OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

GUIDELINES ON THE DECISION TO CHARGE, 2019

Foreword

Prosecutors take up an important role in the Criminal justice system in exercising significant state power and responsibilities. The decision whether to charge or not to charge is the hallmark of the institution of criminal proceedings and the heart of the State's criminal justice. It thus behooves the prosecutor to act with independence, integrity, impartiality and professionally in the administration of justice.

The Decision to charge Guidelines are anchored on Article 157 of the Constitution 2010, National prosecution Policy and the General Prosecution Guidelines. It provides the framework of exercising the state powers of prosecution ensuring justice is served to all and sundry. The Guidelines have been developed with the mind of ensuring the quality of prosecutorial decisions, accountability of the prosecutors and transparency of prosecutorial processes to the right holders.

In developing the Decision to Charge Guidelines, the Taskforce adopted international best practices to illustrate the diverse practices that have been adopted worldwide by prosecutorial agencies in making the decision to charge. The focus is thus on the prosecutors in adopting and implementing these Guidelines to ensure they know and consider evidential thresholds before institution of proceedings, review of ongoing proceedings as well as adopt alternatives to prosecution if and where need be to ensure the interests of justice are served.

It is my unwavering conviction that these Guidelines will positively impact the decisions made in the institution of criminal proceedings and the quality of prosecutions. It will also enhance prosecutorial accountability and enhance transparency of a process that is perceived to be shrouded in mystery.

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Thank You.

DORCAS ODUOR, EBS, OGW
SECRETARY PUBLIC PROSECUTIONS

Definitions

The following definitions apply to these guidelines:

Alternatives to prosecution:
cases where a prosecutor has sufficient evidence to charge an offender, but prosecution may not be the best course of action. In such cases a prosecutor may decide not to charge and instead refer the offender to a different institution or form of penalty. Examples are: administrative remedies and asset forfeiture & confiscation.

Child:
means an individual who has not attained the age of eighteen years. 'Children' has a corresponding meaning.

Compensation:
means an award granted to a victim who has suffered economic or emotional loss, damage of property, or physical injury or harm as a result of an offence after claim has been be justified.

Consent:
means an agreement by two parties to the same thing in the same sense or where parties concur with a proposal.

Diversion:
means a process for resolving criminal cases without resort to full judicial proceedings. Diversion can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion programme, restorative justice process or similar scheme.
This enables Offenders to be dealt with by non-judicial bodies and thereby avoiding the negative effects of formal judicial proceedings, a criminal conviction and a criminal record.

Evidential test:
means the test used to ensure that there is sufficient evidence to provide a realistic prospect of conviction against a suspect on each charge.

Investigation Officer:
means a police officer, or any other person formally mandated by statute, who is in charge of a criminal investigation.

Investigative agency:
means the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law.

Offence:
means an act, attempt or omission punishable by law, and includes a regulatory offence.

Offender:
for the purpose of the guidelines means a Suspect, Subject, Accused person or any other person who has been arrested for a criminal offence.

Prosecutor:
for the purpose of the guidelines, has the meaning assigned in the Office of the Director of Public Prosecutors Act 2013 and includes any other person exercising delegated powers of the DPP under Article 157(9) of the Constitution.

Public Interest test:
means the test applied by prosecutors to decide whether charging a suspect is in the interest of the wider administration of justice.

Restitution:
means the act of restoring the victim, to the extent possible, to the same position they were in prior to the offence, which resulted in loss or injury.

The Threshold test:
means the test applied by prosecutors in order to charge a suspect upon reasonable suspicion and where there is a reasonable prospect of additional evidence being available.

Two stage test:
comprises of both the Evidential test and Public Interest test.

Vulnerable Victim:
means a natural person who suffers injury, loss or damage as a consequence of an offence, and who, due to age, gender, disability or other special characteristics may require the provision of special justice and support.

Vulnerable Witnesses:
means a person who has made a statement or has given or agreed to give evidence in relation to an offence or criminal proceedings in Kenya or outside Kenya, and requires protection on the basis of an existing threat or risk.

Contents

Abbreviations and Acronyms

CCTV	Closed Circuit Televisions
CPC	Criminal Procedure Code
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
IO	Investigating Officer
KLR	Kenya Law Report
KWS	Kenya Wildlife Service
NPS	National Police Service
ODPP	Office of the Director of Public Prosecutions
P3	Police Form No. 3 Medical Examination Form

List of Authorities

- The Constitution of Kenya, 2010

Statute Law

- Children Act, No. 8 of 2001 Laws of Kenya
- Criminal Procedure Code, Cap 75 Laws of Kenya
- Evidence Act, Cap 80 Laws of Kenya
- Leadership and Integrity Act, No. 19 of 2012
- LSK Code of Standards of Professional Practice and Ethical Conduct 2017
- Public Officers Ethics Act, No. 4 of 2003
- Securities Law Amendment Act, No. 14 of 2014
- Victim Protection Act, No. 17 of 2014.

Case Law

- Benard Mungungi Njau v Republic [1979] eKLR - Criminal Appeal No. 17 of 1977
- Cleophas Otieno Wamunga v Republic [1989] eKLR – Criminal Appeal No. 20 of 1989
- Dennis Edmond Appa and 2 others v EACC and Another (2012) eKLR
- George Ngodhe Juma,Peter Okoth Alingo, Joseph Ndungu Kagiri v Republic [2016] eKLR.
- Kazungu Katana Ngoa v Republic [2017] eKLR- Criminal Appeal No. 75 of 2014
- Kihara v Republic (1986) KLR 473
- Maitanyi v Republic [1986] eKLR – Criminal Appeal No. 6 of 1986
- R v Stinchcombe (1991) 3 SCR 326.
- R. v Judith Ward (1993) 96 Cr. App. R. 1 – 4 June 1992
- Republic v Mark Lloyd Steveson [2016] eKLR- Criminal Revision No. 1 of 2016
- Republic v Mohammed Ismail Madey & 3 Others (2016) eKLR
- Republic v Raphael Muoki Kalungu (2015) eKLR
- Republic v Wilson Chelelgo Cheponin (2019) eKLR
- Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR- Criminal Appeals Numbers; 480, 208 and 209 OF 197

- Sango Mohamed Sango & another v Republic [2015] eKLR – Criminal Appeal No. 1 of 2013
- Susan Muthoni Nyoike v Attorney-General [2003] eKLR.
- Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR- Criminal Appeal No. 116 of 2007
- Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR.

CHAPTER 1

1.1 Introduction

These guidelines shall be referred to as the **"Guidelines on the Decision to Charge, 2019"** hereinafter "the guidelines" or "the present guidelines" as applicable. They apply in any context in which a prosecutor would reasonably understand that a criminal prosecution could result. The guidelines intend to cement and enhance the growth of a stronger, streamlined and professional prosecutorial service in Kenya having made substantial progress since establishment of the Office of the Director of Public Prosecutions, ODPP in 2010.

The guidelines set out the core functions and duties of a prosecutor in relation to the decision to charge and the conduct of criminal proceedings so that prosecutors may properly exercise their functions. They are intended to guide prosecutors on the standards expected of them, their duties in the administration of justice, and the factors to consider in the exercise of prosecutorial discretion. It is expected that the consistent use of the present guidelines will ensure transparency and accountability in the exercise of prosecutorial powers and consequently, build public confidence and trust in the ODPP and the criminal justice system at large.

The guidelines cover the conduct of prosecutors, their powers, roles and duties in relation to guiding investigations and making the decision to charge, the independence of prosecutor in making the decision to charge, duties of disclosure, continuing review and general guidance on discontinuance, plea bargaining, diversion, appeal and revision. In appreciating that poor decision-making can have profound consequences for accused persons, victims, witnesses and the Kenyan public, these guidelines are specially aimed at equipping prosecutors to independently and objectively exercise their role as gatekeepers to the criminal justice system.

The present guidelines are not exhaustive and must be read together with applicable existing law, regulations, policy and other relevant guidelines, including, but not limited to; the International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors; the Office of the Director of Public Prosecutions Act 2013, the Leadership And Integrity Act 2012, the Public Officers Ethics Act and the Law Society Rules of Professional Conduct. The guidelines do not create any rights or obligations on the part of any third party including any defence counsel.

1.2 Compliance and Accountability

All prosecutors have a legal duty to comply with all the guidelines and instructions issued by the DPP in respect of prosecutions. Failure to adhere to the guidelines may lead to internal disciplinary action and in serious circumstances, may lead to a criminal prosecution.

Prosecutors should familiarise themselves with **Sections 54, 55 and 56 of the ODPP Act.** As well as the Official Secrets Act paying attention to the prohibition of sharing information to any unauthorised person.

1.3 Powers of the Director of Public Prosecutions

Article 157 of the Constitution of Kenya, 2010, established the independent Office of the Director of Public Prosecutions and set out the powers of that office. These include, *to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction (Art 157(4)).*

The Constitution Art 157(6) further vests the sole exercise of state powers of prosecution with the Director of Public Prosecution, who may:

(a) *Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*

(b) *Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority;*

(c) *Subject to clauses (7) and (8), discontinue, at any stage, before judgment is delivered, any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

Art 157 (7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

Art 157 (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

Art 157 (9) Powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

Art 157 (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and, in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

1.4 Functions of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions Act (hereinafter ODPP Act) operationalizes the above Constitutional provisions by providing for the following functions of the Director of Public Prosecutions:

- To formulate and keep under review public prosecution policy.
- To perform any functions and exercise any powers prescribed by legislation in addition to the functions and powers conferred by the Constitution and the ODPP Act.
- To promote appropriate standards of practice by public prosecutors, prosecution assistants, and any other person exercising prosecutorial authority under the ODPP Act or any other statutes that enables the DPP to delegate the power of prosecution.
- To implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime.
- To cooperate with the National Police Service, investigative agencies, the courts, the legal profession and other government agencies or institutions to ensure fairness and effectiveness of public prosecutions.
- To set the qualification for the appointment of prosecutors.
- To review the decision to charge, or not to charge, any criminal offence.
- To advise the State on all matters relating to the administration of criminal justice.
- To delegate powers of prosecution to other authorities where statute allows.
- To represent the state in all criminal cases, criminal applications, revision, appeals and matters relating to extradition and mutual legal assistance.
- To advise government ministries, departments and state corporations on matters pertaining to the application of criminal law.
- To address Parliamentary questions relating to the administration of criminal justice.
- To address complaints raised by members of the public, watchdog bodies and other institutions.

[1]See Article 157(9) of the Constitution, the ODPP Act 2013 s28 to s30 and the Criminal Procedure Code for definitions.

1.5 Guiding Principles - Conduct of the Prosecutor

1.5.1 Basic Obligations of prosecutors

Prosecutors must act in accordance with the Constitution, laws of Kenya and in a manner that is compatible with their functions and the rights of the accused. As critical players in the justice system, prosecutors have a duty to prepare and conduct cases in accordance with all enabling legislation, policies, practice directions and guidelines issued by the DPP or the court.

1.5.2 Professional Conduct in General

Prosecutors shall exercise prosecutorial discretion independently and in accordance with the law and having due regard to the guidelines and policies currently in force. 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. When making such decisions, prosecutors must not allow themselves to be influenced by irrelevant considerations such as individual, sectional or political interests, media pressure. This means that prosecutors must;

- Exercise the highest standards of integrity and care;
- Seek supervisory guidance before conducting a case that is beyond his/her experience;
- Take reasonable steps to maintain and enhance their professional knowledge and skills and keep themselves well-informed of relevant legal developments;
- Be consistent, independent, fair and impartial;
- Maintain professional confidentiality at all times, subject to the requirements of the law;
- Understand and comply with their duties of disclosure under the law and guidelines;
- Serve and protect the interests of justice without fear, favour or prejudice, taking into account all circumstances whether or not they are to the advantage or disadvantage of the accused person.
- Respect and uphold, the right of all people - prosecutors must never act in a way that unjustifiably favours or discriminates against particular individuals or interests.

