

THE PROSECUTOR

A NEWSLETTER FROM THE **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**



**ODPP ACQUIRES
LAND TO CONSTRUCT
THE PTI**

**EMBRACING DIGITAL
PROSECUTION AS
COVID – 19 PERSISTS**

**ARE WE READY FOR
BODY CAMS FOR
KENYAN COPS?**

INSIDE



Editorial

Welcome to the Third Issue of The Prosecutor, the Newsletter of the Office of the Director of Public Prosecutions (ODPP) which highlights prosecution work in the office, in court and in the community.

The ODPP's strategic focus for the year 2021 include: Quality prosecutions; Automation of case Management system; Upgrading of ICT Intra-net systems in all ODPP offices for information sharing, establishment of Proceeds of Crime Recovery Unit, institutionalization of the Inspectorate Unit, enhanced Community engagements and Construction of the Prosecution Training Institute (PTI).

In addition to being a strategic focus, the PTI is also a flagship project of the ODPP for the 2020-2023 strategic planning period. The recent acquisition of a 17 acre piece of land at Loresho, Nairobi by the Office to construct the Institute is therefore a major milestone towards realization of the project.

The establishment of the PTI is the Director of Public Prosecution Noordin Haji's unstoppable approach to a turn-around capacity building of staff to enable them effectively and efficiently discharge their mandate.

The PTI, therefore, is the ODPP's game-changer, the driver for capacity enhancement for its staff and stakeholders in the sector locally, regionally and internationally.

Enjoy!

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MESSAGE FROM THE DPP

The Constitution of Kenya, 2010 established the Office of the Director of Public Prosecutions (ODPP) under Article 157. The ODPP Act of 2013 operationalized the Office. An analysis of Strengths, Weaknesses, Opportunities and Threats (SWOT) conducted during the development of the ODPP's first Strategic Plan 2011 -2015 identified skill gaps as one of the challenges in realizing the ODPP mandate. It is against this background that the idea of establishing a Prosecution Training Institute (PTI) was conceptualized. The ODPP's second Strategic Plan 2016-2021 focuses on delivery of quality prosecution services. The establishment of the PTI was again identified as one of the vehicles to achieve this objective.

It is no surprise then that the establishment of the PTI is one of the priority projects for the Office as it plays a critical role in realizing its mandate by providing continuous professional training and education to the

members of staff in all aspects in order to improve and standardize provision of prosecutorial services across the country.

It is for this reason that I established the PTI soon after assuming office and immediately after set out to look for suitable land to house the Institute.

Towards this end, we are grateful for the recent acquisition and official takeover of the former Senior Police Training Institute from the National Police Service, in Loresho paving the way for the construction of the PTI. The takeover brings us closer to realizing the PTI's mission of being a world class training and resources institution for prosecutors and the criminal justice system in Kenya and the East African region. We expect to start construction of the institute soon. The Prosecution Training Institute serves a three-fold function: a world class training facility to deliver

quality training for prosecutors and other professionals in Kenya and the East African Region; serve as a thought-leadership hub that will undertake research and recommend law reform in the area of criminal justice practice and lastly serve as a resource center for prosecutors and other criminal justice actors.

Further, the PTI is envisioned to play a key role in the realization of The ODPP Excellence Charter which the Office has developed to drive reforms in the ODPP over the next three years (2019 – 2022).

The ODPP Excellence Charter has identified Lifelong Learning as one of its strategic objectives. Lifelong learning aims at continuously equipping staff with requisite skills and capabilities necessary to deliver their mandate and to adopt international best practices, principles and standards. Once fully operational, the PTI is expected to provide continuous professional development programmes in thematic areas, exchange programmes, visiting professionals' programmes, face to face interactions and use of online knowledge centres in partnership with established educational and training partners.

Additionally, the PTI is scheduled to provide Training of Trainers programmes and center for future learning, induction trainings of all newly recruited staff, experiment on new ways of teaching and learning, training of prosecutors exercising delegated authority to prosecute and training other criminal justice sector agencies.

It goes without saying that the 21st Century prosecution service depends on highly trained, mentored and adaptable workforce. The ODPP leadership is committed to re-engineer office operations by equipping staff with the requisite skills and capabilities for delivery of the Office mandate within a global context under the

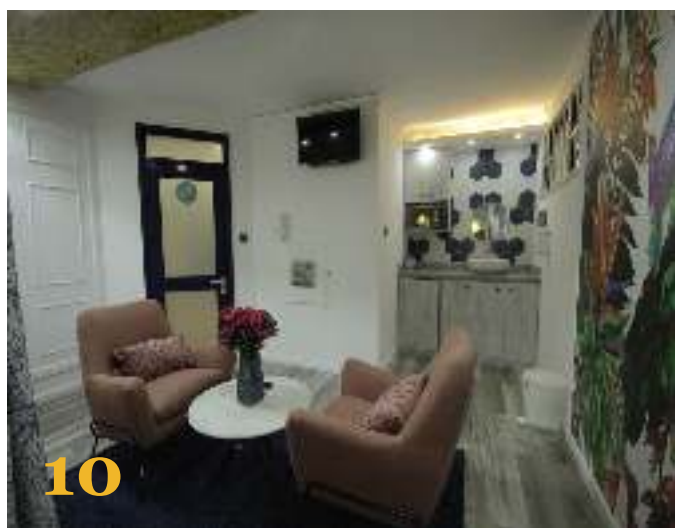
Relearning pillar which requires staff to learn how to build on internal strengths and to adopt international best practices in prosecutions. The PTI will be key in realizing these.

Indeed the PTI is envisioned to offer quality prosecution programmes some of which will involve joint trainings with peer organizations in the sector such as the National Police Service in a bid to build synergy and increase functional professional interaction. The PTI will also be an avenue for further research on substantive legal issues and possible law reforms in the criminal justice sector, ensuring that we are continuously improving our approach on issues of justice. These aspects will lead to professional and standardized delivery of prosecution services.

As an Office, we commit and shall endeavour to do all it takes to make the PTI a premier regional training institute.

Noordin M. Haji, CBS, OGW
Director of Public Prosecutions

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ODPP LAUNCHES GUIDELINES ON DECISION TO CHARGE & *UADILIFU* CASE MANAGEMENT SYSTEM

BY ROSE KIPYEGO

The Office of the Director of Public Prosecutions (ODPP) made twin launch of the Guidelines on the Decision to Charge and Uadilifu Case Management System (UCMS) during a colorful ceremony held at the newly acquired Prosecution Training Institute (PTI) grounds, Loresho.

The Chief Guest during the launch, Chief Justice David Maraga lauded the development of the Guidelines on the Decision to Charge and *Uadilifu* Case Management System by the ODPP saying they will enhance efficiency in the criminal justice sector.

He said the recent launch of the Judiciary E-Filing System and now the ODPP's *Uadilifu* Case Management System is a powerful signal that the justice sector is getting into the digital age. That it heralded a new and promising era of limiting human factor and its attendant errors of inefficiency and corruption in administrative and decision-making processes. The CJ was happy to note that the two systems have been successfully integrated, thus enabling the prosecution system to seamlessly access and use the Judiciary's e-filing system. He said easy access and retrieval of information will facilitate effective decision-making in the process of

prosecution and thus enhance the quality and value of critical decisions required in the execution of ODPP mandate. ‘As the old adage goes, justice must not only be done, but must also be seen to be done. With the implementation of this system, members of the public, the accused, and other persons who interact with the Public Prosecutions Service can, and should, have a more reliable and trusted channel of getting information regarding the status and progress of their cases with ease’, the CJ observed.

He urged all other actors in the criminal justice sector, from the Bar, to the prisons, the Probation, the National Police Service to the Ministry of Lands, among others, to embrace and generously invest in technological processes for efficient and effective service delivery to the public. He noted that digitization is going to be the new normal in the administration of justice, henceforth.

The Cabinet Secretary, Ministry of Interior and Coordination of National Government, Dr. Fred Matiang’i, lauded efforts by the ODPP in strengthening its policy framework and leveraging on ICT in the discharge of its mandate. He promised to support the Office in the implementation of the Decision to Charge and automation of its processes.

In his speech, the Director of Public Prosecutions, Noordin Haji, said the Guidelines on Decision to Charge spells out the steps a prosecutor takes to ensure fairness, consistency, transparency and accountability in the prosecution decision-making process to bolster public confidence in the administration of justice. He named the key feature of the Guidelines as the Two-Stage Test which comprises of the Evidential and Public Interest tests. Under the Evidential Test, the DPP noted that a prosecutor will have to ensure that there is sufficient evidence to provide a realistic prospect of conviction against a suspect on each charge and ascertain the evidence’s reliability, credibility, admissibility, sufficiency and strength.

“The onus is, thus, on the prosecutor to know and consider evidential thresholds before instituting any criminal proceedings, reviewing ongoing proceedings and before considering adopting alternatives to prosecution’ said the DPP.

He said in the Public Interest Test, a prosecutor considers whether charging a suspect is in the good of the public. This include culpability of the suspect, the impact or harm of offence to the community or victim, the suspect’s age at the time of the offence and whether prosecution is a proportionate response.

The DPP said *Uadilifu* Case Management System will enhance efficient and expeditious disposal of criminal cases. The system is aptly named “*Uadilifu*”, a Kiswahili word for Integrity, the cornerstone of this system. The has been developed by local software experts who took time to research and to integrate it into the unique local prosecutorial requirements. The system has capabilities to track and monitor the status and progress of files and further, facilitate electronic filing of pleadings and disclosure of evidentiary material.

He said the integration of *Uadilifu* with the Judiciary’s e-filing system has since reduced the time taken to file a charge sheet from an average of 30 minutes to slightly less than 5 minutes. He added that the reduced timeline coupled with less human contact mitigates against chances of misplaced and of/lost files, thereby, enhancing access to justice through timely and expeditious judicial processes.

He revealed that the ODPP is in the process of integrating *Uadilifu* with the Independent Police Oversight Authority (IPOA) and the Ethics and Anti-Corruption Commission (EACC) and pledged to ensure that all the institutions involved in the administration of justice including those that exercise Delegated Prosecution Powers, are eventually integrated within the ODPP Case Management System.

If deployed and embraced beyond just data capture, he said the system will enhance holistic collaborations among all partners and ensure that multiple viewpoints are embraced from analysis of crime trends, investigations, prosecutions, convictions and correctional phases. More importantly, he said the system can also help the office identify critical areas of focus in its quest to improve the criminal justice system by providing real-time qualitative and quantitative data.

The DPP exuded confidence that the Guidelines on Decision to Charge would bring uniformity, predictability and accessibility in the dispensation of justice to mwananchi. He added that in developing the guidelines, ODPP benchmarked widely but customized the guidelines to the unique justice system in Kenya.

Inspector General of Police, Hilary Mutyambai, said that the National Police Service was also set to digitize its operations. This would then mean a digitized investigative system that feeds into digitized prosecutorial and judicial systems. This collective cooperation and synergized operations gives a promising future for the justice sector.

The Secretary Public Prosecutions, Dorcas Oduor, said that Article 157 (10) of the Constitution requires the ODPP to exercise the power and decision to commence prosecution independently, without any influence or authorization. Further, Article 157 (11) requires the ODPP to have regard to public interest and the interests in the administration of justice saying these provisions seek to ensure that prosecutorial power is not only exercised independently, but is also exercised in a manner that promotes constitutionalism and the rule of law.

She said the Guidelines on the Decision to Charge will standardize prosecutions and bring to an end the arbitrary use of prosecution powers, thereby, legitimizing the prosecution function. ‘The guidelines provide a basis and gauge against which the legitimacy of decisions taken can be measured. We must always remember that constitutional power is constrained power which must

be exercised fairly and judiciously; and certainly not in a selective, imperious, and capricious manner’, the SPP said.

“The Decision to Charge is the heart of criminal justice since therein lies the institution of criminal proceedings. Constitutionally, the ODPP is the sole institution mandated to make the decision to charge and it does so independently. The Guidelines on the Decision to Charge that the ODPP has developed are anchored on Article 157 of the Constitution of Kenya 2010, the National Prosecution Policy and the General Prosecution Guidelines. The Guidelines are set to enhance the quality of prosecutorial decisions, accountability of prosecutors and transparency of prosecutorial processes”, said the SPP.

The ODPP commits to continue collaborating with stakeholders, development partners and other players in the justice sector to ensure that the wheels of justice continue to roll effectively and efficiently, even amidst challenging times such as the current COVID-19 pandemic.

Other dignitaries present at the launch were: Twalib Mbarak, EACC CEO; Amb. Simon Mordue of the European Union; Nelson Havi, President of the Law Society of Kenya; Charity Kagwi, Head of Criminal Justice and Anti-Corruption Pillar at United Nations Office of Drugs and Crime (UNODC) Kenya. Other organizations represented were the United States Department of Justice (USDOJ) and the International Justice Mission (IJM) among others.



The ODPP commits to continue collaborating with stakeholders, development partners and other players in the justice sector ...”



Hon. Chief Justice, David Maraga & CS Interior Dr. Fred Matiang'i during the ODPP launch.



