*

40 Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment); <http://kenyalaw.org/kenyalawblog/grounds-for-judicial-review-in-kenya/>

- 8.9.3. In Judicial Review proceedings, the Prosecutor is expected to respond by filing any of the following pleadings or as the case may be;
- i. Preliminary objection on points of law
  - ii. Grounds of Oppositions
  - iii. Replying Affidavit
  - iv. Oral or written Submissions
  - v. List of Authorities or Case Digest
- 8.9.4. The Prosecutor may contact the investigating officers involved in the investigations to assist in preparation of a Replying Affidavit on matters of facts relating to the investigations where the ODPP has made a decision to charge.
- 8.9.5. When dissatisfied with the judgment of the High Court a Prosecutor may prefer an Appeal to the Court of Appeal as a first appeal. Civil Procedure Rules will be applicable in filing and prosecuting the Appeal.
- 8.9.6. Where the ODPP is the Respondent, the Prosecutor is expected to file a Replying Affidavit, Grounds of Opposition or a Preliminary Objection as the case may be and then file written Submissions within the specified timeline.
- 8.9.7. The Prosecutor is advised to prepare for highlighting of submissions where the court directs.

## 8.10. Constitutional Petitions

- 8.10.1. Constitutional Petitions are proceedings commenced by persons seeking reliefs against public bodies where there are allegations that their Constitutional rights have been threatened or violated.<sup>41</sup>
- 8.10.2. The Constitutional Petitions are filed in the High Court. The procedure is provided for under the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) (Mutunga Rules).
- 8.10.3. The reliefs available under Article 23 of the Constitution include but are not limited to:
- i. Declaration of rights
  - ii. Injunction

*Article 22 of the Constitution of Kenya 2010,<sup>42</sup>*

*(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

<sup>41</sup> *Anarita Karimi Njeru v Republic* [1979] KECA 12 (KLR); *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) (29 September 2014) (Judgment)

<sup>42</sup> *The Constitution of Kenya, 2010; Article 22 (1)*

- iii. Conservatory order
- iv. Declaration of invalidity of any law
- v. An order for compensation
- vi. An order for judicial review

8.10.4. The Prosecutor should respond to a Constitutional Petition by filing the following pleadings as the case may be:

- i. Replying Affidavit
- ii. Grounds of opposition
- iii. Preliminary Objection

8.10.5. The Prosecutor may contact the Investigating Officers involved in the investigations to assist in preparation of a Replying Affidavit on matters of facts relating to the investigations where the ODPP has made a decision to charge.

*The petition shall disclose the following:*

- a. *the petitioner's name and address;*
- b. *the facts relied upon;*
- c. *the constitutional provision violated;*
- d. *the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;*
- e. *details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;*
- f. *the petition shall be signed by the petitioner or the advocate of the petitioner; and*
- g. *the relief sought by the petitioner.*

8.10.6. Where an order for compensation is made against the ODPP, the Prosecutor should inform the Head of Department (HOD) to notify the Attorney General and/or appeal against such an order.

## **8.11. Conservatory Orders/Stay of Proceedings**

Where an application for conservatory orders or stay of proceedings has been filed in respect to proceedings in the Superior Courts, the Prosecutor shall unless otherwise directed oppose such an application and file relevant pleadings.

*The Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others summarized the principles for grant of conservatory orders as;*

- a. *The Appeal or intended appeal is arguable and not frivolous*
- b. *Unless the orders sought are granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory*
- c. *That it is in public interest that the conservatory orders be granted*

## 8.12. Bail Pending Appeal

- 8.12.1. Where an Appellant Applies for bail pending Appeal, the Prosecutor shall unless otherwise directed oppose such an application and file relevant pleadings.
- 8.12.2. The test to be considered in an application for Bail pending Appeal was set out in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, to wit;
- i. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.
  - ii. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.
  - iii. The main criteria are that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued."

# CHAPTER NINE

## REPORTS

### 9.1. Introduction

The ODPP is required under Article 254 of the Constitution, section 37 of ACECA and section 7 of the ODPP Act, to prepare annual and any ad hoc reports and submit them to the President, the National Assembly or the Senate.

In order to ensure the ODPP fulfills the obligations under the law, and for the DPP to effectively perform the supervisory role over prosecution services, Prosecutors are required to keep up-to-date records of the progress of all matters.