1.5.3 Duty to Avoid Conflict of Interest

Prosecutors must not knowingly participate in, or seek to influence, the making of a decision in regard to any case where their personal or financial interests or their family, social or other relationships would reasonably appear to influence their conduct as prosecutors. They should not act as prosecutor or advice in cases in which they, their family or business associates have a personal, private or financial interest or association. Furthermore, prosecutors must not act in any case in which their action or decision is the subject of litigation (e.g. judicial review), or in which, for any other reason, they are likely to be called as a witness.

Prosecutors should disclose to their supervisor any potential conflict of interest that could reasonably be perceived as affecting their independent judgment in any case.

Where prosecutors are instructed through special or general instructions (i.e. they are special counsel from the ODPP acting on instructions or where they are exercising delegated powers of prosecution such as Kenya Wildlife Service prosecutors), they shall sign a Conflict of Interest Declaration Form confirming the absence of any issues that might reasonably be perceived to be a conflict of interest together with an undertaking to report any issues that may arise pertaining to a conflict of interest or attempt to interfere with their function. Prosecutors must immediately report to their supervisors:- any improper attempt to influence their decision-making; any attempt to pervert the course of justice or; where anything emerges that gives rise to a potential conflict of interest. The supervisor will be responsible for determining the necessary action.

1.5.4 Professional Conduct in Court

When presenting cases in any court, prosecutors serve as officers of the court and therefore have a duty to act independently and in the interest of justice. Prosecutors must also act in accordance with the practice directions issued by the Office of the Chief Justice.

1.5.5 Record Keeping

Prosecutors have a duty to keep up to date records of all matters and ensure that the court attendance is recorded in sufficient detail on the prosecution file and any instructions issued by the court or ODPP are clearly written. See Part Two of these guidelines for the detailed guidance on the preparation of the Prosecution File.

CHAPTER 2

2.1 Prosecution Guided Investigations

From time to time, prosecutors will be called upon to provide guidance to investigative agencies in the spirit of inter-agency collaboration. In such instances, prosecutors will, on an objective assessment, be guided as provided hereunder.

2.1.1 Directing that investigations be conducted

The investigator and the prosecutor share a common objective to ensure that perpetrators of offences are taken through the criminal justice system in a manner that is impartial, effective and expeditious. This calls for close collaboration between the prosecutor and investigator throughout the process. However, the prosecutor must remain objective and impartial when evaluating evidence at the time of making a decision to charge.

A Prosecutor may guide investigations by firstly, directing that investigations be carried out and secondly, by providing legal advice and guidance.

The DPP or officers acting under his/her delegated authority may direct that investigations be carried out upon knowledge of alleged criminal conduct. Such direction shall be in writing to the Inspector General of the National Police Service or the appropriate investigative agency depending on the nature of the alleged criminal conduct. The directive will indicate a time limit within which the direction must be complied with. Any such direction e.g. to an investigating officer or sub-county commander, must be copied to a prosecutor's supervisor.

It is the responsibility of the investigator to investigate offences, and the responsibility of the DPP to ensure the right person is charged with the correct offence and that cases are withdrawn when it becomes clear there is no realistic prospect of conviction. In order to fulfil this duty, the ODPP commits to: delivering justice through timely legal decision-making[2] and excellent case preparation and presentation. The ODPP will do this by:

- Giving timely advice to investigators so that the cases with merit progress and those without are dropped.
- Treating every case fairly and equally and preferring the correct charges backed by evidence.
- Timely case preparation, encouraging, where appropriate, early guilty pleas, considering alternatives to prosecution and supporting the court in its role of *active case management*.
- Building strong cases – this includes taking an active role in liaising with the investigating officer to ensure witnesses are prepared and that exhibits are ready and available; and ensuring that officers are ready to give evidence and disclosure is effected in good time.
- Providing the highest standards of trial advocacy at every stage of the case. This includes advance preparation of legal submissions limited to any objections as to admissibility of evidence which the prosecution might present, and which in the prosecutor's opinion will elicit an objection by the defence counsel. Building partnerships, nationally and internationally to ensure excellence across the criminal justice system.
- Identifying vulnerable witnesses at an early stage and liaising with the investigating officer to ensure their protection and facilitation.

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;

[2] See Performance Management Targets

- Whether there has been a previous investigation or investigations are on-going; and
- The nature and seriousness of the allegation.

When directing that an investigation be conducted, an **ODPP Correspondence file** should be opened and clearly endorsed with the written advice or summarise in writing any advice, specific actions and timelines. The correspondence file is classified as confidential and subject to legal professional privilege. In determining the specific actions required, Prosecutors must first consider the nature of the allegation and advise accordingly.

2.1.2 Offering legal advice and guidance before charge

In the spirit of inter-agency collaboration, prosecutors may be called upon to offer legal advice and guidance. Requests for advice may be formal or informal. The prosecutor shall record the advice given and the information upon which it was based in the ODPP correspondence file. When necessary, prosecutors will consult their supervisors before giving advice.

The advice provided to investigation officers should be consistent with the National Prosecution Policy, Code of Conduct and Ethics for Public Prosecutors, the General and Specific Prosecution Guidelines and any other guidelines in force.

The request for advice should be handled diligently, professionally and quickly. At all times, a prosecutor will satisfy himself or herself that the information supplied by the investigator is sufficient to inform the provided advice.

If in the judgment 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. In offering legal advice or conducting prosecution-guided investigation, the prosecutor should consider the following;

- Offence(s), disclosed;
- Elements of each of those offences;
- The most appropriate charges;
- Any requirements governing admissibility of evidence.
- Any further evidence to be obtained;
- Whether any documentary evidence is needed;
- Whether the evidence is admissible;
- Public interest considerations or any bars that may affect any eventual prosecution.

2.1.3 Offering legal advice and guidance after charge

During the course of prosecution, the prosecutor shall, where necessary, give written instructions to the investigator requesting for additional evidence or further areas of investigations to be covered.

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 majority of cases, a duty prosecutor will assess trial-readiness under the central case in-take mechanism – see the DPP's Central Case Intake practice directions.

A written pre-trial review shall be completed to confirm trial readiness and any anticipated difficulties and placed in the ODPP file.

2.1.4 Resolution of disagreements

Prosecutors are encouraged to have a harmonious relationship with investigators and to amicably resolve disagreements always bearing in mind that the ultimate decision to prosecute lies with the Office of the Director of Public Prosecutions. Where a disagreement 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.


DECISION TO CHARGE
ADMISSIBILITY
RELEVANCE
COMPETENCE
AVAILABILITY

CHAPTER 3

3.1 The Decision to Charge

The decision to charge is the Prosecution Counsel's determination as to whether evidence availed by an investigator or investigative agencies is sufficient to warrant the institution of prosecution proceedings against an accused person in a Court of law. Due to its intrusive nature and potential adverse effect of the decision on the life, liberty or property of an accused person, it is the most important decision that is made by any prosecutor. The independence of the DPP and other institutions of prosecution revolves around this decision. Prosecutors are required to, and must exercise, due care in making the decision to charge.

3.1.1 Making the decision

The decision to charge or not to charge requires an objective and independent analysis of the case. Whilst the roles of the investigator and prosecutor are complementary, ultimately the decision to charge rests with the prosecutor, who must assess whether it is appropriate and what charges to prefer for a court to consider.

It is the duty of a prosecutor to ensure that the right person is prosecuted for the right offence, properly applying the law and ensuring that relevant evidence is submitted before the court and that disclosure obligations are complied with.

When making charging decisions, prosecutors must be fair and objective and must not let personal views based on ethnic or national origin, gender, disability, age, religion or belief, sexual orientation, status, or gender identity of a suspect, accused person, victim or any witness influence their decision and must be apolitical. Prosecutors must also act in the interest of justice and not solely for the purpose of obtaining a conviction.

Prosecutors should note that certain cases require prior authorisation from the DPP e.g. terrorism, corruption cases, treason, sedition, offences under the Anti-Counterfeit Act and offences involving aircrafts. Offences that require such consent may change and so prosecutors must keep themselves up to date with the law, policy and practise directions. Similarly, there are certain classes of persons who are entitled to immunity under the Privileges and Immunities Act. When in doubt, a prosecutor must seek guidance from their supervisor before proceeding to make a decision to charge and be mindful of guidelines on thresholds for cases of this nature.

All decisions made on whether to prosecute or not and the reasons for such decisions must be conducted and written in accordance with these guidelines. In all cases prosecutors must complete the Decision to Charge Form ODPP 1A and file this in the relevant Prosecution File.

3.1.2 Standard required in making the decision to charge

The standard required in making the decision to charge is whether there is a reasonable prospect of conviction. The prosecutor must consider **key evidence** and certain **minimum requirements of a file** which would apply depending on which test (the Two Stage Test or the Threshold Test) is applied. The Two Stage Test and the Threshold Test are set out below.

3.1.2.1 Key Evidence

Key evidence is evidence which either alone (the evidence of one witness) or taken together with other evidence (further witnesses or exhibits) establishes; first, elements for each offence and second, person or persons to be charged who committed the offence.

The elements of an offence are defined by statute and in some cases, clarified by legal precedent. These elements must be proved in order to secure a conviction. Key evidence should be available at the point of charge. It would usually include but not limited to:

- Statements from witnesses who give direct evidence of any element of the offence.
- Statements from police officers who have witnessed any aspect of the offence.

- Expert evidence e.g. forensic scientists whose evidence establishes one or more of the elements of the offence.
- Where numerous witnesses provide differing evidence relating to the same events, witness statements should be provided for each witness.
- Any statements of the accused whether exculpatory (not guilty) or inculpatory (incriminating).
- Any statement relating to the arrest of the accused.
- Digital and electronic evidence for example CCTV, other audio/visual multimedia and metadata that prove the offence.

NOTE:
Evidence such as chain of custody / continuity of exhibit and procedure or corroboration are not usually key evidence but will undoubtedly need to be addressed before trial.

- Documents or forms.
- Medical evidence – even where the full medical report is not yet available, an indication of the medical position should be provided by the officer in charge of the investigation as a minimum such as a P3 form.
- Physical evidence such as contraband e.g. drugs.

3.1.2.2 Minimum requirements of a file: Under the two stage test
Where an investigation is complete and a decision to charge is sought on the Two Stage Test, in addition to the key evidence detailed above, the prosecutor must be satisfied that the investigation file is sufficiently composed to allow the making of an informed decision to charge. In general, the file must include:
- Initial report
- Investigation diary[3]
- Where applicable, the correspondences
- A brief summary of the facts of the case.
- Key witness statements including the complainant's addressing the necessary elements of the offence, identification of the suspect and / or the arrest.
- Statements of all investigating officers assigned to the case.
- Any expert report available at the time or exhibit memo.
- Any relevant documentary exhibits including photographs or financial statements. In the case of CCTV or other multimedia (e.g. from a mobile phone), if a copy is not available, an officer who has viewed the media should provide a statement summarising the content and should identify the offender or offence. The date of request for a copy of the media and timescales for return must be indicated.
- Any inventory.
- Statement of the suspect, if any, along with any cautionary statement or statement under inquiry.

[3] The prosecutor must ensure that the investigation diary is accurate. Dates, orders and any preliminary investigations match the evidence in the file.

- Exculpatory evidence (if any)
- Confirmation of the age of the accused where appropriate.
- Where applicable, any evidence of compensation or restitution
- Any background information considered relevant for the prosecutor to know should be included in a form marked ‘confidential’ e.g. the need for ‘special measures’ for vulnerable victims.
- The proposed charge(s).

Statements may be obtained purely for the purposes of chain of custody / continuity post-charge along with full expert evidence provided the evidence revealed at the time of a decision to charge establishes an element of the offence. In cases involving, for example, narcotics drugs or specimens of wildlife, a statement from an experienced officer as to his/her opinion on the nature of the item, should suffice. That statement must set out his experience and basis for his/her opinion.