Participants during the launch of Guidelines on Decision to Charge & Uadilifu Case Management System.

ODPP ACQUIRES LAND TO CONSTRUCT THE PTI



DPP, Noordin Haji, & IG, Hilary Mutyambai, signing an agreement during PTI land handover ceremony at Loresho.

BY ROSE KIPYEGO

The Office of the Director of Public Prosecutions (ODPP) has finally acquired the much awaited piece of land to construct the Prosecution Training Institute (PTI) which is one of the ODPP's flagship projects. The PTI is set to be a state-of-the-art institution and one of its kind in Eastern Africa. The ODPP took possession of the National Police Service Senior Staff- Loresho Campus at a momentous and colorful handover ceremony graced by both the Director of Public Prosecutions (DPP), Noordin Haji and the

Inspector General of Police (IG), Hilary Mutyambai. It was also witnessed by the Secretary Public Prosecutions, Dorcas Oduor and the Deputy IG Edward Mbugua.

This great milestone is a “dream come true” for the DPP since upon assumption to office in April 2018, he promised to steer the ODPP in a strategic direction in a bid to realize optimal potential in executing its mandate. The DPP from the onset of his tenure expressed his desire and is still keen and committed to professional

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The PTI's intermediate vision is to set up centers of excellence, continuous professional education and structured mentorship programs.

>>> *Continued*

delivery of prosecution services to the people of Kenya. In order to achieve this, DPP in August 2018 established the Prosecution Training Institute, a ground-breaking initiative that envisages the standardization of quality prosecutorial services across Kenya and the East Africa region. The acquisition of land for the PTI is therefore, a great achievement for the ODPP.

The land handover ceremony brought together different agencies and partners, which clearly demonstrated growth of structured and functional interagency collaboration within the criminal justice sector and the willingness to share scarce resources to spur growth and increase capacity of peer agencies.

Since its inception in 2018, the PTI has run a three (3) months successful induction program; undertaken various thematic trainings; entered into professional development partnerships with both national and international institutions; undertaken a Training Needs Assessment; signed memoranda of understanding with various development partners; developed training materials suitable for adult professional learning; and

developed a Training Curriculum as steps towards fully operationalizing its activities.

The PTI's intermediate vision is to set up centers of excellence, continuous professional education and structured mentorship programs. It is hoped that through these centers of excellence, the PTI will inject accountability, transparency, public confidence and quality control in all operations with the overall aim of transforming ODPP into a prosecution service that best responds to the needs of all Kenyans. The ODPP is committed to put the PTI premises to good use and looks forward to partnering with both State and non-State actors towards the achievement of this dream.

The land where PTI will sit boasts an enviable serene environment, conducive for learning. Among those present at the land handover ceremony were James Warui, Senior Assistant Director of Public Prosecutions and then Head of the PTI, Patrick Obimo, Commandant Loresho Campus and Charity Kagwi, Head of the United Nations Office on Drugs and Crime (UNODC).



Artistic impression of the PTI.

THE PTI CURRICULUM

BY MEDIATRIX RAPANDO

The Prosecutions Training Institute (PTI) continues to identify priority areas of undertaking as it gears up for its full implementation. One key area is development of a prosecutions training curriculum meant to impart staff with adequate skills that will enable them carry out their respective duties efficiently and effectively.

The PTI has commenced on the curriculum development process with a Diploma in Public Prosecutions Curriculum. The content of the curriculum is informed by the Training Needs Assessment and Curriculum Development Framework carried out by the ODPP in 2019.

The proposed modules in the diploma curriculum include the Prosecutor's Induction course which targets newly recruited prosecutors to induct them on their roles and responsibilities. The curriculum also contains Advanced Studies in Prosecution Course which provides

a continuous capacity developing and maintaining professional skills for prosecutors.

The curriculum further contains Non-Prosecutor Module which targets corporate service staff within the ODPP who play a role in delivering the prosecutorial service. Equally, there is the Thematic and Emerging Areas in Prosecution Course which focuses on areas that are continuously emerging in the prosecution field and would require new skills and knowledge to successfully undertake the prosecutorial mandate.

Finally the curriculum has an inter-Agency Coordination Module that provides prosecutors with knowledge, skills and attributes necessary for coordinating prosecution with other relevant agencies and stakeholders. The curriculum will go a long way in realizing the PTI dream of improving the quality of prosecutions in Kenya and beyond in line with its strategic commitment of lifelong learning.



Prosecutors & stakeholders pose for a photo during a training conducted by the PTI.



Decision to Charge Task Force Members.

THE ROAD TO THE DEVELOPMENT OF GUIDELINES ON DECISION TO CHARGE

BY DORCAS ODUOR, SECRETARY PUBLIC PROSECUTIONS

The decision to charge is the core of the Office of the Director of Public Prosecutions (ODPP) and serves as the critical screen to the criminal justice system by ensuring that appropriate suspects face trial, victims find justice and integrity of the criminal justice system is upheld through effective dispensation of justice.

In recognition of this, the Director of Public Prosecutions, Noordin Haji, soon after assuming office, appointed the Decision to Charge Task Force and charged it with the responsibility of reviewing

the National Prosecution Policy in order to develop a minimum standard on the decision to charge.

The mandate of the Task Force included making policy recommendations and guidelines to be used by all prosecutors in the course of discharging their single most important mandate—that of deciding whether and if so how to charge.

The Task Force which was constituted by the DPP in August 2018 brought together all the actors within the criminal justice chain to interrogate the laws, practices

and policies that shape the process of making the decision to charge.

The Task Force completed its work and handed over its report to the DPP, paving way for its launch and implementation. This means that for the first time in the history of prosecutions in the country, guidelines have been developed to guide prosecutors on who, how, when, where and why they are to make the decision to charge. The development of the decision to charge is timely given the fact that the past three decades have witnessed a significant shift from colonial era system in which all first line prosecution were handled solely by the police. Indeed before the promulgation of the Constitution of Kenya 2010, the then Department of Public Prosecutions managed only a meager 5% of the cases as part of the functions of the Attorney General (in the High Court and Court of Appeal) while police prosecutors handled the 95% of cases. The decision to charge was, therefore, exercised by officers with no, little or inadequate legal training to effectively prosecute.

In addition to prosecution, the police also investigated the alleged offences before prosecuting them. The mutually exclusive roles of investigator and prosecutor inevitably undermined the independence and integrity of prosecution.

This necessitated the establishment of the independent office of the DPP which has taken over the prosecution mandate from the police. The new office inherited a prosecutor complement of only 93 Counsel against optimal staffing level of 927 counsel. Currently, the ODPP has 630 Counsel, 85% of whom have been recruited over the last five years.

The nature of prosecutors' job grants them tremendous discretion to do justice. This power is further reinforced by the Constitutional mandate which both enables and cautions the DPP to safeguard the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

Unfortunately, such wide discretion is complex as this is not taught in Law School nor in continual legal

education and even goes beyond case law or statutory interpretation. Consequently, prosecutors make these decisions without adequate training, based on instinct and institutional knowledge.

From the foregoing, the DPP felt the urgent need to put in place an institutional framework with established guidelines that set out the minimum standards for determining when to charge, when not to charge and in the case of the latter, clear guidelines on the alternatives to prosecution.

Once fully implemented, the guidelines will not only ease the burden of relying on instinct, but most importantly equip the prosecutors with requisite knowledge and skills to effectively and efficiently offer professional service to the public.

It is envisaged that the Guidelines will provide a standard framework for engaging with criminal justice actors, investigation and prosecution of new and emerging crimes as well as managing victims and other persons who would be affected by such offences in addition to taking into consideration public perceptions and expectations.

The Guidelines will further complement the DPP's new strategic focus for the office which is Recasting, Retooling and Relearning and also serve to ensure transparency and accountability in the delivery of the ODPP mandate. This will lead to increased public confidence in the ODPP and the criminal justice system as a whole.



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The new ODPP lactation room.

DIARY OF A PROSECUTING MOTHER: PART I

BY SAMITA MANG'OLI

I grew up watching my mother manage her home effortlessly. Little did I know how draining this was. How did she manage her farm, home, job and the eight of us? I am now in a similar position with no farm, though with a little house and two boys to manage. This has almost sent me into depression. Monday morning. I wake up at 4.00 am to prepare and get the kids ready for school. My personal assistant sought to attend an uncle's burial in the village. You see, from where

I come, everyone is a relative and we attend all burials. This meant that I had no moral authority to question her request. Life has to move on. Everything is ready by 6.45 a.m. I manage to drop the kids to catch the school bus and off I go to work. I have so much to do on this day and I wonder if I will get out alive. But from Sunday's sermon, I am encouraged never to give up. I am actually not sure whether to say I attend Sunday church service because with these

boys, one can only afford 10 minutes of concentration. The rest are spent trying to convince them to keep quiet. But I was brought up to believe that God understands.

At 7.45 am, I pass by the laundry to drop clothes and head to the office. I quickly scan through the cause list to get a glimpse of what awaits me at the court. After a few minutes, I receive a distress call from a colleague. She has an emergency and needs me to stand in for her



The lactation room is fully equipped to meet all the needs of nursing staff.

in court. I only wish I could say no. It is a defence hearing with a last adjournment on the part of the prosecution. My brains are literally scattered. I send Michael to pick up the file nevertheless. A woman got to do what she got to do. I quickly go through the file by reading statements. This is an interesting case of forgery of certificates. I shake my head in disbelief. How do such people manage to get jobs with forged certificates? How do they manage to go unnoticed? But as they say, one can run but they cannot hide. Even as I prepare to rush to court, I pray that somehow, the court is unavailable. Truth be told, every advocate has had this prayer often.

In court, I decide to start with my mention case. I am overjoyed to learn that the other court is not in session. My prayers worked. Two matters down, I walk back to the office. I have submissions to be filed in two days and a pre-trial to attend

to. On my way, my investigating officer calls me requesting to visit my office. We agree on the time. I manage to finalise my submissions. It's at this time that I am reminded that I have not had anything to eat since morning. I remember this after my son's teacher calls me to remind me of his lunch. I forgot and carried it with me. Poor boy has to go hungry today. I am filled with guilt. I am a bad mother.

Anyway, I quickly chose to forget this to enable me concentrate. My pre-trial is soon starting. I cannot imagine how fast time flies when you need it to drag even just a little. Without noticing, it's 5.00 pm. I wrap up and decide to dash home. I know my boys are waiting at the neighbours, hungry. Hungry, because mummy forgot and carried their lunch to her workplace.

Hungry, because mummy said there was no eating at the neighbours. I pity them. One, because I have to

pass by the market to buy groceries and two, because Nairobi traffic is unforgiving. Even as I make my way home, I know that I have not cleared the day's work. I even had a doctor's appointment which I totally forgot.

I will let you know what transpired this evening in our next Issue...

Meanwhile the ODPP has established a fully equipped lactation room for nursing mothers.

Studies show that organizations that encourage and support working mothers to continue breastfeeding at work, have been proven to enjoy significant cost benefits that include lower absenteeism rates, reduced turnover, lower healthcare costs, higher productivity and satisfied and loyal employees.

FIVE BANKS ENTER INTO DEFERRED PROSECUTION AGREEMENT WITH THE ODPP

BY BEATRICE OMARI



Criminal justice actors led by DPP, Noordin Haji, sign an agreement with five banks on deferred prosecution.

Five commercial banks have entered into Deferred Prosecution Agreements with the Office of the Director of Public Prosecutions (ODPP) and agreed to pay a total of Ksh 385 million as penalties for failure to report suspicious transactions relating to the NYS 2 corruption cases.

The said amount has been paid into the Prosecution Fund account and will be restituted to the public following the existing laws and procedures. In addition to the penalties, and as part of the agreements, the banks Committed to review and implement a number of corrective measures aimed at enhancing monitoring on an ongoing basis, of all complex, unusual, suspicious and large transactions undertaken by their customers.

The banks are: Kenya Commercial Bank (K) Ltd, Equity Bank (K) Ltd, Co-operative Bank of Kenya Ltd, Standard Chartered Bank (K) Ltd and Diamond Trust Bank (K) Ltd.

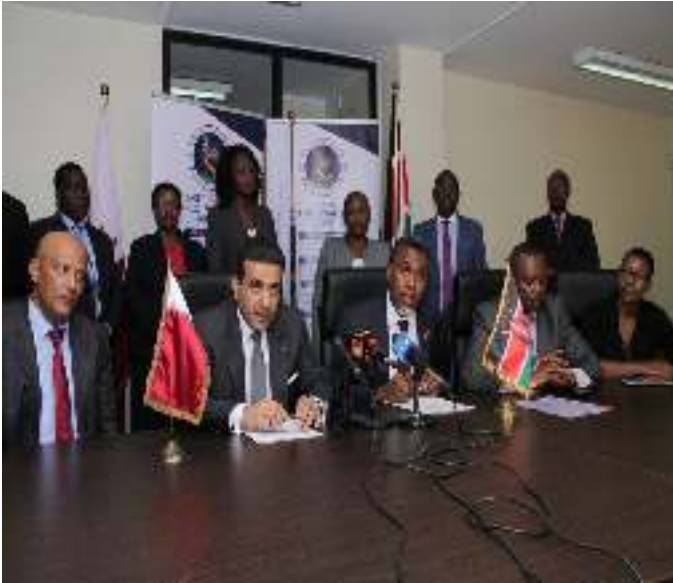
The move between the ODPP and the banks is aimed at fighting financial crimes and the resolve to remain committed to ensuring that financial institutions strive to attain highest principals of integrity and professionalism.