### 9.2. Case file registers

The Office shall maintain the following registers related to corruption and economic crime cases;

- i. A register for inquiry files received from the investigative agencies
- ii. A register on the status of files
- iii. A file movement register
- iv. A register for prosecution files opened
- v. A register for revisions and appeals
- vi. A complaints register
- vii. A register on concluded cases
- viii. A register for concluded Plea Bargains

### 9.3. Engagements with investigative agencies

The Department of Economic, Organised & International Crimes shall maintain a record of engagements with the investigative agencies; the record shall contain among others;

- i. Inquiry/prosecution file number
- ii. Date and time of the meeting/retreat/correspondence
- iii. The Prosecutor assigned to the case and details of the investigator
- iv. A brief summary of the case/outcome of the meeting/retreat

## **9.4. Reports during the Trial**

### **9.4.1. Court attendance report**

The Prosecutor shall prepare a court attendance report in the prescribed form. A court attendance report shall contain, among others;

- i. The ODPP case file reference number
- ii. The court case number
- iii. Court station/lower courts/High Court/Court of Appeal/Supreme Court
- iv. Parties
- v. Subject matter/ Case summary/ charges/ about the petition/ application/ appeal
- vi. Coram
- vii. Outcome
- viii. Next action
- ix. Person attending court
- x. Date and signature

### **9.4.2. Periodic updates**

The Prosecutor shall regularly report back to the DPP at such intervals as may be necessary on the progress in Court of the case assigned to him or her.

The report shall, among other things, include:

- i. Information on any application made by any person in connection with the matter;
- ii. The directions and orders made by the trial Court: and
- iii. The status of compliance therewith. The Prosecutor may seek advice and directions on how to handle the same as and when required.

## **9.5. Reports at the Conclusion of the Trial**

9.5.1. At the conclusion of the trial, the Prosecutor shall within seven (7) days of the pronouncement of the decision and sentence (if any) by the Court, brief the DPP in writing of the judgment, sentence and any ancillary orders made.

9.5.2. The brief shall include the Prosecutor's opinion on the merits or propriety or otherwise of the decision, sentence or ancillary orders and shall advise on the desirability or otherwise of an appeal or application for Revision as the case may be.

## **9.6. Quarterly reports**

The department shall prepare quarterly reports to the DPP which shall contain the following information and any other requirement as may be prescribed from time to time;

- i. Inquiry files received from the investigative agencies
- ii. Files returned to the investigative agencies
- iii. Prosecution files opened
- iv. Status of cases pending in court
- v. Cases where plea agreements have been signed
- vi. Cases withdrawn
- vii. Cases concluded
- viii. Complaints received

## **9.7. Annual Reports**

9.7.1. The department shall prepare an annual report on prosecutions in accordance with Section 37 of ACECA. The report shall contain;

- i. Summary of the steps taken, during the year, in each prosecution and the status, at the end of the year, of each prosecution.
- ii. Indicate whether the ODPP has agreed with the recommendations by the Commission to prosecute a person for corruption and economic crime and if not, set out succinctly the reasons thereof.

9.7.2. The reporting period shall be a calendar year, ending 31st December each year.

## **9.8. Monitoring, reporting and review**

The DPP will establish a system for monitoring and evaluating the effectiveness of these guidelines.

The Guidelines on Prosecution of Corruption and Economic Crimes will reviewed from time to time as determined by the DPP.

# ANNEX 1: PRE-TRIAL CONFERENCE FORM



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

## ANTI-CORRUPTION AND ECONOMIC CRIMES

### PRE- TRIAL CONFERENCE FORM

ODPP CASE FILE REF. NO: .....

COURT CASE NO: .....

PARTIES: .....

DATE: .....

VENUE: .....

	NAME OF WITNESS	ROLE	SIGNATURE
1.			
2.			
3.			
4.			
5.			
6.			
7.			



# ANNEX 2: COURT ATTENDANCE NOTE



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

## ANTI-CORRUPTION AND ECONOMIC CRIMES

### COURT ATTENDANCE NOTE

ODPP CASE FILE REF. NO.: .....

COURT CASE NO/ APPLICATION NO.: .....

PARTIES: .....

PLEA/MENTION/HEARING/RULING DATE: .....

BEFORE JUDGE/MAGISTRATE: .....

COUNSEL FOR REPUBLIC/ RESPONDENT: .....

COUNSEL FOR ACCUSED/ APPELLANT: .....

COUNSEL FOR INTERESTED PARTY (IES): .....

OUTCOME OF PROCEEDINGS:

.....  
.....  
.....  
.....

NEXT ACTION TO BE TAKEN: .....

NEXT PLEA, MENTION, HEARING/JUDGMENT DATE: .....

COUNSEL: ..... SIGNATURE: .....

DATE: .....

- COPY: 1. FILE  
2. OFFICER  
3. HEAD OF DIVISION/STATION







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