When reviewing the investigation file, the prosecutor must ensure that the investigation diary is up to date and accurate. Dates, orders and any preliminary investigations should match the evidence in the file. Additionally, the prosecutor shall prepare and maintain an inventory of all the documents presented in the investigation file and indicate whether or not they are in their original state. All copies must be certified as true copies of the original. A certificate under section 106B of the Evidence Act (Cap 80) shall accompany documents that have been extracted from any electronic media.

If a prosecutor decides not to charge, reasons shall be given in writing and where appropriate the Investigating Officer and the victim shall be consulted.

Where there is need for additional evidence to meet the minimum requirements a prosecutor shall give written advice, outlining key areas to be covered, together with any other specified information within reasonable time (this can usually be assessed in discussion with the investigating officer) and the file be resubmitted for further direction.

3.2 The Two-Stage Test

The Two Stage Test, comprising an ‘evidential test’ followed by a ‘public interest test’ should be applied: when all outstanding reasonable lines of enquiry have been pursued or; prior to an investigation being completed, where the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the Two Stage Test whether in favour or against a prosecution.

3.2.1 The Evidential Test

Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity[4].

Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. A realistic prospect of conviction means an objective, impartial and reasonable court hearing a case, properly directed and acting in accordance with the law, is more likely than not to convict the accused. This is however a different test from the one that the criminal courts must apply; a court will convict if it is sure that the accused’s guilt is proved beyond reasonable doubt.

[4] Evidence Act, Cap 80 of the Laws of Kenya. S3

When deciding whether there is sufficient evidence to prosecute, prosecutors should first identify all the elements for each offence. This involves a thorough understanding of relevant substantive and procedural law including legal precedents. Once the prosecutor is clear about the elements of the offence, the prosecutor should address the following factors:

3.2.1.1 Relevance

Relevant evidence is evidence tending to prove or disprove a matter in issue.[5] A prosecutor should assess whether the evidence tends to prove or disprove an element of an offence or does it add any probative value to make one of the elements of the offence more likely or not. See Chapter II of the **Evidence Act** and relevant authorities[6].

3.2.1.2 Admissibility

Admissibility is the quality of evidence that makes it capable of being legally admitted, allowable or permissible in court[7]. Admissible evidence is therefore evidence that is relevant and is of such character (e.g., [inter alia] not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it. In some cases it is called competent, proper or legal evidence[8]. A prosecutor should assess:

a) Admissibility of evidence under existing law and procedure **-** for example under the Evidence Act and other relevant statutes specific to the nature of the alleged offence e.g. admissibility of intercept evidence in terrorism trials or the use of digital evidence (and copies) under the Security Laws (Amendment) Act.

b) The likelihood of the evidence being held as inadmissible by the court e.g. illegally obtained evidence; confessions and hearsay.

3.2.1.3 Reliability

Reliability comes from the basic term "reliance" which means: dependence or trust by a person[9]. Prosecutors must determine if the evidence is capable of being regarded as trustworthy or accurate? Prosecutors should consider the consistency of the evidence and witnesses over time, e.g. are there questions on accuracy or integrity? In a case that relies wholly or substantially upon the identification of an accused person, the circumstances in which the identification took place must adhere to certain principles[10]. Also, where identification parades have been conducted, adherence to Police Service Standing Orders on the same is key. In all cases, contradictions within the evidence must be assessed to determine if they undermine the prosecution case, the totality of the evidence should be considered[11].

3.2.1.4 Credibility

Credibility is the quality that makes something (as a witness or some evidence) worthy of belief[12]. Prosecutors should

[5] Black's Law Dictionary at page 599

[6] **Republic v Mark Lloyd Steveson [2016] eKLR and Kihara versus Republic (1986) KLR 473** which state that the court, in determining if evidence is relevant, must determine the probative value of the evidence adduced namely, does it have a 'tendency to make the existence of any fact that is of consequence to the determination of fact in issue more or less probable that it would be without the evidence[5] Black's Law Dictionary at page 599

[7] Black's law at page 50

[8] Black's Law Dictionary page 595

[9] Black's Law Dictionary (Ibid) at page 1316

[10] In identification cases, **Reuben Taabu Anjononi & 2 Others v Republic [1980]eKLR; Cleophas Otieno Wamunga v Republic[1989] eKLR Maitanyi v Republic [1986] eKLR** state that consideration must be given to the circumstances of the identification e.g. lighting and visibility, the circumstances in which the initial sighting took place e.g. crowded area/ mobility of the environment, the distance between the witness and the suspect at the time of sighting and whether that distance remained constant e.g. was the suspect running away or getting closer?, general description of the suspect (height, weight, build etc. and distinguishing marks or features; Duration of observation: Familiarity – is this a 'recognition' case? If so, information as to how long he has known the accused, when was the last time he saw him and/or how often he would see him; A description of the type and colour of the clothing worn by the suspect; If there were any obstructions between the witness and the suspect; Has the witness been tainted by other factors or opinions of third parties.

[11] **Sango Mohamed Sango & another v Republic [2015] eKLR** addressed the issue of reliability of evidence including circumstantial evidence stating that it can form the basis of a conviction and that where there are grave contradictions, unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to untruthfulness or if they do not affect the main substance of the prosecution case.

[12] See Black's Law Dictionary (ibid) at Page 396

[13] Relevant case law includes: **Benard Munungi Njau v Republic [1979] eKLR** (corroboration of accomplices) a**nd Kazungu Katana Ngoa v Republic [2017] eKLR** (assessing the impact of inconsistencies in prosecution evidence).

[14] See: Blacks Law Dictionary (ibid) at page 145

[15] Black's Law Dictionary at page 599

A case that DOES NOT pass the evidential stage MUST NOT proceed, no matter how serious or sensitive it may be. The only exception to this is where the "Threshold Test" applies.

consider whether there are any reasons to doubt the credibility of the evidence e.g. the motivation of the witness, or where a prosecution has previous convictions for dishonesty; any civil proceedings on-going between the parties or where evidence is perishable over time and has not been examined early enough[13].

3.2.1.5 Availability

Availability is the capacity of evidence to be legally valid at the point of tendering in court[14]. For example, where the witnesses are foreigners, the probability of ensuring their attendance or other options such as live link must be assessed and the value of their evidence weighed against other evidence in the case – can the prosecutor proceed without them? Another example may be where cultural practice calls for a burial within 24 hours in a case involving a death or where items are perishable, such as bush meat, can the prosecutor secure samples or digital evidence of the item in a way that will ensure its admissibility?

3.2.1.6 Strength of Rebuttal Evidence

Rebuttal evidence is evidence offered to disprove or contradict the evidence presented by the prosecution[15]. This will include considering the suspect's explanation or reliability of his confession and also a consideration of examined and unexamined material in the possession of the police as well as any material that may be obtained through reasonable lines of enquiry e.g. privilege and immunity.

3.2.2 The Public Interest Test

The public interest test is what is in the interest of the wider administration of justice. This is where a prosecutor exercises discretion. Sir Hartley Shawcross, a former English Attorney General, explained the rationale behind the public interest test in 1951:

"It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases: wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect therefore is required in the public interest. That is still the dominant consideration. It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed. And almost every day in particular cases, and where guilt has been admitted, I decide that the interests of public justice will be sufficiently served not by prosecuting, but perhaps by causing a warning to be administered instead. Sometimes, of course, the considerations may be wider still. Prosecution may involve a question of public policy or national, or sometimes, international, concern."

When applying the public interest test, the prosecutor should consider each of the factors set out in item 3.2.2. The factors are not exhaustive and not all will be relevant in every case. The weight to be attached to each of the factors will also vary according to the facts and merits of each case. It is quite possible that one public interest factor alone may outweigh a number of other factors that tend in the opposite direction. As always, written reasons for such an approach must be recorded.

In determining public interest, the prosecutor should consider the seriousness of the offence. The more serious, the more likely it is that a prosecution is required. When assessing seriousness, consider the suspect's culpability and the harm caused by considering the factors listed below:

3.2.2.1 Culpability of the suspect

Culpability is the tendency towards guilt or blameworthiness[16]. It is determined by among others, the following factors:

- The suspect's level of involvement in commission of the offence.
- The extent to which the offence was premeditated and/or planned.
- The extent to which the suspect has benefited from the criminal conduct.
- Whether the suspect has previous criminal conduct and/or out of court disposals and any offending whilst on bail or whilst subject to a court order.
- Whether the offence is likely to be continued, repeated or escalated
- The suspect's age and maturity (see below).
- Where the suspect is in a position of trust or authority in relation to the victim.
- The more vulnerable the victim's situation, or the greater the perceived vulnerability of the victim, the greater the culpability of the suspect.
- The prudence of applying state resources to prosecute the case
- The purpose of punishment

Prosecutors should also have regard to whether the suspect is, or was at the time of the offence, affected by any significant mental or physical ill health or disability, as in some circumstances this may mean that it is less likely that a prosecution is required. However, prosecutors will also need to consider how serious the offence was, whether the suspect is likely to re-offend and the need to safeguard the public or those providing care to such persons. Where a suspect is of unsound mind, it may not be appropriate to prosecute through the ordinary criminal justice system where it appears that the suspect may be incapable of understanding the charges or the procedures involved or cannot give instructions. The criminal procedure code (CPC) gives guidance on how to deal with such cases, in particular section **162 of the CPC** states that it is the duty of the court to inquire where it has reasonable grounds to believe that an accused person is of unsound mind and thus incapable of making his/her defence. Prosecutors should not wait for the court to inquire, but should be proactive in seeking such an inquiry where it is clear that one is required.

3.2.2.2 Impact or harm to the victim or community.

The greater the harm to the victim or the community, the more likely it is that a prosecution will be required in the public interest. However, prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence, the availability of special measures and the possibility of a prosecution without the participation of the victim.

Prosecutors should consider the views expressed by the victim about the impact that the offence has had. In appropriate cases, this may also include the views of the victim's family. Note however, that the ODPP does not act for victims or their families in the same way as lawyers act for their clients, and prosecutors must form an overall view in the public interest.

3.2.2.3 The status of the victim:

It is more likely that prosecution is required if the offence was motivated by any form of prejudice against the victim's actual or presumed ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender

[16] Black's Law dictionary, at page 407

identity; or if the suspect targeted or exploited the victim, or demonstrated hostility towards the victim, based on any of those characteristics. A prosecution is also more likely if the offence has been committed against a victim who was at the time a person serving
the public.

3.2.2.4 The suspect's age at the time of the offence.
The criminal justice system treats children differently from adults and significant weight must be attached to the age of the suspect if a minor. The best interests and welfare of the child must be considered, including whether a prosecution is likely to have an adverse impact on their future prospects that is disproportionate to the seriousness of the offence. Prosecutors must have regard to the obligations arising under the Children's Act, No 8 of 2001 and the Constitution of Kenya, 2010. Prosecutors must be familiar with the guidelines and policy on diversion.

As a starting point, the younger the suspect, the less likely a prosecution is required. However, there may be circumstances in which the prosecution of a child offender is in the public interest. Such circumstances include instances where: Firstly, the offence committed is serious; secondly, the child offender's past record suggests there are no suitable alternatives to prosecution and; the child offender does not admit to committing the offence which limits application of out of court disposal mechanisms.

3.2.2.5 Impact on the community
The greater the impact of the offending on the community, the more likely a prosecution is required. Community is not restricted to communities defined by location and may relate to a group of people who share certain characteristics, experiences or backgrounds, including an occupational group.

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, prevailing circumstances (during elections), and environmental protection (wildlife cases in areas with particular biodiversity and for the greater good of the country).