Deferred Prosecution Agreement is an alternative to prosecution which is anchored in law and entered to pursuant to Articles 157 and 159 of the Constitution of Kenya and the ODPP Diversion Policy 2019. It allows a corporate entity which has committed an offence to enter into an agreement with the ODPP to defer prosecution of the entity for a set period on condition that the entity meets certain conditions set out in the agreement. Failure to meet the said conditions will lead to automatic prosecutions.

Deferred prosecution is not a new concept. It is practiced in other jurisdictions such as the United States of America, United Kingdom and Canada among others.

QATAR TO SUPPORT KENYA IN FIGHT AGAINST CORRUPTION

BY BEATRICE OMARI



ODPP, Qatar delegation and justice sector actors address the media on mutual areas of collaboration.

The Kenyan Director of Public Prosecutions Noordin Haji and the Attorney General of the State of Qatar, H.E. Dr. Ali Bin Fetais Al-Marri have signed a Memorandum of Understanding (MOU) aimed at strengthening the joint fight against cross border organized crime and corruption.

The DPP said the MOU will stimulate and enhance the collaboration between the two countries' competent authorities and improve the coordination of their investigations and prosecutions. He noted that the ODPP is increasing international cooperation with non-traditional partners which is necessary in fighting transnational crimes in view of the increasingly interconnected and interdependent world.

He said the agreement will also help target organized crime groups that are transnationally active and cause a major threat to the country's security. Further, the agreement will foster safe and swift exchange of

information and evidence between the two nations. 'The MOU is expected to improve relations between Kenya and Qatar and create new areas for synergy particularly in mutual legal assistance, anti-corruption, transnational organised crime and capacity building for prosecutors', said the DPP. This is in line with the ODPP strategic commitment of enhancing Inter-Agency networks .

The Qatar AG's visit comes at an opportune time when the Office is reinventing and re-structuring itself to be more efficient and effective in combating Corruption and Organized crime. It is worth noting that the State of Qatar, in partnership with the United Nations Institute for Training and Research (UNITAR) hosts one of the best anti-corruption training institutes in the world -the Rule of Law and Anti-Corruption Center (ROLACC) in Doha.

Further, the Public Prosecutions Office in Qatar, has been recognized and awarded for developing the world's best document tracking system, which leads in terms of output and volume.

In particular, the agreement will embrace cooperation in technical assistance, mentorship, exchange programs, special projects to promote and facilitate capacity building and training; the sharing of best practices on policies and procedures; and the exchange of experts, information and technology.

The Qatar-Kenya partnership will also see the construction of the Prosecutors Training Institute in Loresho, Nairobi.

The signing of the document was witnessed by the Director of Criminal Investigations, George Kinoti and Ethics and Anti-Corruption Commission CEO, Twalib Mbarak.

JUDICIARY LAUNCHES ALTERNATIVE JUSTICE SYSTEMS (AJS) POLICY



Secretary Public Prosecutions, Dorcas Oduor(3rd left), during the launch of Judiciary's Alternative Justice Systems.

BY BEATRICE OMARI

The DPP, Noordin Haji, has lauded the Judiciary for the landmark launch of the Alternative Justice Systems (AJS) Policy which will provide a structured mechanism for the administration of AJS.

In a speech read on his behalf by Secretary Public Prosecutions, Dorcas Oduor, the DPP said that the structured mechanism for the AJS was more responsive to the needs of women and girls who are majorly disadvantaged by the traditional mechanism for resolving disputes. He noted that AJS has since time immemorial been used to the traditional African justice system where the notion of punishment was centered more on reconciliation and compensation than retribution, with only a few instances of corporal punishment, expulsion and banishment depending on the nature of the offence.

‘The criminal justice system is moving towards AJS which places emphasis on restorative justice as opposed to the retributive justice, with the principal goal being

reform and rehabilitation of offenders’, observed the DPP.

He said the United Nations Guidelines on the Role of the Prosecutor and the International Association of Prosecutors (IAP) Standards urge Prosecutors to promote alternatives to prosecution and diversion of criminal cases. This is particularly for cases involving young offenders charged with minor offences and first time offenders from the formal criminal justice system. This is aimed at decongesting prisons and reducing backlog of cases.

The DPP said Article 159 of the Constitution of Kenya 2010, provides for the use of alternative forms of dispute resolution mechanisms, including reconciliation, mediation, arbitration and traditional approaches, as long as they do not contravene the Bill of Rights, are not repugnant to justice or morality or inconsistent with the Constitution itself or any written law. He noted that there has, however, been no policy nor legislative framework

enacted to breathe life into the Article neither has there been a formalized structure on how informal justice systems can be applied to handle criminal matters and their scope of operation.

It is expected that the Policy will: ensure that alternative measures are consistent with preventing re-offending; assist in redressing of the damage incurred by society by the offender; have regard to the interest of victims; uphold the rights of the accused and provide response to illegal acts that is in the public interest.

Of importance, the DPP noted, is the immense returns AJS offers to the criminal justice system with the ultimate goal of making the system more effective, efficient, and people responsive in addition to bringing the criminal justice closer to Wanjiku through:

- 1) Providing the parties involved (the complainant, the victim and the offender and the community) with an opportunity to participate in the disposition of cases. This will encourage cohesiveness in the communities and also promote restitution and restorative justice;
- 2) Enhanced speedy disposal of cases by reduction of backlog through channelling of less serious offenses into the alternative dispute mechanism process. This will in turn give the formal criminal justice sector more room to handle cases that are more serious in nature;
- 3) Cost effectiveness: the nature of the alternative dispute resolution mechanism is cheaper. This will, therefore, enable Kenyans that are unable to cater for the costs of a formal criminal process to have their grievances addressed whilst promoting reconciliation among the conflicting parties;
- 4) Decongestion of prisons by reduction of the number of suspects held in custody in the course of their trial, more so petty offenders;

- 5) Reduction of resources expended to sustain people in custody, thus availing such resources for use elsewhere;
- 6) Facilitation and social reintegration of offenders by giving them a second chance in life, thereby, reducing reoffending.

The ODPP has been applying AJS informally for years. In the case of ***Republic vs. Mohamed Abdow Mohamed, High Court Criminal Case No. 86 of 2011 [2013] eKLR***, there was a settlement between the families of the accused and the deceased. “The ODPP in line with the request by the deceased’s family that they did not wish to pursue the matter and in acknowledging AJS, successfully made an application to withdraw the murder charges”, she said.

In 2015, as part of entrenching AJS and formalizing the application thereof, the ODPP introduced Diversion into the National Prosecution Policy and General Prosecution Guidelines as an alternative to prosecution. In line with this, the Office developed Diversion Guidelines to enable prosecutors engage in what is essentially AJS in a more organized, uniform and objective manner.

It is expected that the AJS will complement the Plea Bargaining and Diversion policies that provide opportunities for speedy determination of cases in addition to proving a framework that seamlessly links the court processes to the ODPP process. This will inject accountability, transparency and build public confidence in the administration of criminal justice.

The Office has since carried out country-wide sensitization exercises which have helped to create awareness among stakeholders and the citizenry and to cumulatively instill greater confidence in the criminal justice system. Such awareness will help change the perspective that only courts deliver justice.

The DPP committed to improving the efficiency and effectiveness of the criminal justice system by partnering with other stakeholders to ensure that the AJS Policy is implemented.

DPP MEETS WITH WORLD BANK BOARD TO DISCUSS FIGHT AGAINST CORRUPTION IN KENYA

BY RODAH OGOMA

The Director of Public Prosecutions, Mr. Noordin Haji, met members of the Board of Executive Directors of the World Bank Group in the US to update the Board on the efforts Kenya was making to fight corruption.

The DPP explained to the Board Officials on the mandate of the ODPP, emphasizing the constitutional provisions that had strengthened its independence to undertake impartial and efficient prosecutions. He highlighted the following as the priority areas to strengthen the Office ability to deliver on its mandate; streamlining the prosecution of corruption cases, capacity building, effective whistleblower protection, the establishment of an Internal Affairs Unit and an Inspectorate Unit to strengthen integrity of staff.

Mr. Haji acknowledged that Kenya's corruption was systemic and therefore needed to be addressed through appropriate policy that would enable investigators, prosecutors, and the Judiciary to synergize efforts in addressing it. He said that his Office was aggressively advocating for implementation of Plea Bargaining and Diversion policies which are not only a means of expediting the trial process, but also incentives that

would support expeditious prosecution of cases.

The meeting also discussed integrity and conviction of corruption cases, the recovery and restitution of proceeds of crime through the Prosecution Fund and the Prosecution Training Institute. The DPP identified the following areas as high-risk for corruption: the public procurement processes, infrastructure and development projects and the devolved governments.

Overall, he credited the ODPP's achievements to among others, strengthened legal and institutional frameworks and enhanced collaboration with international partners in sharing information that would support Kenya to fight corruption. He also called on the World Bank to support Kenya to strengthen its debt management and transparency as well as improve its capacity to use best practices to guide the procurement, contracting and implementation of projects.

The Board officials pledged the World Bank's support in the strengthening of institutions that coordinate and collaborate with the ODPP to fight corruption and use of available peer review mechanisms to strengthen the institutional capacity of the Office.



DPP HOLDS TALKS WITH THE EUROPEAN UNION DELEGATION TO DISCUSS FIGHT AGAINST CORRUPTION

BY BEATRICE OMARI



DPP, Noordin Haji, meeting with EU delegation to discuss fight against corruption.

The European Union Heads of Mission in Kenya led by Amb. Simon Mordue called on the DPP Noordin Haji to discuss good governance and the fight against corruption.

The DPP informed the delegation of the key strategies the office had employed in fighting corruption. He highlighted the multi-faceted approaches to efficiently and effectively prosecute corruption and other transnational organized crimes.

The DPP reaffirmed the office commitment in the fight against corruption and thanked the European Union for

their technical and infrastructural support.

He encouraged more partnerships and collaboration from other criminal justice actors, like-minded institutions, civil society, development partners and the general public in the fight against corruption.

On their part, the delegation committed to facilitate the recovery of proceeds of crime in foreign accounts within their jurisdiction through international cooperation with Kenya. They also pledged to promote and support engagements that will ensure a level playing ground within the criminal justice sector.



European Union delegates.



SUPREME COURT OF KENYA, CIVIL APPLICATION NO. 210 OF 2019 EACC- **VERSUS**- PROF. TOM OJIENDA, SC & 2 OTHERS

BY PAULINE MUTHURI

On 18th March, 2015 the Chief Magistrate Kibera Law Court issued Exparte Order giving warrants to Ethics and Anti-Corruption Commission (EACC) to investigate Professor Tom Ojienda advocate – client account on suspected fraudulent payment. Prof. Ojienda contested the said warrants in the High court on the ground that payment of legal fees was protected by Advocate Client Privilege under Section 134 and 137 of the Evidence Act. Further, he argued that the said warrants were in violation of Section 28(1), 28(2), 28(3) and 28(7) of Anti-Corruption and Economics Crimes Act (ACECA). The said sections obligates the EACC to issue a written notice to the suspect of their intention to investigate the account. The omission by EACC to issue notice to the suspect was ultra vires and in violation of his rights under Articles 27(1), 27(4), 27(5), 31, 40(1), 40(2), 47(1), 47(2) and 50(1) of the Constitution. He thus, sought various declarations in that regard and an order of certiorari to quash the said Chief Magistrate’s order.

Upon hearing the Petition, the High Court, *Lenaola, J.* (as he then was), quashed that order, issued a declaration

that “*the warrants to investigate an account given to the officers of the Commission breached their 1st respondent’s (Prof. Ojienda’s) rights and fundamental freedoms under the provisions of Articles 47(1) & 47(2) and 50(1) of the Constitution and were hence void for all intents and purposes.*”

Aggrieved by that decision, the EACC and ODPP filed Civil Appeal Nos.103 and 109 respectively, before the Court of Appeal. The 1st respondent (Prof. Ojienda) cross-appealed faulting the High Court for failing to hold that his fundamental rights to privacy, to property and not to be discriminated against were violated; and for failing to award him damages for the violation of his right to fair administrative action.

The Court of Appeal (*Nambuye, Kiage & Ole Kantai, JJA*) consolidated those appeals and in its judgment dated 28th June 2019, dismissed those appeals and the cross appeal holding that investigations undertaken by EACC are an administrative function subject to the provisions of Article 47 of the Constitution, and directed that in exercise of its mandate, EACC should always

comply with the unambiguous and clear provisions of Sections 26, 27 and 28 of Anti-Corruption and Economic Crimes Act by giving notice to suspects.

After the Court of Appeal's decision, the EACC made an application to the *Supreme Court seeking stay of execution and/or enforcement or implementation of the judgment in reliance upon the judgment or decree of the Court of Appeal in Civil Appeal No. 109 of 2016 (consolidated with Civil Appeal No.103 of 2016).*

In opposition to the application by EACC, Prof. Ojienda raised a preliminary objection challenging the Supreme Court jurisdiction to entertain the application. On jurisdiction, the Supreme Court held that it had jurisdiction under Article 163 (4) (a) of the Constitution to entertain both this application and Supreme Court Petition of appeal No.30 of 2019. **Supreme Court further held** that the fight against corruption and economic crimes is a matter of great public importance. In the circumstances, it was in the interest of justice to provide guidance, a clear and authoritative statement of this Court on the issues raised. The final ruling was delivered on 19th February, 2020, when the Supreme Court ruled that EACC had powers to conduct a search in the premises of a suspect without notification of the public interest. The High Court and Court of Appeal decisions requiring notice to be given to suspects before bank accounts are accessed have serious ramifications on the fight against corruption and economic crimes as it undermines the search (es) as an investigative tool.

Further, various litigants had filed applications in different courts seeking release of documents obtained pursuant to exparte orders (warrants) given to the investigators and others were seeking termination of their cases. The Supreme Court ruling was/and is the greatest win in the fight against corruption.

ODPP PARTICIPATES IN INTERNATIONAL ANTI- CORRUPTION EVENTS

BY VIVIAN KAMBAGA

The Office of the Director of Public Prosecutions participated in the 2019 Annual International Anti- Corruption Day celebrations held in Makueni County in commemoration of interventions, achievements, challenges encountered and the lessons learnt in the fight against corruption. The National and Regional celebrations were held simultaneously at Makueni, Nyandarua and West Pokot counties, under the theme **“We are United against Corruption for Sustainable development”**.

The ODPP engaged members of the public and sensitized them on the mandate of the ODPP, the role of all the players in the criminal justice in fighting corruption, the alternative methods of dispute resolution and the avenues available for the protection of witnesses.

The various activities conducted were done jointly with the Ethics and Anti-Corruption Commission in the spirit of Inter-Agency collaboration. Members of the ODPP family had an opportunity to engage members of the Makueni County Assembly and the Makueni County Executive, carried out road shows and public barazas in various places including places of worship where the clergy promised to spearhead the fight against corruption. Mr. Sebastian Mutinda Senior Assistant Director of Public Prosecutions and Head of Murang'a



Makueni Governor, Kivutha Kibwana and Cabinet Secretary for ICT, Joe Mucheru at ODPP stand during Anti- Corruption Day celebrations in Makueni.

County engaged the public at **Athiani Fm** a local radio station, in Makueni, where he focused on the role of the ODPP in fighting corruption.

On the final day, the event was graced by the Cabinet Secretary for ICT, Joe Mucheru who delivered the President's speech and urged all Kenyans to actively play their role in fighting the vice of corruption. The other dignitaries in attendance were Hon. Kivutha Kibwana (Governor for Makueni), His Grace, Archbishop Eliud Wabukala (The Chairman EACC) Rose Mogoi, (Commissioner EACC) and Colonel Cyrus Oguna (the Government Spokesman).

The International Anti-Corruption Day (IACD) came into existence after the United Nations General Assembly by resolution 58/4 Kenya adopted the United Nations Convention against Corruption on 31 October 2003 and 9th December of every year was designated International Anti-Corruption Day. Since then, many countries all over the world have been commemorating this day to raise public awareness and highlight the role of UN Convention in preventing and combating corruption. The fight against Economic, Organized & International Crimes continues.

EMBRACING TECHNOLOGICAL INNOVATION TO FIGHT CRIME

BY PETER KIPROP & BRIAN AYODO

The ODPP participated at the LawTech Festival held in Nairobi that discussed the importance of technology in law. With participants from Africa and Europe, the event presented success stories from countries that have embraced technology in the criminal justice sector. Various models were shared and how digital platforms can be used to address challenges that citizens face.

Emphasis was laid on the need for governments to automate all their legal functions to avert delays and prevent corruption. The event was timely for the ODPP which is keen to digitize its operations to enhance efficient and effective service delivery in line with the ODPP commitment of reshaping prosecution through modernization of its processes.

There are two ODPP team which have been working on two technological innovations to combat crime; the innovation to combat traffic crime and general innovation on how to address future crimes. The 2 teams had emerged the best from a competition on “think out of the box” concept held during ODPP’s Strategic Planning Workshop in 2019.

The DPP acknowledged the innovativeness of the teams and challenged them to come up with more ideas to fill existing gaps in tackling crimes that emerge as a result of advance in technology. At the LawTech event, the teams learnt on how best to pitch their innovations. They also networked and picked best practices from countries where various innovations have yielded positive results in the justice sector.

The gaps which exist both locally and internationally require concerted efforts from stakeholders. Some of the “pain points” that the teams have come up with are: lack of legislation, lack of skilled investigative personnel,

lack of resources such as financial support and lack of international co-operation.

The ODPP acknowledges that tackling crime gets complicated as technology advances, hence the need to proactively plan ahead in order to counter the dynamics that the future might present. He also noted the need to build cross-boarder and cross-national partnerships and rationalize conflicting legislation on Admissibility of Electronic Evidence in technological crimes. The teams are guided by existing legislation such as the recently enacted Computer Misuse and Cyber Crime Act No. 5 of 2018 which mainly addresses offences relating to computer system.

Locally, there is need to partner with Tech-knowledge based bodies such as the LAWYERS HUB, East African Data Handlers, AFRINET among others in order to tap on their expertise and build a strong base to deal with crime as technology advances. The ODPP is working on the concept of innovation and technology in collaboration with UNODC, Safaricom, K& L GATES, Maryland, among others.



ODPP team participating in the Law Tech Festival in Nairobi.

EMBRACING DIGITAL PROSECUTION AS COVID – 19 PERSISTS

BY TIMOTHY OCHIENG

The Coronavirus (Covid-19) pandemic that hit the country in mid-March, 2020 continues to display its adversity in all aspects of our daily lives. The justice sector hasn't been spared.

In response to Covid-19, DPP Noordin Haji immediately spearheaded the development and adoption of a raft of measures in order to ensure safety of staff and the public and also to enable the Office to continue delivering on its mandate despite the pandemic. These include: development of staff guidelines on protective and preventive measures on Covid19; adoption of online platforms such as Zoom, Webex, Skype and Microsoft Teams to conduct meetings and court sessions and provision of Personal Protective Equipment (PPE) to all staff. The DPP also donated a cheque of Ksh 2 billion to support the national fight against the pandemic. Since the start of the Covid-19 pandemic in March 2020, the Office has registered over 40,000 cases.

The court has allowed filing of cases electronically, electronic case management and presentation of digital evidence subject to certain rules and regulations. This has reduced the cost of accessing justice through reduced travel, enhanced expeditious disposal of cases by avoiding unnecessary adjournments caused by unavailability of advocates and witnesses.

The ODPP has launched and operationalized Uadilifu Case Management System to enhance efficient and expeditious disposal of criminal cases. The system has capabilities to track and monitor the status and progress of files and further, facilitate electronic filing of pleadings and disclosure of evidentiary material. The system has been integrated with the Judiciary's e-filing system.

However, there exist challenges to these technological gains, the notable one being digital illiteracy among the general population due to lack of necessary equipment,



ODPP team receiving police files through Central case intake.



ODPP team using *Uadilifu* Case Management System to file charge sheets to the Judiciary.

exposure and training in understanding the use of technology. This limits their interaction with justice sector actors.

Lack of privacy occasioned by hacking and copyrighted content is another challenge. Copyright owners may reserve the right to manage and produce data which may inhibit transparency and accountability. Software errors, computer viruses, the cost of maintenance to facilitate transparency and quality of data within the sector and for the general public have led to reluctance in the use of technology.

Further, there is misuse of technology for self-gain by rogue maintenance companies. For instance, the use of 'logic bombs', which are codes intentionally put in

software systems so as to unleash malicious functions when specific conditions are in place. This becomes a potential 'cash cow' for such maintenance companies who engineer the 'need for regular maintenance'.

In terms of digital evidence, it is noteworthy that some internet technologies have been designed specifically to enable hiding the identity and location of individuals who are accessing or sharing information. This may pose a challenge if the evidence being sought for is hidden. Poor internet connectivity and interference by irrelevant pop ups during online interactions are other challenges.

Overall, the constant and rapid growth of technology imposes a responsibility on law formulators to draft and pass, up to date policies and legislations to guide the use of technology in the country.

ODPP COVID-19 containment measures.





ODPP staff during the launch of Kisumu model office.

DPP OFFICIALLY LAUNCHES THE ODPP KISUMU REGIONAL OFFICE

BY BEATRICE OMARI

The DPP Noordin Haji has unveiled a model office for the Kisumu Region, one of the nine regions which have been established by the reviewed ODPP organizational structure.

The new regional headquarters is equipped with modern facilities, pre-trial conference rooms, a central case intake registry, a resource centre and a nursing room among others and is set to be replicated in the remaining 8 regional ODPP offices across the country to provide conducive working environment for delivery of quality services to the public. Other regions are Nairobi, Central, Upper Eastern, Lower Eastern South Rift, North Rift, Western and Coast.

The DPP said the establishment of the regional offices is aimed at ensuring standard service delivery to the

citizens across the country -from Lamu to Kisumu, from Busia to Garissa, the services should and must be the same in line with its strategic commitment of organizational effectiveness.

He urged staff to discharge their mandate with integrity transparency, accountability, and respect for human rights saying this will enhance public confidence in the Office.

The DPP noted that inter agency cooperation was key in fighting crime and challenged the regional offices to embrace the same in order to build synergies with all the criminal justice actors in their respective regions.

COMMUNITY DIALOGUES TO FOSTER COHESION

BY BEATRICE OMARI & GITONGA MURANG'A

DPP Noordin Haji visited and engaged in Community Dialogue with residents of Manyatta and Obunga estates of Kisumu County, to listen to and address their concerns. He also sensitized them on Plea Bargaining Guidelines and Diversion Policy.

The DPP said the Diversion policy and Plea Bargaining Guidelines will help shorten the trial process and help to decongest prisons and courts. He said this will enhance access to justice for all.

Major concerns raised during the community engagements include police excesses, land issues, unemployment and corruption.

In a similar activity, the DPP held community dialogue in Isiolo to establish workable solutions to issues that are prevalent in the county in respect to criminal justice.

Upon engaging with the community, DPP, Noordin Haji urged agencies to collaborate in ensuring justice prevails. The community dialogue that attracted a lot of public attention was informed by complaints, among them, land conservancy wrangles, police excesses and enforced disappearances.

Land related complaints averaged 47% which was the largest followed by murder at 11%, assault at 7%, and civil cases at 6%. Corruption was identified as a major contributor to other offences, and resulted in some of the complaints raised by members of the public.

The complaints captured will be followed up and appropriate actions taken. The Isiolo community engagement was conducted in partnership with the International Justice Mission (IJM) and the Missing Voices.



ODPP team during a community engagement exercise in Isiolo.



ODPP Coast Region Head, Alloys Kemo (Right) and other stakeholders during Public Inquiry Forums on Criminal Justice Accountability held in Lamu, Kilifi, Tana River, Kwale and Mombasa Counties.



ODPP staff virtually providing mentorship to children in Kamiti Juvenile Remand and Youth Training Centre.



ODPP staff and stakeholders at Thika Prisons during a sensitization on Plea Bargaining and Diversion policies.



Retreat of the members of the ODPP Excellence Charter Development Committee.

ODPP Prosecutors in court.



AWARDS



DPP Noordin Haji wins the 2019 Leadership Integrity Award.



SPP Dorcas Oduor receives The Star Person of the Year Award 2019 on behalf of DPP Noordin Haji, awarded for his Courage and Zeal in fighting corruption.



H.E. the President awards ODPP for its role in fighting tax evasion.

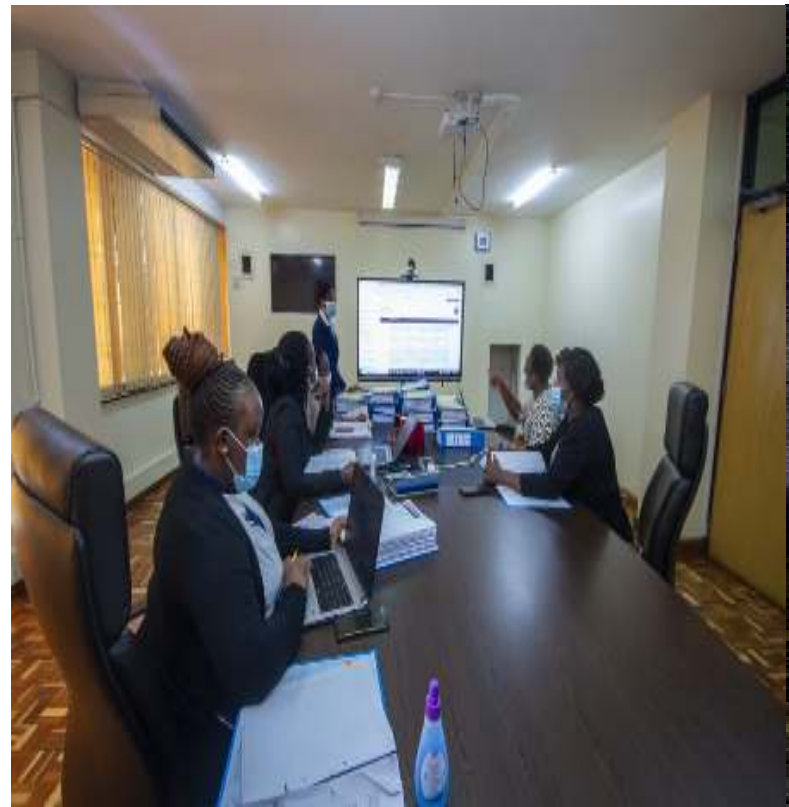


ODPP's James Machira receives the 2019 Public Sector Access to Justice Award.