3.2.2.6 Whether prosecution is a proportionate response
In considering whether prosecution is proportionate to the likely outcome, a prosecutor should consider the cost to the ODPP and the wider criminal justice system. This especially applies where prosecution could be regarded as excessive when weighed against any likely penalty. The consideration of prosecution as a proportionate response should not be the sole determinant of public interest. It is essential that regard is also given to the public interest factors identified above i.e. suspect's age, impact to community, status of victim or suspect's culpability. Cost, therefore, can be a relevant factor when making an overall assessment of public interest.

When considering the public interest in any case, consideration will be given as to whether the matter can be appropriately dealt with out of court. Prosecutors should apply the **ODPP Diversion Policy** and ensure that any decision to divert a case is recorded with reasons. Similarly, cases should be prosecuted in accordance with principles of effective case management. For example, in a case involving multiple suspects, prosecution might be reserved for the more culpable participants in order to avoid excessively long and complex proceedings.

3.2.2.7 Whether sources of information require protecting
In some cases, special care should be taken when proceeding with a prosecution where details may need to be made public that could harm sources of information, on-going investigations, international relations or national security. It is essential that such cases be kept under continuous review.

Upon reaching a decision to charge, the prosecutor must consider the acceptability of alternative or lesser charges were the accused person offers to plead guilty. Where an alternative charge or lesser charge might be acceptable, this should be indicated in the review with reasons. Also, a prosecution may be unable to proceed on statutory bars such as immunity or where the suspect has been prosecuted for the same offence before.

3.3 The Threshold Test

In rare and unique circumstances, the prosecutor can apply the Threshold Test to charge a suspect based on prima facie evidence and a reasonable prospect of additional evidence being available. This test can only be used during the early stages of very serious cases, such as sexual and gender based violence, murder, election violence, anti-corruption cases and counter terrorism, and only after consultation with the immediate supervisor.

Prosecutors must review cases involving decision to charge based on the threshold test within 14 days of making the decision. If the evidence anticipated is still not available within the 14 day period, the case should be escalated to the supervisor for direction on the next steps.

When the threshold test is applied, the following **four requirements MUST be met:**

3.3.1.1 First requirement - There are reasonable grounds to believe that the suspect has committed the offence.

Prosecutors must be satisfied, on an objective assessment of the evidence, that there are reasonable grounds to believe that the suspect has committed the offence. The assessment must consider the impact of any defence or information that the suspect has put forward or on which they might rely.

In determining whether there are reasonable grounds to believe that the suspect has committed the offence, prosecutors must consider all of the material or information available, Prosecutors must be satisfied that the material to be relied on at this stage is capable of being admissible, reliable, credible and relevant.

3.3.1.2 Second requirement - Further evidence can be obtained to provide a realistic prospect of conviction

Prosecutors must be satisfied that there are reasonable grounds to believe that the continuing investigation will provide further evidence, within a reasonable period of time. This allows the prosecutor to consider the totality of the evidence, including material which may point away from, as well as towards a particular suspect, and determine whether it is capable of establishing a realistic prospect of conviction in accordance with the Two Stage Test. The likely further evidence must be identifiable and not merely speculative.

Note: Where any one of the four conditions is not met, there is no need to consider any of the other conditions, as the Threshold Test cannot be applied, and the suspect should NOT be charged. As with all decisions to charge, a written justification must be given when applying the threshold test even where a decision is made not to charge.

In reaching these decisions, prosecutors must consider;

- The nature, extent and admissibility of any likely further evidence and the impact it will have on the case;
- The charges that the evidence will support;
- The reasons why the evidence is not already available;
- The time required to obtain the further evidence, including whether it could be obtained within a reasonable period; and
- Whether the delay in applying the Two Stage Test is reasonable in all the circumstances.

3.3.1.3 Third requirement - The seriousness or the circumstances of the case justifies the making of an immediate charging decision

The seriousness and the circumstances of the case should be assessed in relation to the alleged offence(s).

3.3.1.4 Fourth requirement - it is in the public interest to charge the suspect.

If all of the above three conditions are satisfied, the same factors in the public interest test of the Two-Stage Test should be applied. (Refer to the Public Interest section above.)

3.3.2 Minimum requirements of a file: under the threshold test

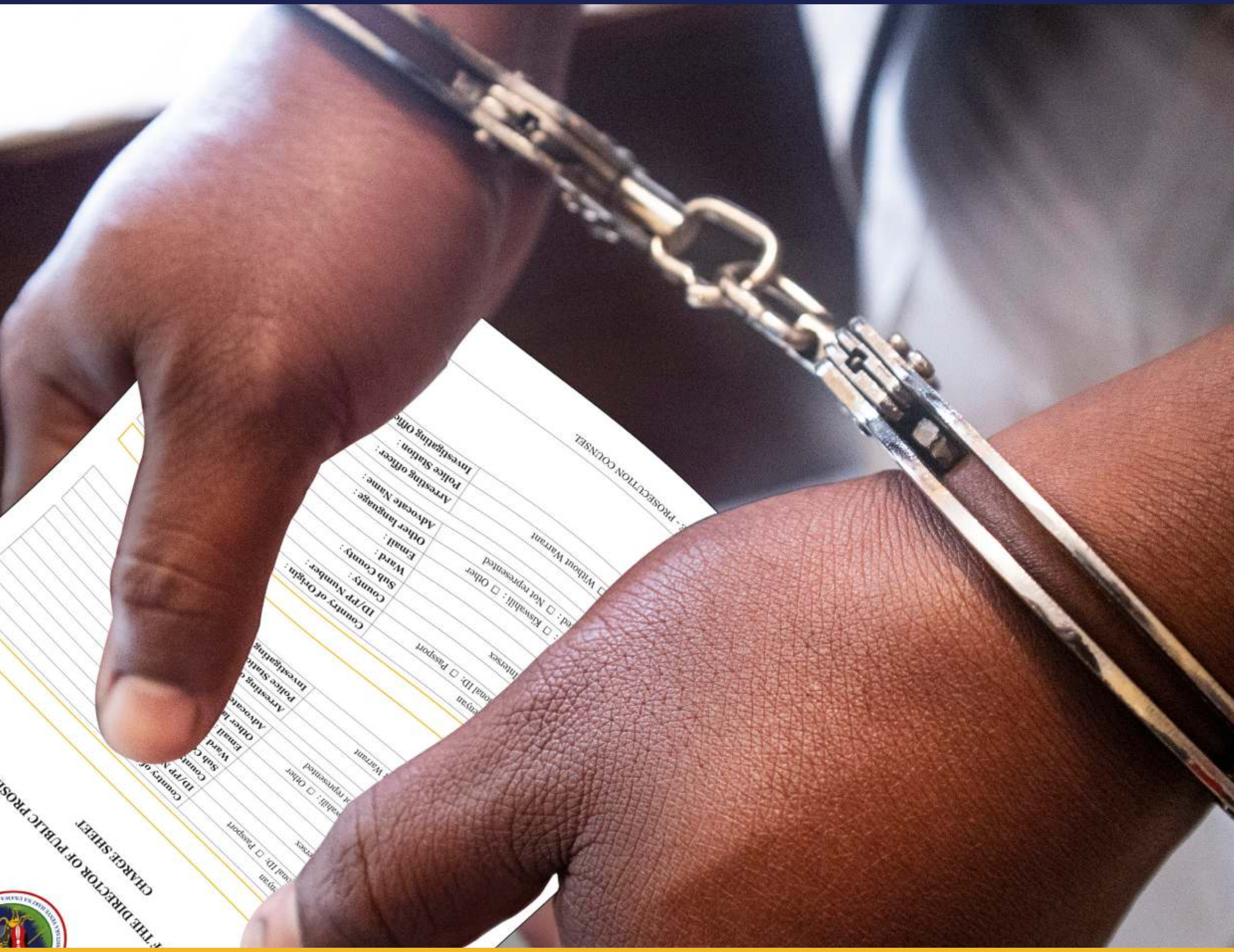
In order to make a decision to charge based on the threshold test once the above four requirements are met, the prosecutor must be satisfied that the investigation file is sufficiently compiled to allow the making of an informed decision.

Where the investigation is not complete and a decision to charge is sought on the **Threshold Test**, the file MUST contain:

- Key evidence or information that raises reasonable grounds to believe that the suspect has committed the offence.
- A description of outstanding evidence and anticipated timelines.
- A summary of the facts of the case stating why the case is serious for the purposes of the threshold test and;
- Where applicable, reasons why the suspect is a flight risk.
- Where the suspect poses a threat to national security

Where the minimum requirements are not met, the threshold test will not be applied, and a charge cannot be preferred. Prosecutors should advise investigators as to what further evidence or steps must be taken in order to revisit the question of charge.

A proposed charge alone will never justify the making of a decision on the Threshold Test. If the threshold test is not passed, the prosecutor may advise the police to issue the suspect with police bond (P22) pending further investigations or, in very unique circumstances make an application for the extension of custody pending completion of investigations.



CHAPTER 4

4.1 Charge

In criminal Law, a charge is a formal accusation of a crime or an offence by a formal complaint or information as a preliminary step to prosecution[17]. Once the prosecutor has assessed the evidence on file based on which they make the decision to charge an accused person, they then have to frame the charges appropriately for court.

4.2 Selection of charges

It is the duty of the prosecutor to determine the charges for which the accused takes plea, taking into consideration the proposed charges by the investigator. The prosecutor must prefer charges that: Reflect the seriousness and extent of the offence(s); Give the court adequate powers to sentence and; Allow suitable ancillary orders to be made in appropriate cases, for example, confiscation orders where a accused person has benefitted from criminal conduct;

The framing of the charges and information must be consistent with the provisions of **section 137 of the Criminal Procedure Code**. Prosecutors must take account of any relevant change in circumstances as the case progresses after charge and be proactive in seeking an amendment if it is in the interests of justice to do so.

4.2.1 Cases involving Multiple Offences and/or Offenders.

Prosecutors must be familiar with **section 134 to 137 of the CPC** in relation to joinder of persons and charges. It is important that prosecutors identify and correctly consider the number of files to be submitted to deal with the number and type of suspects and offences. The most common combinations are: Single offender, multiple linked offences; single offender, multiple non-linked offences; multiple offenders, linked offences; multiple offenders, non-linked offences.

Charges for any offences may be included in the same charge sheet provided those charges are: founded on the same facts or form or are part of a series of offences of a same or similar character. As a result, case files containing charges that are not linked in those two ways will need to be separated, each with a different ODPP registration number.

4.3 Submission of the Charge Sheet

The duty prosecutor shall draft the charges, stamp and sign then place their initials and rank on the charge sheet. A copy shall be retained in the ODPP file. Once the charge sheet is filed in Court, 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 availed to take plea. The attendance of the accused if not in custody can be procured by way of issuance of summons. Otherwise, apprehension and arraignment as the case may be.

With the charge sheet filed in the court registry, a court file is opened and a case number assigned – this number must be recorded on the ODPP's copy of the charge sheet as well as the ODPP file.   The ODPP file itself should remain with the prosecutor and under no circumstances may a file be left unattended in the court or office.

4.4 Bail

Bail is defined as: "An agreement between an accused person or his/her sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court."[18]

4.4.1 Opposing bail

A prosecutor must carefully consider whether or not to oppose bail and persuade a court that a suspect or accused person's right to bail should be curtailed with in line with Article **49 of the Constitution, 2010 and the Bail and Bond Policy Guidelines.**

[17] Brayan A. Garner (Ed), Black's Law Dictionary, 8th Edition, 2004, West Publishing Co

[18] National Council on Administration of Justice, Republic of Kenya, Bail and Bond Policy Guidelines, March 2015: at page 3

Where the prosecutor is inclined to oppose bail, they must have compelling reasons. Prosecutors should familiarise themselves with the Bail and Bond Policy guidelines and statutes governing custody time limits where applications to remand are made before charge such as section **36A of the CPC or the Security Laws (Amendment) Act.** Prosecutors must remain objective in assessing an investigating officer's arguments to opposing bail.