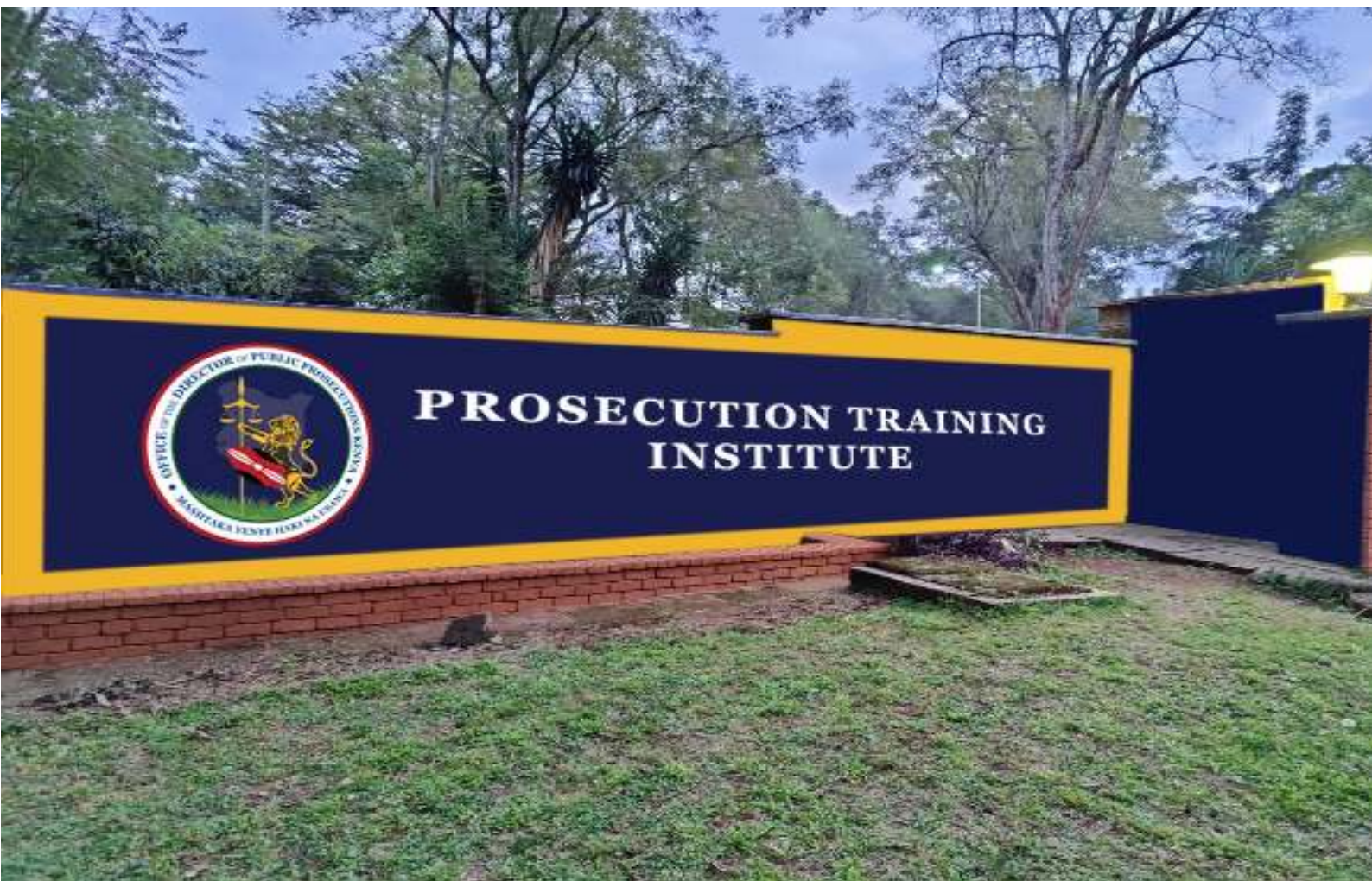


ODPP's Prosecution Counsel Caroline Karimi receives the 2019 Utumishi Bora Awards

ODPP staff analyzing prosecution files in fully equipped ODPP Boardrooms while observing Covid -19 regulations.



The new Prosecutions Training Institute (PTI) - Loresho.



JUDICIAL REVIEW VS DPP'S ABSOLUTE POWER TO PROSECUTE: THE DPP'S CONSTITUTIONAL QUANDARY

BY HASSAN ABDI

The American Bar Association Standards on Criminal Justice defines a prosecutor as an administrator of justice, a zealous advocate and an officer of the court.

The primary duty of the prosecutor therefore is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity and by exercising discretion not to pursue criminal charges in appropriate circumstances.

The prosecutor serves the public and not any particular government agency, law enforcement office or officer or unit, witness or victim. The public's interests are paramount in the prosecutor's duty which calls for heightened sense of integrity on the part of the prosecutor.

The Director of Public Prosecutions under Article 157(6) of the Constitution of Kenya may Institute and undertake criminal proceedings, take over and continue any criminal proceedings, or discontinue at any stage before judgement is delivered any criminal proceedings.

Article 157 (10) further provides that the Director of Public Prosecutions shall not require the consent of any person or authority in the exercise of his or her powers or functions but shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process- Article 157 (11).

It is important to note that Article 157 (12) of the Constitution provides that parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. The question that continues to call for clarity is whether the power to prosecute vests or should vest absolutely in the office of the Director of Public Prosecutions and in exercising the power to prosecute, whether the Director of Public Prosecutions should be subject of control by any person or authority notwithstanding the provisions of Article 157 (10) of the constitution.

The Black's Law Dictionary describes an authority, by government law definition, as that body that has legal power, a right to command or to act, the right and power of public officers to require obedience to their orders lawfully issued in their scope of public duties. In the English law relating to public administration, an authority is a body having jurisdiction in certain matters of public nature. In this context where a court has legal authority to issue orders and require obedience with the orders, such court may be described as an authority. Certain powers may be administrative or judicial in character, depending on whether it is a court or tribunal which is exercising the power and its purpose; the mechanism for enforcing the decision, determination or order may be a guide in borderline cases.

It is safe to assume that in exercising Judicial Review proceedings the courts can be defined as Authorities. Judicial Review is the means through which the courts supervise the actions or decisions of administrative bodies or tribunals. In the case of *COUNCIL FOR CIVIL SERVICE UNIONS V MINISTER FOR CIVIL SERVICE* [1985] A.C 374 the court classified judicial review under

“ Courts do not have power to quash the decision of the DPP to charge or prosecute as seen in light of the provision fore stated (Article 157 (10)) ”

three heads: illegality, irrationality and procedural impropriety. In a Judicial Review application, the court's role is not to concern itself with the merits of the decision but with the decision making process.

Where the DPP's decision to charge is subject of a judicial process, the emphasis is on the process and not on the merits or de-merits of the matter at issue. In this context thus the court is concerned only with the process and in which case the court is not primarily concerned with substituting the decision of the DPP.

Courts do not have power to quash the decision of the DPP to charge or prosecute as seen in light of the provision fore stated (Article 157 (10) which prohibits direction or control by any person or authority so far as the exercise to prosecute is concerned.

Courts in Kenya have quashed criminal cases on the grounds such as biased, collateral motives, abuse of power, abuse of process and infringement of constitutional rights. Though each case is to be determined on its merits, the underlying theme has been an analysis of the facts or evidence even before such facts or evidence has been tendered and canvassed in a trial.

The Director of Public Prosecutions is to conduct the functions in the utmost faith and with fidelity to the accepted principles applicable in the Criminal Justice System.

Where there is suspected abuse of prosecutorial powers, the burden is always upon the applicants to place before the court evidence that the Director of Public Prosecution's conduct is reprehensible, an abuse of the court and legal process and that the pre-dominant purpose in preferring the criminal charges is an ulterior motive other than genuine desire to counter crime. This, of course is dangerous as it calls for analysis of facts which ought to be in the province of the trial court.

There is a well-known principle in law that there can be no wrong without remedy (*Ubijuse Ibi Remedium*). It is important to note that the Judicial Review determinations are not in the nature of compensations. They are declaratory in nature, in essence, maintaining the status quo ante.

Where an applicant seeks damages, then they bring an action for malicious prosecution against the Director of Public Prosecutions. Malicious prosecution is an action of *damages* brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without probable cause and for a purpose other than that of bringing the alleged offender to justice. (Civil Appeal No 27 of 2015)

Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. The key aspect is the presence of malice which is to be proved in an action for malicious prosecution.

Malicious prosecution, as the label implies, is an international tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect. (Civil Appeal No 27 of 2015)

The plaintiff in a malicious prosecution suit must prove:

- a) that the prosecution at issue was initiated by the defendant
- b) that the prosecution terminated in the plaintiff's favor. *Civil Appeal No 27 of 2015*)
- c) absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs.

The power to stay criminal proceedings on the ground of abuse of process should be used sparingly if at all. Where there is no fault on the part of the Prosecution it will be rare to grant a stay prosecution. Courts should not use their inherent power to stay proceedings merely to discipline the prosecution. There is redress in the form of damages in an action for malicious prosecution. The provision that insulates the DPP from the control or directions of any person or authority should not be in vain.

ODPP ROLLS OUT PLEA BARGAINING AND DIVERSION POLICIES

BY ROSE KIPYEGO

The ODPP has developed Plea Bargaining Guidelines, Diversion Guidelines and Diversion Policy with the aim of reducing case backlogs, shortening the trial process, decongesting prisons, saving time and resources and ensuring there is credibility in the criminal justice process.

Plea Bargaining is a negotiation towards an agreed settlement of a criminal case between the prosecution and an accused person. In plea negotiations, an accused person voluntarily enters into and voluntarily pleads guilty to a case already in court, which according to the prosecution, has overwhelming evidence and would lead to a conviction.

During plea negotiations, the prosecutor informs an accused person of the sufficient evidence at hand in the case and the possible sentences. For instance, in a murder case, the sentence is life imprisonment. However, if an accused person voluntarily pleads guilty to the murder charges, the prosecutor recommends manslaughter charges, which means an accused will be jailed for some years but not for life.

Therefore, one of the strengths of plea bargaining is the reduction

of charges that the prosecution recommends: murder to manslaughter, robbery with violence to robbery, among others. During plea negotiations, the prosecutor may recommend the withdrawal of some charges or recommend a non-custodial sentence, whereby, an accused serves their sentence without going to jail.

Through plea bargaining, a case does not go into full trial. This saves time and resources for the court, prosecution and the accused. It also saves on government allocations to the agencies in the sector including prison services.

In plea bargaining, negotiations may be initiated by the prosecutor, an accused person, the legal representative of the accused person or any other party of the accused person's choice. In cases involving children in conflict with the law, the negotiations may be initiated by the child's parent or guardian or a children's officer. The negotiations must be in writing and all parties must be present during the negotiations.

Plea negotiations may be terminated by either party and the reasons for

termination must be in writing. The reasons for termination may be due to: fraud, giving of false information, death of the accused person, coercion, rejection by the court or withdrawal of plea of guilt by either party.





Prisoners at Garissa Prisons reading Plea Bargaining & Diversion policies during ODPP sensitisation.

Some of the cases that cannot go through plea bargaining are sexual offences, crimes against humanity, war crimes and genocide.

Diversion Policy on its part means resolving a criminal case outside court; that not all cases must go through court. Take an example of theft of small items and other petty offences. Diversion is meant to give an offender a second chance to reform. Diversion is largely used on children in conflict with the law.

The Diversion process requires that an offender admits their wrongdoing and are willing to apologize and compensate the victim. The ODPP has successfully diverted many cases.

Recently, a woman who had been accused of child neglect approached the prosecution, requesting to have the case settled out of court. Prosecutor, Lilian Ndambiri, signed a Diversion Agreement between ODPP & Jane Kwamboka over child neglect; abandoning children due

to alcoholism. The prosecutor accepted to divert the case after the accused apologized and promised to change her ways. The Probation Officer, who was present, also provided convincing reports as to why the case should be diverted. Also present was an organization that promised to rehabilitate the accused for three months and a home to take care of the children. All parties were in agreement. Like in Plea Agreements, Diversion Agreements must be in writing.

Some of the cases that cannot be diverted include murder and sexual offences. It is important to underscore that murder can be plea bargained but cannot be diverted. Sexual offences cannot be plea bargained nor diverted. The ODPP, in collaboration with the United Nations Organization on Drugs and Crime (UNODC) and the United States Department of Justice (USDOJ) developed the policies and set out an implementation plan. A training of trainers for ODPP senior staff at the headquarters, regions and counties to enable them take lead in the implementation.

Countrywide sensitizations on the policies have seen ODPP reach out to government agencies in the criminal justice sector, the media and support structures such as civil societies, rehabilitation centres, non-governmental organizations, among others. The ODPP engaged with the public through community and national media channels including social media campaigns.

The regions that ODPP and partners have so far sensitized on the policies are: Coast region, Wajir County, Nyanza region and Garissa County.



ODPP staff during Plea Bargaining & Diversion policies sensitisation at Mombasa Law Court.

ODPP DEVELOPS GUIDELINES ON DELEGATED AUTHORITY TO PROSECUTE

BY JACQUELINE NJAGI AND JOHN NJUE

The ODPP is in the process of receiving views on the Guidelines on Delegated Authority to Prosecute from agencies seeking authority to prosecute from the DPP.

Speaking during the opening of Nyanza Region Stakeholders Validation Forum DDPP Nicholas Mutuku noted that the guidelines were informed by the findings of an audit commissioned in August 2018. Some of the findings were that: there were about 1000 prosecutors outside of ODPP; some of the appointees were not qualified; there were no accountability and feedback mechanisms; and there were skill gaps, as some of the prosecutors had no legal background. As a result, 755 prosecutors were degazetted.

The primary objective of the guidelines is to: ensure that all Ministries, Departments and Agencies prosecute effectively; set prosecution standards; set the criteria for the appointment of prosecutors; implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice system. Further, the guidelines will enhance accountability and protection of citizens. All prosecutors appointed under delegated authority will be subject to the ODPP Act, Prosecution Guidelines and the Prosecutor's Code of Conduct, among others.

It was reiterated that going forward, all prosecutors granted delegated authority will be Advocates of the High of Kenya. This is informed by the bid to professionalize and uphold prosecution standards across the board. Once the guidelines are validated, the applicants would be expected to attend a mandatory prosecution course at the ODPP's Prosecutors Training Institute (PTI) for 12 months before gazettelement and that the authority would be reviewed every two years.

The participants were drawn from Kenya Revenue Authority, Higher Education Loans Board, Kenya Copyright Board, Public Health, Anti-Counterfeit Authority, Ministry of Labour, National Hospital Insurance Fund, National Social Security Fund, Kenya Bureau of Standards, Tourism Board, National Environment Management Authority, Department of Immigration Services, Kenya Power and Lighting Company, National Industrial Training Authority and County governments.

The ODPP will be conducting Stakeholder Validation Forums for the Guidelines on Delegated Authority to Prosecute in all the nine (9) regions including Coastal, North Rift, South Rift, Lower Eastern, North Eastern, and Nairobi. Currently the office has conducted such forums in Nyanza and Western regions.



DDPP, Nicholas Mutuku, speaking during the Nyanza Region Stakeholders Validation on the Guidelines on Delegated Prosecution.

ODPP APPLAUDS DEVELOPMENT OF BAIL/ BOND LEGISLATIVE FRAMEWORK

BY ROSE KIPYEGO

Over 80% of remandees countrywide could not afford bail/bond granted to them. Addressing an NCAJ forum during the launch of Bail and Bond Legislative Framework, the Director of Public Prosecutions, Noordin Haji commended the development of the Framework with the hope that it will streamline the hearing and administration of bail and bond.

The DPP said that the findings of ODPP's Community Engagements and All For Justice Initiative that saw visits to prisons countrywide, call for innovative ways to address the plight of offenders who cannot afford bail. He added that inasmuch as bail/bond is a Constitutional Right, the Right isn't absolute as there is need to balance the determination of bail/bond against public interest & administration of



Deputy Director, Jacob Ondari, addressing participants during the launch of Bail & Bond Legislative Framework.

justice. He hopes the framework promotes public interest and trust.

He emphasized the need for everyone to obey court orders, noting instances where influential persons who are out on bail remain in office, interfere with witnesses or tamper with evidence. The Framework is envisaged to bring uniformity, predictability

& consistency in bail/bond determination.

The forum sought to understand what 'compelling reasons' from the prosecutions perspective meant, with regard to bail and bond, which Deputy Director Public Prosecutions Jacob Ondari expounded on.

ARE WE READY FOR BODY CAMS FOR KENYAN COPS?

BY GITONGA MURANG'A

The ODPP and the National Police Service (NPS) are considering embracing body cameras (body cams). These body worn cameras would assist in maintaining law and order on the roads, reducing police excesses, assist in cases of police violations and in the fight against corruption. As we imagine what the future of criminal law enforcement would look like in the era of technological advancement and emerging crimes, body cams would prove to be an essential tool in the criminal

justice system. The body cams would help police officers assigned traffic duties, particularly during periods when reported incidences or accidents tend to rise such as holiday festivities.

Body cams are a recent innovation that may redefine policing. An incident where body cams would have come in handy is the recent case of Mildred Atieno Owiso alias Atty, a human rights activist whose involvement in a confrontation with a traffic police



PHOTO: COURTESY

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Available research globally indicates that police officers are generally receptive to the use of body cams as they have a positive impact on their behaviour.

officer elicited negative publicity to both parties based on the video recording that was widely circulated on social media.

Available research globally indicates that police officers are generally receptive to the use of body cams as they have a positive impact on their behaviour. The research adds that the officers believe they gain experience from using the cams through appraising themselves by reviewing the recordings. However, the value of the cams to officers is often associated with the exonerating effect it has on false or exaggerated accusations against them. Another benefit that law enforcement have attributed to using body cams is their effect on evidence collection, particularly in

strengthening prosecution cases and their value in accurately reporting events.

There have been some criticisms on the use of body cams. For example, the citizens' right to privacy that might be violated as well as some recordings might be traumatizing to audiences such as medical emergencies, accidents and killings. Similarly, the privacy of some police officers might be at risk as well as fears that the recordings could be used to subject them to disciplinary measures or unsolicited 'fishing expeditions' by their supervisors. Concerns have also been raised on the health implications of wearing the body cams.

In order to bring about the realization of the use of body cams as a technological tool towards promoting the rule of law, there will be need to develop clear administrative policies that can provide guidance to law enforcement officers. Also to be considered are related issues such as when recordings should be done, when the videos can be reviewed, preparation of the videos for prosecution and how the data will be stored and managed.

Continuous training of law enforcement officers and prosecutors will be required. Monitoring and evaluation on usage and operation of the body cams will need to be conducted annually and remedial actions taken.

PROCEDURES IN HANDLING MENTALLY ILL ACCUSED PERSONS IN KENYA

BY MARY WANGELE

It is a rule of universal application and of criminal responsibility that a man cannot be condemned even if it can be proved that at the time of the perpetration of the criminal acts or omissions, he was not mentally stable. As a matter of general rule, the law presumes that every person is sane and responsible for their actions, including when they are alleged to have committed an offence. This presumption is accentuated under Section 11 of the Penal Code.

The presumption of sanity can be disproved with evidence. Consequently, for a person to be said to have committed an offence, it is a general rule that the person must be able to appreciate the consequences of their actions and where they do not appreciate such consequences, then they should not be punished.

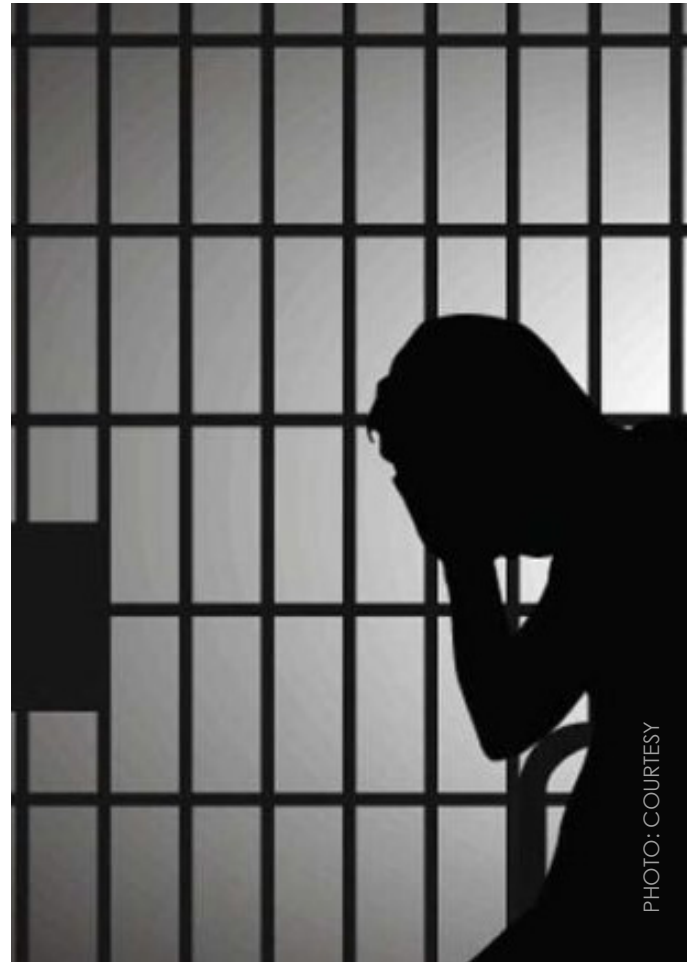
The Kenyan Law on insanity and its procedures were as a result of codification from the M’Naghten Rules – *“every person is presumed sane and responsible unless it is shown that he was laboring under such a defect of reason, from a disease of the mind, as not to know the*

nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong”.

Every accused person has the right to be present at trial and be able to present a defense. It is, therefore, imperative that such a person must have the mental capacity to participate in the court proceedings. When an accused person is mentally challenged; and does not have the capacity to participate in the trial, the court will then declare him unfit to stand trial. Equally, even though the accused person may be fit to stand trial, the mental status at the time of committing the alleged offence may affect the verdict.

The procedure for handling mentally challenged accused persons, is clearly provided for under Section 162 to 166 of the Criminal Procedure Code, of the Laws of Kenya.

In reference to the provisions of Section 162 to 166 of the Criminal Procedure Code, It is generally, the duty of the court to ensure that the accused person is of





sufficient mental soundness; capable to stand trial and that the accused person's mental status at the time of the alleged offence is established. However, information as to the mental status of the accused person, may be brought to the attention of the court, either by the accused person himself, an intermediary, the defense lawyer, the prosecutor or any other person as the case maybe. As a matter of practice, in murder cases, a mental vassessment is done before commencement of the case.

The Court of Appeal in **Criminal Appeal No. 112 of 2014, Leornard Mwangemi Munyasia Vs. Republic** suggested the kind of evidence the court requires to ascertain the mental status of an accused person.

The constitutionality of the provisions of section 162 (4) and (5) have been the subject of the court's interpretation. **In the case of Grace Nyoroka Vs. Republic, Criminal Appeal No. 246 of 2006;** The Court of Appeal faulted a decision rendered by the High Court committing an accused mentally challenged person to a mental hospital without an order of the President as the procedure dictates. The Court of Appeal however did not overturn the decision of the High Court but noted that the wording of that section is discretionary, and the

court is essentially subject to the Executive Arm of the Government in administering justice.

When an accused person is found to be medically fit, the ODPP is informed of the status through a report and thereafter the ODPP informs the court of his intention to proceed or not to proceed with the case against the accused person.

Where the accused person claims to be have been insane at the time of committing the offence the court will make a finding that the accused is guilty but insane for purposes of criminal liability. Where a finding is made of guilty but insane the trial court forwards the file to the President for consideration for the accused to be committed to a mental hospital or prison or other suitable place at the President's pleasure.

In conclusion, although the finding on whether an accused person is mentally challenged, is the discretion of the court, it is the duty of the Prosecutor, the Defence, the accused or the Intermediary and the victim's family to act as ministers of justice and ensure any information regarding the accused's person mental status is availed to the court for consideration.

ODPP HOSTS THE EAST AFRICAN ASSOCIATION OF PROSECUTORS ANNUAL GENERAL MEETING AND SYMPOSIUM

BY WINNIE KABINGA

The ODPP hosted the East African Association of Prosecutors (EAAP) the 2019 Annual General Meeting and Symposium in Kwale County between October and November 2019.

The meeting brought together a network of prosecutors and Attorney Generals from Tanzania, Uganda, Rwanda, Burundi, South Sudan, Ethiopia, DRC-Congo, Zambia, Mozambique, Djibouti and Kenya. The forum was a demonstration of the existing harmony, relations and joint efforts among the prosecutors in fighting crime and especially transnational organized crime.

The forum was also graced by the Cabinet Secretary for Interior and Coordination of National Government Dr Fred Matiangi, the Cabinet Secretary for the East Africa Community and Regional Development Adam Mohamed, ODPP development partners, Investigators and inter-agency partners.