4.4.2 Grounds for opposing bail

The prosecutor must be satisfied that the grounds are sufficient to establish, compelling reasons for opposing bail. The grounds include but are not limited to:

- **The suspect would fail to attend trial.** Factors would include where the suspect has no community ties, no family ties, or no fixed place of abode, is a foreign national or has previously absconded.

- **That the suspect is likely to interfere with witnesses or the conduct of investigations.** Factors such as the proximity to prosecution witnesses or relationship with them may be relevant here as will his/her conduct upon arrest.

- **That the suspect is likely to commit an offence whilst on release.** Factors would include record of previous offending (especially if on bail), other pending prosecutions.

- **That detention is necessary for the suspect's own protection** or, where the suspect is a minor, for his own welfare e.g. where community tensions are high.

Where a prosecutor intends to oppose bail, the prosecutor must prepare the grounds which must conform to the constitution and case law. Prosecutors must also familiarise themselves with the provisions of **the Bail and Bond Policy Guidelines** issued by the NCAJ and consider the grounds itemised therein. If the Court grants bail despite prosecution objections, the Prosecutor must consider whether to seek revision of that decision. (Refer to Section 6.2 and Section 6.3. on - Appeals and Revision

4.5 Pre-Trial Conference

Pre-trial Conference is a meeting or meetings between the prosecutor and the Investigating officer or; between the prosecutor and defence counsel held with the aim of working towards the disposition of the case by discussing matters of evidence and in some cases narrowing the issues that will be tried.

For every pre-trial conference, prosecutors must complete a pre-trial form indicating date, time, location, attendees (i.e., witnesses, court, investigating officers and prosecutors), compliance with disclosure, comments on the readiness of the case for trial, decisions made, action points,

4.5.1 Internal Pre-Trial Preparation

Internal Pre-trial with the Investigating Officer (IO) is different from the judicial pre-trial conference in Court It should take place in the period between the time of making the decision to charge and before the suspect is presented to court for plea taking. During this internal pre-trial conference the prosecutor and investigator shall agree on:-

1. The evidence and witnesses to be relied upon.
2. Any ancillary applications such as asset recovery and bail
3. Witness protection
4. Modalities of disclosure of evidence
5. Give directions on outstanding evidence
6. Alternatives to prosecution e.g. plea bargaining and diversion

It is in the internal pre-trial meeting that the prosecutor is appraised on the status of the witnesses and other matters relating to the case.

4.5.2 Court-held pre-trial conference

The courts will expect prosecutors to play their part in the fair and efficient administration of justice and prosecutors must be aware of their obligations under the guidelines issued by the Chief Justice from time to time. This includes; understanding that adjournments should be sought only as a last resort and defence applications to adjourn should not be accepted at face value but questioned in light of the overriding objective of the court.

Prosecutors should request and prepare for a pre-trial management conference with the court within 14 days of a not-guilty plea being entered. In preparing for the pre-trial conference, a prosecutor shall consider the following:

- Identifying the issues in dispute.
- Confirming whether or not key prosecution witnesses have any relevant convictions that may be relevant to their credibility and consequently may require disclosure to the defence as 'unused material'. However, just because a witness has previous convictions does not mean that they are incapable of being believed. Factors like the type of conviction, the length of time since conviction and the number of convictions must be assessed against the nature of the evidence being given by the witness.
- List of witnesses indicating the dates when they are available or unavailable (for the purposes of listing for trial).
- Considering in advance any issues relating to admissibility of evidence.
- Identification of witness requirements and needs including the likely length of testimony, whether any special assistance will be required and whether tele-conferencing or live link shall be necessary.
- Giving a realistic time estimate for the length of the trial.
- Ensuring that disclosure has been completed or will be completed by the time of the pre-trial conference or as soon as possible thereafter.
- Ensuring that all directives to an investigating officer are being complied with and confirming any time estimates for receipt of further evidence e.g. forensics.
- Consideration of how to present the evidence in the shortest and clearest way.
- Any possible plea-bargaining agreements and any alternatives to prosecution.
- A prosecutor must consider issues concerning exhibits – the management, return, handling, securing and even early presentation in court where appropriate. Also, the prosecutor should consider asset recovery and financial investigations and preparation for any ancillary orders sought.

4.6 Continuing Review of the Decision to Charge

A review can be conducted by a prosecutor seized of /assigned the matter. Supervisors and the performance management team shall, as a matter of practice, compliance and quality control, regularly review decisions to charge. All reviews must be made in consultation with the person who made the initial decision. Where a prosecutor is aware of other matters related to a case under review, the process of review should include and consider all related files. All reviews will be recorded on the **Decision to Charge Continuing Review Form (ODPP form 1B)** and filed in the internal ODPP file.

4.6.1 Continuous review of ongoing prosecutions

The prosecution should keep cases under constant review using the **ODPP 1B form** and attach it to the ODPP file. Review is necessary as circumstances of the case may change. The evidential factors that supported a prosecution may no longer be available or the public interest may alter during the course of a trial as new information or facts come to

[19] The Guidelines for Active Case Management of Criminal Cases in Magistrates Courts and High Courts of Kenya focus on ensuring that cases are resolved justly and expeditiously.

light. The circumstances in which a review would be required include:

- Three consecutive adjournments, by the prosecution, should trigger a review. This is to ensure prosecutors remain vigilant over the conduct of a prosecution once it has started, to assess the reasons for those adjournments and determine whether there is any action to mitigate the risk of further adjournments;

- When further evidence is received in relation to the case, or new information has come to light e.g. where a witness is no longer willing to testify or available;

- As a trial progresses, it may be that some of the witnesses, fail to attend trial and leave essential elements of the offence unresolved to the standard required at trial.

- A prosecutor's continuing duty of disclosure may also result in the need to review the case.

4.6.2 Review of Decision to Charge based on Threshold Test

A decision to charge under the Threshold Test must be kept under regular review. The prosecutor should be proactive to secure from the police the identified outstanding evidence or other material in accordance with an agreed timeframe. The evidence must be regularly assessed to ensure that the charge is still appropriate and that, where applicable, continued objection to bail is justified. The Two-Stage Test must be applied as soon as the anticipated further evidence or material is received. If that evidence is not forthcoming, or it becomes known to the prosecutor that the evidence does not meet the required standards, a review with a view to withdraw the case must be conducted without delay.

4.6.3 Review of the decision not to charge

Occasionally there are cases where the prosecutor will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal. This will usually be triggered by further evidence or information that comes to light. These cases include:

- Cases where a further review of the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, charges should be instituted.

- Cases which charges were not filed for lack of sufficient evidence but where more significant evidence is discovered later; and

- Cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought.

4.6.4 Confidentiality of written review forms

Written review forms are internal ODPP forms and MUST NEVER be given to unauthorised persons under any circumstances as they contain information on the strengths and weaknesses of a case. They are also subject to legal professional privilege between the police and the ODPP only.

Where prosecutors are requested by complainants, family members of deceased persons, accused persons or their representatives to provide reasons for a decision not to prosecute, this should be communicated in a written letter and approved by a supervisor. Any queries on the decision to charge should be responded to with a reference to the ODPP National Prosecution Policy, a public document.

4.7 Plea Bargaining

Prosecutors must be familiar with the **ODPP Plea Bargaining Guidelines** as read together with **the Criminal Procedure (Plea Bargaining) Rules and** section 137A to O of the **CPC**. A plea agreement may be entered into between the Prosecutor and an accused person where an accused person has been charged in court; and at any time before the court passes judgment. At the earliest opportunity and where possible, Prosecutors should apply plea bargaining in line with the stated provisions.

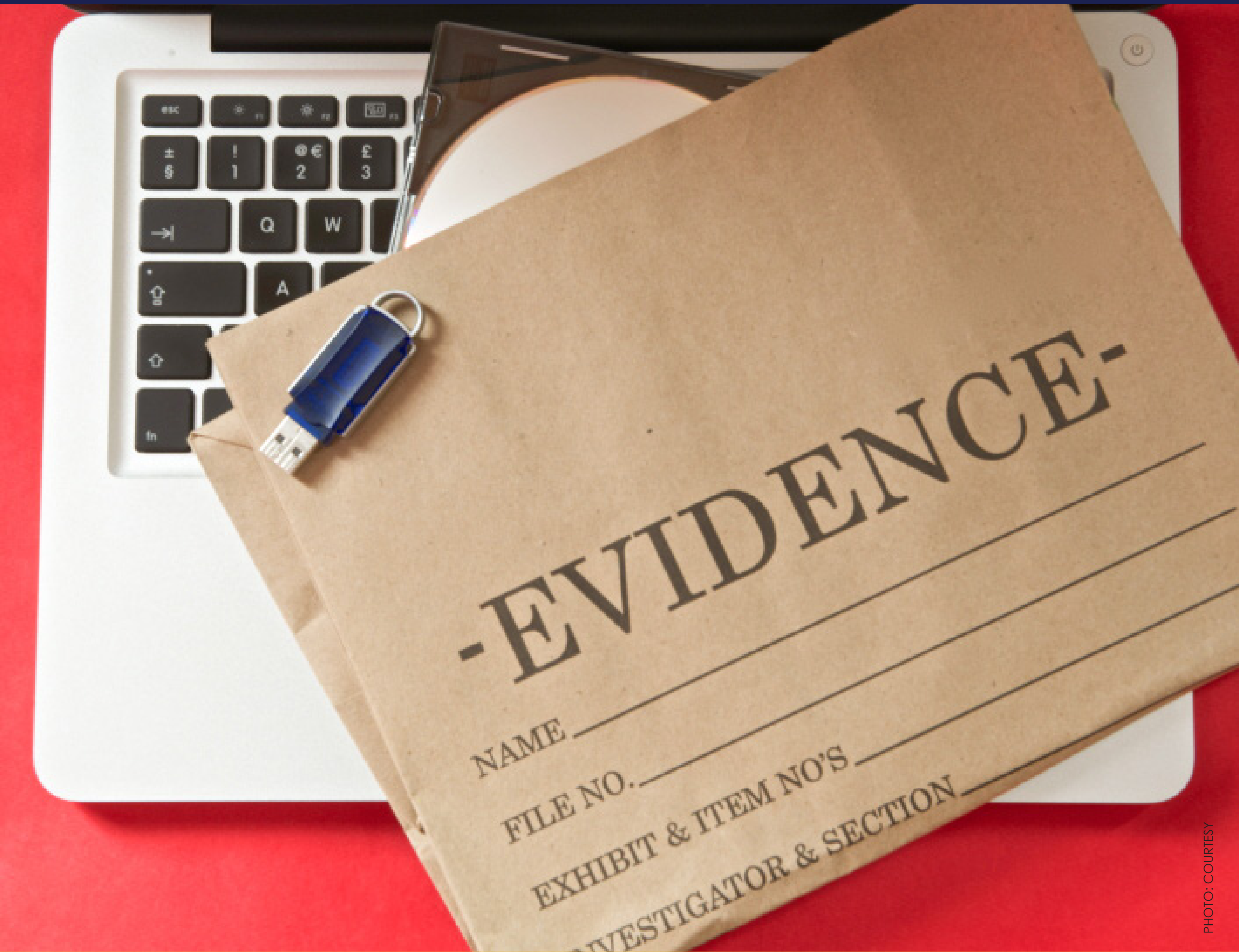


PHOTO: COURTESY

CHAPTER 5

5.1 Disclosure

Disclosure is the act or process of making known something that was previously unknown. In the criminal law context, disclosure refers to the pre-trial procedure of providing the accused person or the accused person's representative with all evidence in the prosecutor's possession. This includes copies of, or access to, any material which the prosecution intends to rely on during trial as well as evidence that might reasonably be considered capable of undermining the prosecution case against the accused person's case and which has not previously been disclosed. Prosecutors must ensure that they familiarize themselves with practice directions on disclosure issued by the DPP from time to time.

5.1.1 Objectives of disclosure

1. To ensure that the accused person is guaranteed a fair trial.
2. To ensure that there is execution of the fair administration of justice.

5.1.2 Types of disclosure

i. Pre-trial disclosure

Kenya has the pre-trial disclosure which includes the disclosure of statements and exhibits. It is an objective test. What may assist the accused has to be objectively assessed from any available prosecution material, including what is said by the accused when questioned during an interview.

ii. Continuous disclosure during trial

The prosecution is still under obligation to disclose all the evidence it intends to use to the defence. This duty begins at pre-trial and continues during the course of the trial. If there is any new information that is obtained during the trial, it must also be disclosed as there are instances when all information relating to investigation may not be available at the time of charging the suspect.

5.1.3 Practice of disclosure in Kenya

The practice of disclosure in the Kenya springs from the **Constitution of Kenya 2010** and case law as there is no legal procedure on disclosure set out in the Criminal Procedure Code of Kenya.

Article 50 (2) of the **Constitution** deals with disclosure. The relevant provisions of the Constitution of Kenya that deal with disclosure are:

i. **Article 50 (2) (c)** of the **Constitution of Kenya:** The right to have adequate time and facilities to prepare a defence.

ii. **Article 50 (2) (j) of the Constitution of Kenya:** The right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence the prosecution intends to rely on.

The criteria for disclosure in Kenya has been elaborated by the courts as outlined below:

5.1.3.1 Disclosure as a key component of fair trial

The courts have held that "it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under the Constitution, the Prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."[19]

5.1.3.2 Disclosure as a continuing duty of the Prosecution

The courts have held that "the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defense during the pretrial stage and throughout the trial."[20] In addition, the courts have stated that "Nevertheless, the obligations to disclose is a continuing one and disclosure must be completed when the additional information is received."[21]

5.1.3.3 Disclosure as a continuing process

The courts have held in this regard that "The right to be provided with material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defense."[22]

5.1.3.4 Disclosure of all evidence in the custody of the Prosecution

The courts have held in this regard "that whatever information/evidence that may come into the possession of the prosecution in the course of this trial ought to be disclosed and supplied to the defence to avoid trial by ambush."[23] Further "It is the trial court that shall determine the evidential value and the credibility of the said witnesses and therefore to lock out that evidence at this stage before the same is presented to court and subjected to cross examination will in my view result in a miscarriage of justice."[24]

In addition to the foregoing, the courts have also stated that "The prosecution's duty at common law is to disclose to the defence all relevant material, i.e., evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakens the prosecution's case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."[25]

5.1.3.5 Disclosure in a timely manner to allow defence preparation

The position of the courts in this regard is that "The short delay in recalling the witnesses and any delay that may result from an adjournment for purposes of allowing the defense adequate time to prepare for cross-examination of the witnesses is all in the interest of a fair trial and justice for the accused as well as the complainant in the case. Moreover, it is significant that the ODPP has not closed its case and it shall from then to call other witnesses subject to allowance of adequate time and facility for the accused to prepare his defence'.[26]

"It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with fundamental principles of justice and due process of law of which [...] a party has a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis for the adverse view of him and for the judgment"[27] The court further stated that: "On the broad basis of this right, an accused person is plainly entitled, (subject to statutory limitations on disclosure, and public interest immunity) to be supplied in advance with copies of statements to the police by persons to be called as witnesses for the prosecution, and those who prepare and conduct prosecutions owe a duty to the court to ensure that all relevant evidence of help is either led by them or made available to the accused reasonably early."

5.1.3.6 Consequences of prosecutorial failure to disclose evidence

The courts have held in this regard that "failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair

[19] The Court of Appeal, **J. Omolo R.S.C., J. O'kubasu E. O.** And **J. Onyango J. W. Otieno** in ***Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR*** stated that:

[20] J. Majanja in ***Dennis Edmond Appa and 2 Others Vs EACC and Another (2012) eKLR*** stated:

[21] The principles of disclosure in ***Dennis Edmond Appa and 2 Others v EACC and Another (2012) eKLR*** were also reiterated in the case of ***R V Stinchcombe (1991) 3 SCR 326.***

[22] J. Majanja in ***Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR.***

[26] In ***Republic V Wilson Chelelgo Cheponin (2019) eKLR*** J. E. M Muriithi.

[27] The court in ***George Ngodhe Juma,Peter Okoth Alingo,Susan Muthoni Nyoike v Attorney-General [2003] eKLR.***

trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. ...under no circumstances should fair trial be jeopardized. "The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be a yard stick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial."[28]

5.1.4 Conclusion on Disclosure

In the absence of statutory criteria on the process of disclosure, Prosecution Counsel should be guided by applicable judicial precedents as well as guidelines issued from time to time by the Judiciary and the Office of the Director of Public Prosecutions.

[28] Mativo J. in ***Joseph Ndungu Kagiri v Republic [2016] eKLR.***

CHAPTER 6

6.1 Discontinuing a Prosecution

6.1.1 Power to discontinue prosecution

Article 157 of the **Constitution of Kenya 2010** gives the DPP power to discontinue a prosecution at any stage before judgment is delivered. However, the prosecution must seek the court's permission to do so. Accordingly, any decision to discontinue a prosecution must be done with justifications that can be clearly and compellingly articulated before a court.

6.1.2 Timing

It is important to note that the timing of a discontinuance of proceedings is significant. If done before the prosecution has closed its case, proceedings may be reinstated at a future date.

If, however, the prosecution is discontinued after the prosecution has closed its case and even before the accused person has been called upon to make his or her defence, the accused person shall be acquitted and this shall serve as a bar to future prosecutions on the same subject matter or facts. However, prosecutors should not hesitate to discontinue a case where it is clear that there is no realistic prospect of conviction. This may happen where:
It becomes clear after further investigation and review that there is no longer any reasonable prospect of conviction.

- It becomes clear during the trial that the evidence adduced cannot sustain a conviction. This can include where prosecution witnesses repeatedly fail to attend court and the prosecutor is satisfied that they had been given sufficient notice.
- The continuation of the case has become undesirable due to exceptional circumstances such as serious sickness of the accused person or a key witness.

Wherever possible, prosecutors should act swiftly to terminate cases that do not have realistic prospect of conviction.

6.1.3 General considerations

It is important to consider the views of victims, complainants and the investigating officer in deciding whether or not to withdraw a case, but decisions on discontinuance should not be postponed unduly for a consultation to take place. [29]
A written review must be completed within three days of the last court hearing or within three days of receipt of further evidence or information that indicates the charge is no longer sustainable.

As soon as a prosecutor concludes that withdrawal is the right course of action, the case may be withdrawn only once a discussion with a supervisor has taken place.
Where a court insists that a case should be withdrawn (or refuses an application for adjournment from the prosecution), the decision to withdraw should be made after consultation with a supervisor, including through a phone call and the file must be endorsed accordingly.

Once the charges are withdrawn, a full written review should be conducted as soon as reasonably practicable and, in any event, no later than three working days thereafter, and submitted to a supervisor for review and affirmation.

Any communications with victims thereafter should be done with sensitivity and in accordance with the principles of the **Victim Protection Act 2014** and guidelines issued by the DPP.

6.2 Revision

Revision is a power that the prosecutor can exercise in accordance with Articles 165 (6) and 165(7) of **the Constitution** and **section 362 of the CPC.** Prosecutors should be proactive in anticipating such problems and should be advancing the correct law and procedure before any order is made. In exercising this power, prosecutors will often have to make decisions quickly. If the order appears illegal or incorrect, prosecutors should first diplomatically and courteously draw the magistrate's attention to the relevant law and procedure and invite the court to reconsider the decision.

6.2.1 Factors to consider

In deciding to seek a revision, prosecutors need to exercise discretion by firstly: Identifying the ground for revision. When deciding whether an order or finding is improper or incorrect, a prosecutor must identify whether the court has:

[29] For more information on withdrawal of cases see the case of Republic v Jack Alexander Wolf Marrian and Another eKLR 2019. Misc Application No. 75 and 64 of 2019.

- Improperly exercised its discretion
- Failed to take into account a material consideration
- Has taken into account an immaterial consideration
- Has exercised discretion in a way that no reasonable, sensible court would do in the same circumstances.

Secondly, if the legal grounds are established, the prosecutor must then assess the likelihood of the High Court reversing or amending that ruling. The prosecutor must then consider the impact of reversing the order or amending it in the High Court. Here, the evidential and public interest tests will have to be exercised in much the same way though, to differing degrees based on the order.

A decision to seek review should be made in consultation with a supervisor, but where time does not allow, the prosecutor should alert the court of the intention to review. The prosecutor must seek an adjournment and move as soon as possible to draft the review application and submit it to the High Court.

6.3 Appeals against Acquittal

The decision to appeal against an acquittal should be exercised with extreme care and only with consultation with a supervisor. This should be undertaken without delay and a written review justifying the decision to appeal conducted as soon as possible after the acquittal.

6.3.1 Appeals from High Court to Court of Appeal

A second appeal may be lodged to the Court of Appeal only on a matter of law. No second appeal lies against a sentence except where the sentence was enhanced by the High Court or the Subordinate Court had no power to pass the sentence. The Director of Public Prosecutions may oppose an appeal filed in the Court of Appeal. A prosecutor may concede an appeal against conviction where it is meritorious to do so.

6.3.2 Appeals to the Supreme Court

Appeals to the Supreme Court from the Court of Appeal relate to 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. 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 would deserve the further input of the Supreme Court. An application for certification to appeal to the Supreme Court shall originate from the Court of Appeal. The decision to appeal to the Supreme Court must be taken only with the authority of the Director of Public Prosecution.

Part 2

GUIDELINES ON PREPARATION OF THE PROSECUTION FILE

1. Introduction

1.1 These guidelines prescribe a standard approach for the creation, handling and management of the ODPP prosecution files. The guidelines are to be read together with relevant ODPP legislation, policy documents and guidelines.

1.2 These guidelines apply to prosecution counsel and other professionals working in the ODPP at all levels in Kenya.

1.3 These guidelines are applicable to all cases within the mandate of the ODPP.

1.4 A prosecution file is internal and confidential to the Office of the Director of Public Prosecutions. Unauthorized persons should not peruse or have unsupervised access to a prosecution file. Any prosecution counsel assigned a case and / or having custody of a file shall be responsible for its safe keeping. ODPP shall provide secure storage facilities and equipment for safekeeping of prosecution files.

1.5 Any access to a prosecution file, by any person other than an ODPP staff, must be approved in writing by the head of station and such access must be supervised.

2 Definitions

2.1 **Central Case Intake Register:** A register of all cases brought to the ODPP Central Case Intake registry. It must contain details of each case received, the office / agency of origin, purpose of receipt and action to be taken.

2.2 **Prosecution File:** Refers to the criminal case file created by the ODPP in accordance with these guidelines

2.3 **Investigative agencies:** Any of the agencies mandated by Kenyan law to investigate criminal cases and recommend the same for prosecution to the ODPP. These agencies include the National Police Service (NPS), Directorate of Criminal Investigations (DCI) Ethics and Anti-Corruption Commission (EACC), Independent Policing Oversight Authority (IPOA) among others.

2.4 **Investigation file:** A case file created by any of the investigative agencies as defined in 2.3 above.

2.5 **Unauthorized person:** Any person who is not in the employment or service of the ODPP or any person who does not have formal written authority to peruse or have custody of a prosecution file.

3. Procedure

3.1 Cases recommended for prosecution by the police or other investigative agencies will be received at the ODPP station at the designated central intake facility in line with the **Central Case Intake Practice Directions.**

3.2 Once received, a case will be registered in the ODPP Central Case Intake Register and forwarded to the duty prosecutor for review of the decision to charge.