The theme of the meeting was “*International cooperation amongst prosecutors: Effective use of the Justice System as a tool to fight Transnational Organized Crime*”

The participants in the forum discussed various topics that included: Strengthening Regional Co-operation



SPP, Dorcas Oduor, addressing participants during EAAP Annual General Meeting



Delegates to EAAP Annual General Meeting in investigations and prosecutions of Transnational Organized Crimes, Establishment of Regional inter-agency networks for investigations as well as prosecutions, Exploring areas of synergies in capacity building and best practices in combating Transnational Organized Crimes, Modern approaches to fighting corruption, Alternatives to prosecution and the role of prosecutors in community outreach.



Panel discussion during EAAP, 2019 Annual General Meeting & Symposium in Kwale County.

ROLE OF THE PROSECUTOR IN CHILD JUSTICE

BY CAROLINE KARIMI

The ODPP conducted a training of trainers (TOT) on the role of prosecutors in child justice. The DPP Noordin Haji in his opening remarks at the workshop said that there had been a great challenge carrying out investigations and prosecution of children and related matters. He noted with concern the rising cases of defilement in some of the regions such as Nyanza and Lamu where the ODPP had conducted community engagement forums.

The DPP added that acquittals in sexual and gender based violence cases, particularly against children, have been witnessed. He said children must be protected from abuse, neglect, harmful cultural practices, all forms of violence and inhuman treatment. Consequently, the TOTs should be proactive and develop policies and strategies that will promote the rights and welfare of children as stipulated in Article 53 of the Constitution, various International and Regional Conventions and the Children's Act, Chapter 141 laws of Kenya.

Further, the DPP directed that all cases with regards to sexual offences and particularly against the children must not be investigated by General Duty Police Officers. He said that Prosecutors ought to be firm and fair in their

decision-making regarding children cases and that the decision to prosecute must only be made on cases that have met the two-stage test, that is, evidential test and public interest test. In this regard, the TOTs are urged to include this directive in their trainings. They will develop action plans on conducting joint trainings for prosecutors, police, judicial and probation officers, among others.

The Child Justice TOTs will create a pool of experts under the ODPP's Prosecution Training Institute (PTI) thus, enabling roll out of comprehensive training on children matters to prosecutors across the country. Prosecutors are expected to employ alternatives to trial such as plea bargaining and diversion, in order to give children a second chance to reform, others may require rehabilitation and re-integration back to society.

The DPP called for enhanced collaboration among state and non-state actors in the criminal justice system to promote child justice. He acknowledged the United States Department of Justice (USDOJ), International Justice Mission IJM and IMLU for their continued partnership in building the capacity of prosecutors and investigators.



ODPP staff interacting with the public during Milimani Children's Court open day.

KNOW YOUR CUSTOMER CONFERENCE FOR IMPORT AND EXPORT SECTOR

BY BEATRICE OMARI

The Cabinet Secretary for Interior and Coordination of National Government Dr. Fred Matiang'i has directed that private jetties and landing sites be registered afresh in order to enhance security and curb illegal trade.

He said the private jetties were being used by criminals to traffic illegal goods and said the review and fresh registration of the facilities was aimed at ensuring security and support for genuine and clean businesses.

The Cabinet Secretary was speaking during the 'Know Your Customer Framework' conference for the import and export sector in Mombasa. The two day conference organized by the Office of the Director of Public Prosecutions in collaboration with Space for Giants aims to develop a legal framework to guide trade with a focus on reducing potential cost burden, maximizing on efficiency and ensuring that the country turns the tide against the risk of being a safe haven for criminal activity.

The Director of Public Prosecution, Noordin Haji, has expressed concern over absence of proper framework to regulate trade in the country, saying this exposes Kenya to a high risk of criminal activities. He said the criminal justice sector experiences challenges in investigation of complex offences at the port due to the lack of a regulatory framework on due diligence of importers and exporters.

He said, the port of Mombasa is strategically at the centre of cargo processing, in East and Central Africa and serves as a transport corridor for tonnes of international cargo. The port also serves as a transit hub to the Eastern Africa Region, especially to the landlocked states. However, it



Delegates to 'Know your Customer' Conference in Mombasa.

lacks a legal framework to guide its operations, and as a result, he noted criminal networks take advantage to use the port for criminal activities.

The envisaged legal framework shall provide a policy direction with clear regulations and guidelines that will inject transparency and accountability and inspire public confidence in the dealings at Kenyan ports. It will also help mitigate transnational organized crimes such terrorism, corruption, drug trafficking, trafficking of wildlife trophies, cybercrime, trade based money laundering, tax evasion, false invoicing activities amongst others.

Executive Director, Anti Counterfeit Authority (ACA) Elema Halake called for greater partnership in the war against illicit trade through intelligence sharing and expeditious arbitration of illicit trade matters.

He said Kenya is experiencing a heightened level of illicit trade perpetrated by individuals and organized illicit trade networks. Smuggling, counterfeits, tax evasion are costing the government billions of shillings in tax revenue losses while legitimate businesses are being undermined and consumers exposed to unsafe products. The vice has grown to great proportions in recent years threatening the economy and the realization of the country's national development agenda.

The CEO said ACA had seized illicit trade worth Ksh8.5 billion in one and half years and destroyed illicit goods worth over ksh 2.8 billion over same period.

The conference was also attended by the Central Bank governor Patrick Njoroge and senior deputy Solicitor General Christine Agimba.

REGIONAL COOPERATION: INTERNATIONAL & REGIONAL FRAMEWORK

BY VICTOR MULE

Technological advancement in transport, information technology and telecommunication have made the world a single vast global village. Crime is no longer a national phenomenon but has taken on a transnational dimension.

It is this transnational nature that all transnational crimes pose serious problems for the national criminal justice systems. National courts try perpetrators since there is no international court that is competent to try such crimes (unless such cases present elements that constitute crimes for which the International Criminal Court is competent). Therefore, it is difficult for criminal justice officers to investigate or institute criminal proceedings against persons suspected of participating in transnational crimes/activities when such persons are outside their territory or where the key evidence, witnesses, victims or the proceeds of the crime are located outside the country's jurisdiction, or where the legal and judicial systems with which they must cooperate are different from those of their own country. This therefore, poses a challenge for legal practitioners to work within the confines of national borders leaving no choice but to cooperate with their foreign counterparts in order to bring perpetrators of such crimes to justice. The effectiveness of the fight against transnational crime



ODPP delegation at a forum to foster international cooperation in criminal justice.

depends on the close cooperation between States in criminal matters.

There are several interdependent forms of cooperation in criminal matters. However, the best known and most common forms of co-operation in practice is the extradition and mutual legal assistance. Extradition is the process by which one state upon the request of another effects the return of a person for a trial for a crime punishable by the laws of the requesting state and committed outside the state of refuge. Extraditable persons include those charged with a crime but not yet tried, those tried and convicted who have escaped custody and those convicted in absentia. Mutual legal assistance is the process by which states seek for and help other states in servicing of judicial documents and gathering evidence for use in criminal cases.

The importance of international cooperation is that there is no safe haven for criminals as they face justice through prosecutions. In effect, it acts as a deterrence to transnational crime as criminals face stiffer sentences. For example, Ibrahim Akasha was handed 23 years imprisonment for drug trafficking in the United States. There is also the promotion of peace and stability to enhance economic integration among member states



ODPP delegation at a forum to foster international cooperation in criminal justice.

such as seen in Economic Community of West Africa States (ECOWAS). International cooperation also brings about favorable investment opportunities/atmosphere to investors to enhance economic development. There is also justice for victims as they get to be compensated through tracing, recovery and confiscation of assets from the criminals.

Some of the challenges to effective cooperation include the failure by countries to accede to, sign and ratify international instruments. Equally, lengthy court processes pose a challenge such as that of Gilbert Juma Deya who was accused of child trafficking and eventually extradited after 15 years. Another challenge is the failure by countries to negotiate and adopt Treaties for International Cooperation such as Kenya lacking extradition treaties with South Sudan. There is also the challenge of physical location of fugitives in the requested State such as Rwanda's Felician Kabuga who was accused of genocide in his country though he was suspected to be in Kenya and has not been traced for 15 years.

Additionally, different legal systems pose a challenge whereby, evidence that is collected in one jurisdiction may not be admissible in another. Further, language

differences serve as a barrier and it is a great challenge when translators are not readily available. Lack of specialized, skilled, trained and well-resourced personnel within the various agencies is also another challenge to effective cooperation. Crimes perpetuated by governments in power brings in the other challenge. For example, the Holocaust was a genocide involving every arm of Germany's bureaucracy under the leadership of Adolf Hitler's Nazi where about six million Jews were killed. Underdeveloped case law (*stare decisis*) and outdated extradition laws and treaties is another challenge faced by criminal justice officers.

Some of the best practices in the promotion of regional cooperation include encouraging states to join Regional, Sub-Regional and International arrangement for cooperation. Equally, parties are encouraged to negotiate and sign bilateral treaties on international cooperation (mainly extradition, mutual legal assistance, transfer of persons, among others). Additionally, best practice is seen where countries incorporate reciprocal backing of warrants of arrest issued in one country for execution in another. The acceding to, signing and ratification of international and regional conventions is where best practice is demonstrated. Furthermore, best practice is seen in the domestication of International Conventions. Therefore, it is preferred that states should use the United Nations Model Treaty on Extradition and Mutual Legal Assistance. In urgent circumstances, states need to consider using INTERPOL to transmit requests for mutual legal assistance.

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The importance of international cooperation is that there is no safe haven for criminals as they face justice through prosecutions.



STRENGTHENING OF MUTUAL LEGAL ASSISTANCE IN WILDLIFE CRIMINAL MATTERS IN EASTERN AFRICA

BY GIKUI GICHUHI

The ODPP is at the forefront in promoting cooperation among agencies in Eastern Africa that are responsible for the enforcement of the fight against wildlife crime. It is worth noting that wildlife crimes and associated illicit trafficking activities create wealth for criminal networks that are often utilized for other organized crimes such as drug trafficking, terrorism and violent extremism.

Organized transnational crimes are complex in nature, calling for strategic approaches in addressing them. Agencies involved have thus resorted to using mutual legal assistance (MLA) which enables

member States seek for and help each other in tackling these nature of crimes. Crimes perpetuated through destruction of our natural resources is a great threat to sustainability of our ecosystems. Through MLA, States will be able to share information is critical to realizing our joint aim of disrupting organized criminal networks and such was the noble focus of the meeting.

Kenya is using the multi-agency approach, cooperation and collaboration with law enforcement agencies including customs-border control and immigration authorities to combat organized transnational crimes. Local communities, ranchers

and other conservation stakeholders have also been engaged to counter poaching threats and other wildlife crimes.

Collaboration and engagement with judicial authorities has also been adopted as a strategy with the aim of sensitizing judicial officers on emerging trends and effects of wildlife related crimes. This has intensified and further contributed to the full enforcement of wildlife related laws. There are amendments that have been made to the Wildlife Conservation and Management Act, which has created the opportunity for stiffer penalties in relation to wildlife trafficking.

Tools have been developed to enhance effective investigation and prosecution of those who facilitate trafficking of wildlife products. For instance, *'Points to Prove: a Rapid Reference Guide for Investigators and Prosecutors on Wildlife Crime' (3rd Edition)*, *'Rapid Reference Guide for Investigators and Prosecutors on Forestry and Marine & Fisheries Crime' (1st Edition)*, *Request for Mutual Legal Assistance*



in Criminal Matters Guidelines 2018 and the ODPP Plea Bargain Guidelines and Diversion Policy.

Pointers that ODPP gives in order to strengthen MLA in criminal matters include:

- creation of synergies to harmonize MLA legislation and develop instruments that sets standards for best practices and cooperation;
- Encouraging convergence and compatibility of national legislations on wildlife and MLA;
- Capacity building within the different countries and encourage cooperation at regional level;
- Focus on international and regional concerted action such as through targeted visa restrictions for criminals and asset seizure and forfeiture;

- Continued awareness of the process of MLA and extradition among cross-border law enforcement agencies;
- Creation of new sense of urgency and commitment towards enforcement of MLA and all relevant legislation in combating wildlife crime.

Stakeholder forums will be encouraged in order to create opportunities to discuss more complex, cross border investigation techniques which will yield success in the fight against wildlife trafficking. Some of the stakeholders that ODPP is collaborating with in MLA are the UNODC, International Consortium on Combating Wildlife Crime, Space for Giants, European Union and the Government of the United Kingdom that has provided financial support.

STREAMLINING INVESTIGATION AND PROSECUTION OF CASES ON POLICE EXCESSES

BY ROSE KIPYEGO

The Office of the Director of Public Prosecutions in collaboration with the Independent Policing Oversight Authority (IPOA) have commenced the development of Standard Operating Procedures (SOPs) to streamline and enhance efficiency in investigation and prosecution of cases on human rights violation by police.