3.3 The duty prosecutor will fill a Decision to Charge Form (Prescribed form **ODPP 1A**) indicating whether the evidence in the file is sufficient to sustain a charge and, if so, whether the case meets the public interest test.

3.4 The duty prosecutor will endorse, in the investigation file, the assigned ODPP file number. Similarly, the duty prosecutor will endorse on the ODPP Central Case Intake Register the investigative file reference numbers. Where an investigative agency returns a file after follow up investigation, the original reference number is to be used to avoid duplicate registration of intake of cases.

3.5 The duty prosecutor will note on the ODPP Central Case Intake Register the nature of disposal of the case; whether a decision to prosecute, not to prosecute, threshold test and / or request to investigative agency to conduct further investigation.

3.6 In the event that a decision to charge is made, the duty prosecutor will fill a decision to charge form **(Prescribed form – ODPP 1A)** and an ODPP Charge Sheet **(Prescribed form – ODPP 2)** and open a prosecution file.

3.7 The duty prosecutor will make a copy of the entire investigation file and retain it. S/He will then return the original investigation file to the investigating agency. In some cases investigators provide two files – an original and its copy. The prosecutor will retain the copy and return the original file to the investigator. A copy of the ODPP Charge Sheet is to be given to the investigator and filed in the investigation file.

3.8 Where appropriate, the process under 3.7 above will also apply in miscellaneous applications as well as cases where the duty prosecutor makes a decision to charge, but for reasons indicated in the decision to charge form, decides to divert the case. In such cases, the duplicate investigation file with an ODPP reference will suffice. There will be no need to create a separate prosecution file.

Contents of a Prosecution File

3.9 During the pendency of a criminal trial, the content of a prosecution file will inevitably change. The prosecutor must ensure that the file contains sufficient information to conduct an effective plea, to successfully go through a pretrial conference and main hearing.

3.10 The ODPP will provide blank files for the creation of a prosecution case file. Such files will come in different colours to be used for different types of cases, i.e. white - children, Red - murder, Grey - appeals, Blue - Lower Court. **ODPP will also avail ODPP File cover templates** in electronic format/soft copy for filling, printing and attaching using glue or staples to blank case files.

The ODPP file will consist of:

3.10.1 Everything from the investigation file except confidential material in sub file K and filed in the same order as the investigation file.

3.10.2 A completed ODPP Charge Sheet, that is signed, with initials and rank of prosecution counsel making the decision and stamped as approved by the prosecution counsel. Including the complete list of additional accused persons where there are multiple accused persons.

3.10.3 Summary or copies (if available) of proceedings to be written on a **court attendance docket**. A new form will be filled by a prosecutor at every court appearance. This will include, the date, reason for court attendance (hearing / mention / other), coram, directions, and applications, summary of witness testimonies, submissions and rulings/ judgments and next steps. These are filed in chronological order from the earliest to the most recent and will be coloured prominently for ease of reference.

3.10.4 All evidence disclosed by the prosecution,

3.10.5 In all cases where disclosure is done, including by electronic format, the prosecutor will fill the **Evidence Disclosure Form (form ODPP 4)** to be signed by the prosecutor and the accused person or his/her representative to whom disclosure is made and the same filed in court. A copy of the evidence disclosure form is to be filed in the ODPP file as the last item in the evidence section immediately before the charge sheet, i.e. between the evidence and the charge sheet.

3.10.6 In cases where disclosure is by hard copy, the evidence will be adequately copied to allow the prosecutor to disclose them by sharing during plea taking or pretrial conference or any time before hearing provided adequate time is given to the accused or his representative for preparation.

3.11 Consolidation of prosecution files: If it comes to the attention of the prosecutor that two files relate to the same transaction of offences before charge or if a court directs that the file should be consolidated, the prosecutors involved in the cases will, after relevant approvals, applications or court orders as applicable, consolidate the ODPP files in question. The consolidated file will retain the earlier ODPP reference number with a mention of the subsequent number.

ODPP Prosecution File

Next Date	Hg/Mn

PROSECUTION FILE

Republic

Versus

1. .____
2. .____
3. .____
4. .____
5. .____

____

Accused Persons (If more accused persons, please cite only the first five accused persons" names and the number of the others. Then include full a list of accused persons in the file)

Criminal Case No. 2425 of 2019

Case No

Court No. 2 | Eldoret Law Courts

Court no, and station

Langas Police Sation

Originating police Station

____

CR/TCR/PCR Number

Case Status/Progress

1. ☐ Plea Taken   Date ____________   ☐ PO-GE or ☐ PO-N-GE
2. ☐ Pretrial Conference   Date____________   ☐ Disclosure done
3. ☐ Prosecution hearing start   Date____________
4. ☐ PW1 ☐ PW2 ☐ PW3 ☐ PW4 ☐ PW5 ☐ PW6 ☐ PW7 ☐ PW8 ☐ PW9 ☐ PW10+
5. ☐ Prosecution Hearing close   Date____________
6. ☐ Case to Answer Ruling   Date____________   ☐ Case   ☐ No case
7. ☐ Defense Hearing close   Date____________
8. ☐ Judgement   Date____________   ☐ Convicted   ☐ Acquitted
9. ☐ Sentence   Date ____________   ☐ Custodial   ☐ Non-Custodial
10. Details e.g. sentenced to…

Part 3

GUIDELINES ON ALTERNATIVES TO PROSECUTION

1.0 Introduction

1.1 These guidelines lay down the standard procedure prosecution counsels in Kenya apply when considering alternatives to prosecution.

1.2 The guidelines apply to prosecution counsel working in the ODPP at all levels.

2.0 Definitions

2.1 **Alternatives to prosecution:** Includes, but not limited to, cases where a prosecutor has sufficient evidence to charge an offender, but prosecution may not be in the public interest. In such cases a prosecutor decides not to charge, but instead, refer the offender to other forms of punishment. Examples are: administrative remedies, asset forfeiture, confiscation and diversion before charges are preferred.

2.2 **Alternatives to trial:** where a case satisfies the two-stage test and the offender is charged, but during the course of prosecution, the accused person admits to the charges and agrees to an alternative form of prosecution as a means of punishment. Examples are; plea negotiation, reconciliation and diversion after charge. These guidelines do not apply to alternatives to trial.

2.3 **Diversion:** The process of resolving criminal cases both without resorting to judicial proceedings or after charges have been preferred. This enables offenders to be dealt with by non-judicial agencies thereby avoiding the negative effects of formal judicial proceedings, a conviction and a criminal record.

2.4 **Administrative Action:** sanctions by professional bodies such as; the Police, Internal Affairs Unit and Teachers Service Commission, amongst others.

3.0 Overriding provisions on Alternatives to Prosecution

3.1 Alternatives to prosecution should be applied at the earliest opportunity.

3.2 The duty prosecutor shall make the initial decision and identify the alternative to be applied with reasons.

3.3 The decision of the duty prosecutor may be subject to review by a supervisor.

3.4 The decision shall be recorded on ODPP form 1A.

3.5 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.

4.0 Procedural Guidelines on Reconciliation

4.1 Pursuant to Section 176 of the Criminal Procedure Code, Cap 75 (“CPC”) prosecutors must ensure that they do not apply reconciliation to felonies or cases with any aggravating factor.

4.2 A prosecutor, suspect or complainant may suggest the use of reconciliation before or after charging. This is applicable to cases of a personal nature.

4.3 It may be necessary to consult with the investigating officer before allowing reconciliation in order to gain an understanding of the offender and complainant’s background, history or circumstances.

4.4 Where parties have reconciled before charging and have reached an agreement that does not involve prosecution; a prosecutor ought to have the parties sign an agreement indicating the dispute has been settled. This agreement will be included in the registered ODPP file (see ODPP standard guidelines on preparation of a prosecution case file).

4.5 Where parties have reconciled after charging and registering the matter in court and have reached an agreement to withdraw the case; a prosecutor ought to bring this to the court’s attention the next time the matter is in court. Both parties will be required to inform the court of their settlement and the court, if satisfied, may elect to withdraw the case under section 204 of the CPC. In this instance a prosecutor ought to note the same in the ODPP file and mark the file as closed.

5.0 Alternatives to prosecution shall include:

5.1 Warnings, surcharge, fines, demotion and psychosocial support.

5.2 Forfeiture and confiscation of assets.

5.3 A public prosecutor shall seek forfeiture and confiscation of assets and other proceeds of crime in accordance with relevant laws.

5.4 Administrative Action

Appendix 1: Decision to Charge Form ODPP1A

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DECISION TO CHARGE FORM

1.0. Preliminary Information

1.	Date	
2.	ODPP Ref No	
3.	ODPP Station	
4.	Court Station	
5.	OB Number	
6.	Police Station	
7.	IO Name	
8.	IO Tel Number	

2.0. Complainants Details

No	Name	Nationality	ID/PP No	Gender	Age	Contacts
1.				☐ M ☐ F		
2.				☐ M ☐ F		

3.0. Suspects Details

No	Name	Nationality	ID/PP No	Gender	Age	Contacts
1.				☐ M ☐ F		
2.				☐ M ☐ F		
3.				☐ M ☐ F		
4.				☐ M ☐ F		
5.				☐ M ☐ F		

4.0. Recommended Charge(s)

No	Name
1.	
2.	

5.0. Witnesses Details

No	Name	Role (tick as appropriate)	Contact Information
1.		☐ Eye Witness or ☐ Expert	
2.		☐ Eye Witness or ☐ Expert	
3.		☐ Eye Witness or ☐ Expert	
4.		☐ Eye Witness or ☐ Expert	
5.		☐ Eye Witness or ☐ Expert	
6.		☐ Eye Witness or ☐ Expert	
7.		☐ Eye Witness or ☐ Expert	

6.0. Evidence Consideration

Elements of charge	Evidence Available

7.0. Threshold test *(Do not fill this part if the evidence is sufficient)*

Conditions
1. ☐ There are reasonable grounds to believe that the suspect has committed the offence 2. ☐ Further evidence can be obtained to provide a realistic prospect of conviction 3. ☐ The seriousness or the circumstances of the case justifies the making of an immediate charging decision 4. ☐ There are substantial grounds to object to bail and in all the circumstances of the case it is proper to do so

8.0. Public Interest Test

Considerations
☐ Seriousness of the offence. ☐ Culpability of the suspect ☐ Impact or harm to the victim or community. ☐ The status of the victim ☐ The suspect's age at the time of the offence. ☐ Impact on the community ☐ Whether prosecution is a proportionate response
Other (specify)

9.0. Special Considerations

Considerations
☐ Protection orders ☐ Ancillary orders ☐ Witness protection ☐ Disability ☐ Alternatives to prosecution ☐ Asset Recovery ☐ Plea bargaining ☐ Bail conditions ☐ Refer to Supervisor
Other (specify)

10.0. Prosecutor Decision ☐ Decision To Charge or ☐ Decision NOT To Charge

If Decision to Charge
☐ Allocated for trial ☐ Pursue possibility of alternatives to trial ☐ Additional evidence to be collected ☐ Refer to alternatives to prosecution ☐ Refer back for further investigation with notes and timelines ☐ Refer to Supervisor ☐ Refer to disciplinary or other process ☐ File to be closed
Comments:

NAME, SIGNATURE & DATE - PROSECUTION COUNSEL

Prosecution Supervisor Comments

If Decision to Charge

NAME AND SIGNATURE AND DATE – PROSECUTION SUPERVISOR

Appendix 2: Decision to Charge Review Form ODPP1B

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DECISION TO CHARGE CONTINUING REVIEW FORM

(only fill this section if the threshold test was used or a review of the decision not to charge has been conducted)

1.0 Preliminary information

1.	Date	
2.	ODPP Ref No	
3.	ODPP Station	
4.	Court Station	
5.	Name of reviewing prosecutor	
6.	OB Number	
7.	Police Station	
8.	I.O Name	
9.	I.O Tel. Number	
DUTY PROSECUTOR: ☐ **or** **ASSIGNED PROSECUTOR:** ☐		
REASONS FOR REVIEW:		

2.0 Recommended charge(s)

1.	
2.	

3.0 Further evidential material (any further statements, evidence or information considered at time of review)

Evidence	**Does this evidence satisfy the evidential test?** (tick as appropriate)
	Yes ☐ No ☐
	Yes ☐ No ☐
	Yes ☐ No ☐
	Yes ☐ No ☐

4.0 Public Interest Test

5.0 Special needs? e.g. witness protection/disability/special measures at court

☐ Protection orders	☐ Asset Recovery
☐ Ancillary orders	☐ Plea bargaining
☐ Witness protection	☐ Bail conditions
☐ Disability	☐ Refer to Supervisor
☐ Alternatives to prosecution	☐ Diversion
Other (Specify)	

6.0 Next actions/time limits

Next action	Responsible official	Date due

7.0 Prosecutor's Decision: Decision To Charge ☐ OR Decision NOT To Charge ☐

NAME, SIGNATURE & DATE - PROSECUTION COUNSEL

Prosecution Supervisor Comments

NAME AND SIGNATURE AND DATE – PROSECUTION SUPERVISOR

Appendix 3: ODPP Charge Sheet Form ODPP2

Court File No :	
ODPP Case No :	
ODPP Station :	

Police Case No :	
OB Number :	
Date drafted	

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

CHARGE SHEET

Full Name of Accused 1 :

Nationality : ☐ Kenyan : ☐ Non Kenyan	**Country of Origin :**
Identification Document : ☐ National ID: ☐ Passport	**ID/PP Number :**
Date of Birth / Age:	**County :**
Gender : ☐ Male : ☐ Female : ☐ Intersex	**Sub County :**
Postal Address :	**Ward :**
Telephone Number(s) :	**Email :**
Languages Spoken : ☐ English : ☐ Kiswahili : ☐ Other	**Other language :**
Accused person : ☐ Represented : ☐ Not represented	**Advocate Name :**

Date of Arrest :	**Arresting officer :**
Arrested : ☐ With Warrant : ☐ Without Warrant	**Police Station :**
Date to Court :	**Investigating Officer :**

Name of Accused 2 :

Nationality : ☐ Kenyan : ☐ Non Kenyan	**Country of Origin :**
Identification Document : ☐ National ID: ☐ Passport	**ID/PP Number :**
Date of Birth / Age:	**County :**
Gender : ☐ Male : ☐ Female : ☐ Intersex	**Sub County :**
Postal Address :	**Ward :**
Telephone Number(s) :	**Email :**
Languages Spoken : ☐ English : ☐ Kiswahili : ☐ Other	**Other language :**
Accused person : ☐ Represented : ☐ Not represented	**Advocate Name :**

Date of Arrest :	**Arresting officer :**
Arrested : ☐ With Warrant : ☐ Without Warrant	**Police Station :**
Date to Court :	**Investigating Officer :**

NAME, SIGNATURE & DATE - PROSECUTION COUNSEL

Full Name of Accused 3 :

Nationality : ☐ Kenyan : ☐ Non Kenyan	**Country of Origin :**
Identification Document : ☐ National ID: ☐ Passport	**ID/PP Number :**
Date of Birth / Age:	**County :**
Gender : ☐ Male : ☐ Female : ☐ Intersex	**Sub County :**
Postal Address :	**Ward :**
Telephone Number(s) :	**Email :**
Languages Spoken : ☐ English : ☐ Kiswahili : ☐ Other	**Other language :**
Accused person : ☐ Represented : ☐ Not represented	**Advocate Name :**

Date of Arrest :	**Arresting officer :**
Arrested : ☐ With Warrant : ☐ Without Warrant	**Police Station :**
Date to Court :	**Investigating Officer :**

Name of Accused 4 :

Nationality : ☐ Kenyan : ☐ Non Kenyan	**Country of Origin :**
Identification Document : ☐ National ID: ☐ Passport	**ID/PP Number :**
Date of Birth / Age:	**County :**
Gender : ☐ Male : ☐ Female : ☐ Intersex	**Sub County :**
Postal Address :	**Ward :**
Telephone Number(s) :	**Email :**
Languages Spoken : ☐ English : ☐ Kiswahili : ☐ Other	**Other language :**
Accused person : ☐ Represented : ☐ Not represented	**Advocate Name :**

Date of Arrest :	**Arresting officer :**
Arrested : ☐ With Warrant : ☐ Without Warrant	**Police Station :**
Date to Court :	**Investigating Officer :**

Name of Accused 5 :

Nationality : ☐ Kenyan : ☐ Non Kenyan	**Country of Origin :**
Identification Document : ☐ National ID: ☐ Passport	**ID/PP Number :**
Date of Birth / Age:	**County :**
Gender : ☐ Male : ☐ Female : ☐ Intersex	**Sub County :**
Postal Address :	**Ward :**
Telephone Number(s) :	**Email :**
Languages Spoken : ☐ English : ☐ Kiswahili : ☐ Other	**Other language :**
Accused person : ☐ Represented : ☐ Not represented	**Advocate Name :**

Date of Arrest :	**Arresting officer :**
Arrested : ☐ With Warrant : ☐ Without Warrant	**Police Station :**
Date to Court :	**Investigating Officer :**

Charge (Second Count)	
Particulars of offence	

Charge (Third Count)	
Particulars of offence	

Charge (Fourth Count)	
Particulars of offence	

Alternative Charge	
Particulars of offence	

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

Accused 1 - Date of Plea

Accused 2 - Date of Plea

Accused 3 - Date of Plea

Accused 4 - Date of Plea

Accused 5 - Date of Plea

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

Appendix 4: Conflict of Interest Declaration Form ODPP3

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

CONFLICT OF INTEREST DECLARATION FORM

Criminal Case Number:

Republic Versus:

I, ____

Hereby confirm the absence of any issues that might reasonably be perceived to be conflict of interest on my part In this case. I also undertake to report any issues that may arise or attempt to interfere with my function including any apparent or latent conflict of interest in the subject case which include the following:-

- **a.** Personal private financial interest or gain
- **b.** subject property is owned by myself of close family or business associates
- **c.** Close relative is involved as accused or victim or representative
- **d.** Social relations are involved as accused or victim
- **e.** My decision or action is subject matter of the case.
- **f.** I am likely to be called as a witness in the case

I also undertake to disclose to my supervisor at the earliest opportunity any potential conflict of interest that could reasonably be perceived as affecting my independent judgment in my conduct as prosecutor in this case and will request not to participate or be in a position to influence the making of decisions.

____

SIGNATURE AND DATE

Appendix 5: Evidence Disclosure Form ODPP4

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

EVIDENCE DISCLOSURE FORM

Date of Disclosure: ______________________

Case Details

1.	Name of the Accused (s)	
2.	Court Case No.	
3.	Police File Reference No.	
4.	Investigation Officer	
5.	Charges	

The following material is being disclosed strictly for use in these criminal proceedings and cannot be disclosed to any other third party unconnected with this case or for any purpose other than these criminal proceedings.

Used Material

PART A:

Method of disclosure: Supervised perusal of documents ☐ Photocopies ☐ E-mail ☐

Documents disclosed:
(continue overleaf if required)

	Witness Statements (name and date)	Documentary Evidence (name and date)
1.		
2.		
3.		
4.		

Any other e.g. Exhibits, CD roms, USBs, Photographs. – State type and any date of production/ authentication.

	Type	Date of production/authentication
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

PART B:

Where exhibits are in the form of a site visit, identify date & place of inspection or arrangements for inspection:

	Place of Inspection	Date/arrangements for inspection
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

PART D: *DECLARATION* [30]

I **[PRINT]**...being the accused/defense counsel/ relative to the accused **[delete as appropriate]** in the above case do confirm receipt/inspection [delete as appropriate] of the above stated witness statements/ documents and/or that I inspected the exhibits listed under Part B of this form on _____day of ______of 20___.

SIGNATURE OF ACCUSED/DEFENCE COUNSEL/ RELATIVE TO THE ACCUSED

[30] Where a facilitator or translator assists in an inspection of evidence on the part of an unrepresented accused, insert details (name, address, relationship and signature) overleaf.

Appendix 6: ODPP Inventory of Documents Form ODPP5

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INVENTORY OF DOCUMENTS FORM

This form is to be completed by a prosecutor upon review of the investigation file. A separate entry should be made for every document. Documents include witness statements, documentary evidence

Serial No.	Document	Investigation File serial No. [1]	Original	Copy	Status [2]

SIGNED BY: PROSECUTOR

NAME: ____________________

RANK: ____________________

DATE: ____________________

[1] Any unique identifying markings by the investigator on the document

[2] Physical state e.g., Mutilated, legibility, reconstructed, staine

Appendix 7: Non-Disclosure Form

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

NON-DISCLOSURE FORM

I……………………………………………………………………………………………………Being a prosecutor duly attached to the Office of the Director of Public Prosecutions and having read and acquainted myself with sections 54,55 and 56 of the ODPP Act as well as contents of the Official Secrets Act, do hereby declare that I will not share any confidential information[1] to any unauthorised party within the meaning of the above statutes before, during and after this case is completed.

I understand that sharing such information with any unauthorised party may sanction disciplinary action on my end as contemplated under the ODPP Act and the Code of Conduct for Prosecutors. I undertake to take all reasonable steps to safeguard and prevent the loss, destruction, or unauthorized access, use, or disclosure of the confidential information using a reasonable degree of care.

I understand that I may disclose Confidential Information **only** in the following circumstances;

a) If and to the extent that such disclosure is required by court order,
b) As authorized in writing by the DPP.

If Confidential Information is inadvertently disclosed, I will notify my supervisor immediately upon becoming aware of the disclosure.

____

SIGNATURE AND DATE

[1] **"Confidential Information"** shall mean all information given in the form of; email communication, telephone communication, ODPP contact information and documentation regarding the case in question that is not in the public domain.

Appendix 8: Pre-Trial Conference Form

Court File No :	
ODPP Case No :	
ODPP Station :	

Police Case No :	
OB Number :	
Date:	

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PRE-TRIAL CONFERENCE FORM

Accused Details:

Accused 1:	**Accused 4:**
Accused 2:	**Accused 5:**
Accused 3:	

Trial Details:

☐ Plea of Not Guilty:	☐ Plea of Guilty:
Date of Pre Trial:	Date of Mitigation:
Date of Hearing:	Date of Sentence:
Bail/Bond Terms:	Sentence:

Plea taken	1st Accused ☐	2nd Accused ☐	3rd Accused ☐	4th Accused ☐	5th Accused ☐
Plea bargaining	1st Accused ☐	2nd Accused ☐	3rd Accused ☐	4th Accused ☐	5th Accused ☐
Alternative to Prosecution	1st Accused ☐	2nd Accused ☐	3rd Accused ☐	4th Accused ☐	5th Accused ☐
Hearing date assigned	1st Accused ☐	2nd Accused ☐	3rd Accused ☐	4th Accused ☐	5th Accused ☐
Evidence Disclosed	1st Accused ☐	2nd Accused ☐	3rd Accused ☐	4th Accused ☐	5th Accused ☐

Witnesses:

No.	Names of Witnesses (in order)	Comments	Time Allocation
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

No.	Names of Witnesses (in order)	Comments	Time Allocation
16.			
17.			
18.			
19.			
20.			
21.			
22.			
23.			
24.			
25.			
26.			
27.			
28.			
29.			
30.			

Exhibits:

List of Exhibits

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

Next Steps for Investigating Officer:

No.	Action Point	Deadline
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		

Comments:

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

Next Steps for ODPP:

No.	Action Point	Deadline
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		

In Attendance:

No.	Full Name	Institution		Signature
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

Contact us:

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P.O Box 30701- 00100

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