The ODPP's Head of Human Rights Division, Edwin Okello said the SOPs will structure how investigation files on police excesses reach the ODPP. It emerged that there have been occasions when the ODPP receives files on the same case from different investigative agencies that carry conflicting information and conclusions. This duplication of roles is time consuming and wastes



Nairobi Region Head, Jacinta Nyamosi, with criminal justice actors during a public inquiry forum in Tana River County.

resources, hence the need to streamline operations of the concerned agencies.

Through the SOPs, ODPP, IPOA, DCI and the National Police Service will address conflict of interest among police officers that lead to tampering of evidence, such that by the time a file reaches IPOA or ODPP, the evidence is weak. The SOPs will endeavor to uphold integrity of investigating and prosecuting the police.

The SOPs will be enriched through stakeholder validation forums before they are rolled out through countrywide sensitizations. The project is being undertaken with funding from the UN on Human Rights.



ODPP participating in public inquiry forums on human rights violations in Coast Region.

ODPP STEPS UP FIGHT AGAINST TRAFFICKING IN PERSONS

BY JACQUELINE NJAGI

The ODPP through the Prosecution Training Institute (PTI) has embarked on rigorous training of prosecutors in order to meet the standards recommended in the global report on trafficking in persons. It is notable that trafficking in persons is viewed as modern day slavery and an abuse to human dignity and Human rights. It exploits one's vulnerability through sexual exploitation, forced labor, slavery by means of deception, fraud, coercion and abuse of power.

Despite the unavailability of accurate statistics on the prevalence of trafficking in persons, there are consistent activities that can prove that Kenya is indeed a source, transit and destination of victims of trafficking. A big percentage of the victims of trafficking are children, although it also affects women and men with different social economic profiles, especially those subjected to forced labour and sex exploitation. It has been established that the recruiters are most of the times relatives, friends and wealthy people.

Kenya has a comprehensive legal and national policy framework to foster a shared understanding of the human trafficking phenomenon and to provide a coordinated response among different states and stakeholders. The framework is founded on international obligations that ascribe to inter-state and stakeholder co-operation. Globally, trafficking in persons is guided by international standards set by the United Nations Convention against Transnational and Organised Crime (UNTOC). This is complemented by the Palermo Protocol (2000) which supports the fight against human trafficking, which has special attention to women and children.



Prosecutors during an international training on human trafficking.

Both the Convention and the Protocol imposes three major obligations upon the State, that is; to prohibit, prevent and prosecute. This implies that the State must have a proper legislative framework, have the desirability to prosecute offenders and put in place stringent punishments to deter traffickers.

The 2019-Trafficking in Persons ranks Kenya in tier 2 watch list. This mean that it has not fully met the minimum standards for the elimination of trafficking but is making significant efforts which include achieving more prosecutions and convictions of traffickers, directing investigations and allocating money for the Victim Assistance Fund.

Despite enactment of the UN Convention, Palermo Protocol (2000) and Kenya Counter Trafficking in Persons Act (2010) very little has been achieved in investigation and prosecution of cases on trafficking in persons. This calls for enhanced victim support and protection, build the capacity of stakeholders in criminal justice.

The ODPP strives to create more awareness to stakeholders on the prosecution of trafficking in person's cases. For instance, the Office was called upon by the National Gender and Equality Commission and The State Department of Gender to train stakeholders on trafficking in persons. The ODPP is working in collaboration with UNODC in the training of prosecutors on trafficking in persons.



MY JOURNEY TO ODPP

BY WINNIE GATHONI KAMAU (INTERNS)

By the end of my second year in campus, I wasn't sure what I was doing in law school. I had failed a couple of papers and I was generally uninterested in law at that point. Needless to say, I was a bit frustrated. You see, I went to law school for all the wrong reasons. I hated Math and my KCSE scores could not let me choose a course that would satisfy my whims. If you told me that at one point I would appreciate it all, I would be quite skeptical.

While studying law at the University I had re-sits one of which was Criminal Law, I did not like the subject because I did not understand any of it. I studied for the re-sit for three months and I could not understand why I failed it the first time. In my third year I selected International Criminal Law as one of my subject. Studying for the unit surprised me. Somewhere between reading for that criminal law paper and International Criminal Law; I found my reason for going to Kenya School of Law. Ironic, isn't it?

By graduation day, my love for criminal justice made me realize that law was the right fit for me. I was either going to practice it for the rest of my life or teach it. So when I joined the Kenya School of Law, I knew where I wanted to apply for my pupillage. When people applied left right and center, I applied to only one office. Some people called it a gamble, I called it faith!

My first day in the Office of The Director of Public Prosecutions was a little scary. I was scared of falling short or even being incompetent. I didn't know what to expect at all. All I knew was that my dreams were coming true bit by bit. In the last five months, I have learned things that one would not learn in a classroom. The hands-on approach to matters and issues open one up to the realities of our country and society. I have learned to put my prejudices aside in favour of the greater good. I have come to appreciate that an office that works with such teamwork and an open door policy creates a greater environment for learning and growth.

This office has opened my life and eyes to complexities of human beings and the difficulties of handling people. I have been nurtured, groomed and sharpened and every day my appreciation grows for the prosecution work. My admiration and respect flourishes every time this office pushes and breaks assumptions and myths associated with public prosecution. Needless to say, I am a proud ambassador of this office.

I now know that Criminal Justice is where my future lies. I may have gone to law school for all the wrong reasons, none of which now matters. Because of my experience here at ODPP I now have the right reasons. If I am fortunate enough to get a chance to work at the ODPP, I suppose I will have no wishes left. With the Prosecutions Training Institute in the horizon, I might stay in this office for a very long time.

KAZI YETU KUSHITAKI

Ufisadi unanuka, ufisadi unauma.
Ninazama nikizuka, ufisadi ndo wavuma.
Wenzangu je, mwaridhika, na hawa wasohuruma?
Daa! Shuzi la ufisadi, limenuka Kenya nzima.

Tunalo janga nchini, linaitwa ufasadi.
Latufanya masikini, lachochea ugaidi.
Liliingia Zamani, bila kubisha hodi.
Samahani mafisadi, kazi yetu kushitaki.

Mambo yamebadilika, tangu Haji aingie.
Mafisadi wadhoofika, kesi zinawalemea.
Rumande wafadhaika, kabichi wanazoea.
Samahani mafisadi, kazi yetu kushitaki.

Ufisadi si ajali, hupangwa kwa kusudi.
Ni mipango ya awali, na hufanywa kwa juhudi.
Mafisadi makatili, sawia na magaidi.
Samahani mafisadi, kazi yetu kushitaki.

Situite mahasidi, kazi yetu kushitaki.
Kuzingatia ushahidi, Wakenya kuwapa haki.
Siye hatuna madadi, na hatutafuti kiki.
Samahani mafisadi, kazi yetu kushitaki.

Ninayo mengi kwa kweli, ila hapo namaliza.
Mwanawe Ishmael, shairi nalimaliza.
ODPP wana kweli, wengi newanaigiza.
Mwisho nasisitiza, kazi yetu kushitaki.

Wako Mtunzi: Malenga, Rijali msema kweli, mwanawe Ishmael.

THE ROLE OF THE GUIDELINES ON THE DECISION TO CHARGE, 2019 AND UADILIFU CASE MANAGEMENT SYSTEM IN FULFILLING THE ODPP MANDATE




**The independence of the ODPP
in making the Decision to
Charge Without Influence from
anybody or any authority:**

**Art 157 (10) states that Director of
Public Prosecutions shall not be
influenced or controlled or directed
for the purpose of forming a
proceedings and in the exercise of his
official functions. And that shall not do
under the direction or control of any
person or authority."**



**GUIDELINES ON THE
DECISION TO CHARGE, 2015**



**Accountability of the
Office of the Director of Public
Prosecutions (ODPP)**

The *Guidelines on the Decision to Charge* will ensure stronger decision making and transparency by enabling the ODPP to set out both the grounds for prosecution and for not prosecuting.



Fairness

- **This demands that:**
 - Women be prosecuted based on sufficient evidence;
 - Justice shall be served to all regardless of status in society;
 - A zero-tolerance to prosecution be adopted where and to the



Enhanced efficiency in prosecutions by:

- Applying technology through the Case Management System (prosecution and other judicial proceedings) to achieve the Just in Time system
- Efficient case management (improved quality of work practices)



**Enhanced access
to justice:**

Use of process of
information by all
interested parties in a
case to ease
dispute resolution may
be achieved on the click
of a button.





Guidelines on Due Process in Courts, 2010

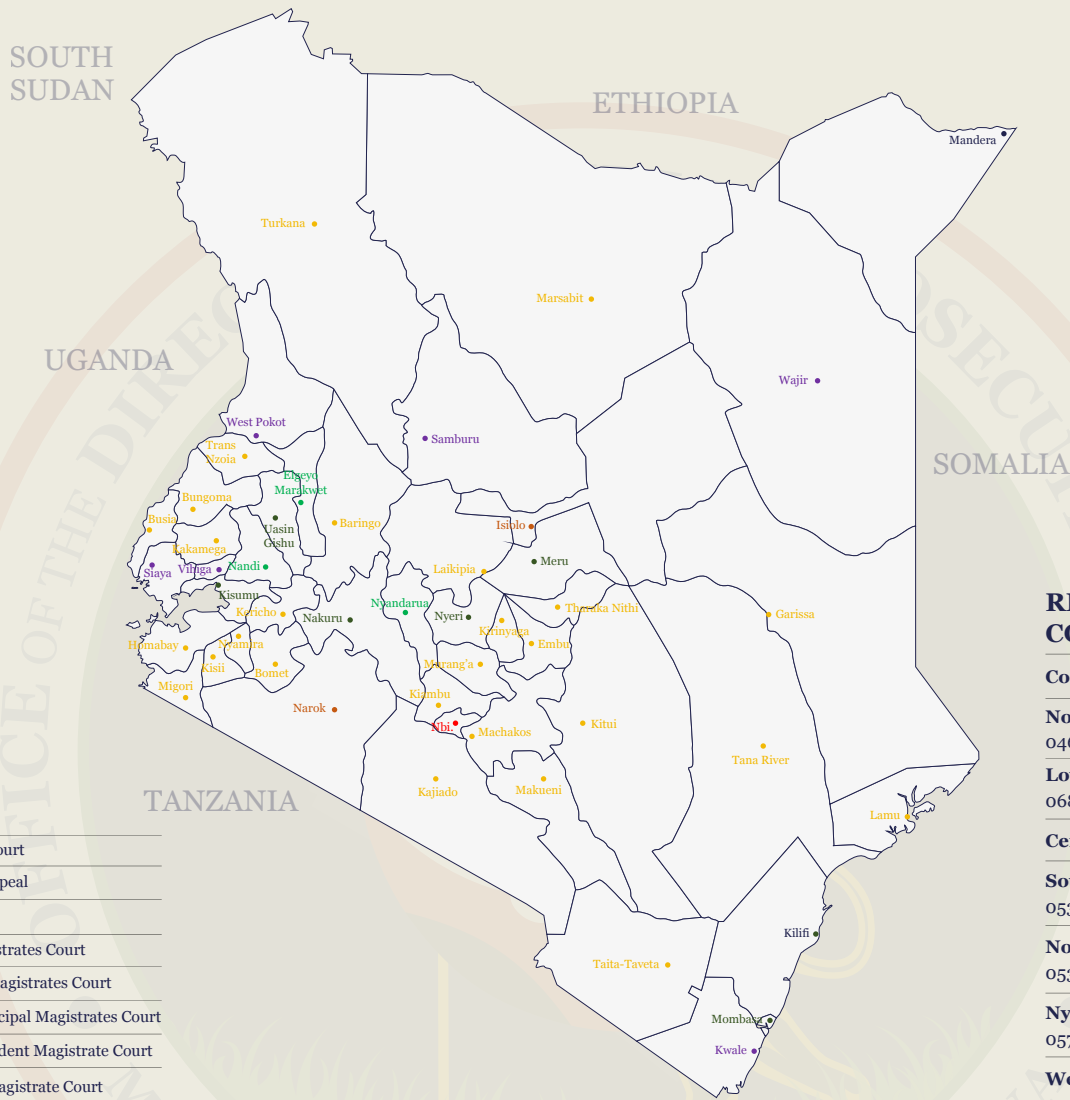
The Judiciary is charged with the vital task of ensuring that justice is done and that the rights of the citizen are protected. It is also a guardian of the rule of law and the separation of powers. In order to ensure that the Judiciary is able to perform its functions effectively, it is necessary to have a set of guidelines that will govern its conduct. The Guidelines on Due Process in Courts, 2010, is a landmark document that sets out the principles and standards that should govern the conduct of the Judiciary. It is a comprehensive document that covers all aspects of the Judiciary's functions, from the admission of cases to the final judgment. It is a must-read for all members of the Judiciary and for all those who are interested in the work of the Judiciary.



e-Judiciary System

The e-Judiciary System is a web-based system that allows the public to access the Judiciary's services online. It is a user-friendly system that provides a wide range of services, including the filing of cases, the payment of fees, and the tracking of case status. It is a convenient and efficient way for the public to interact with the Judiciary. The e-Judiciary System is available 24/7 and can be accessed from anywhere. It is a testament to the Judiciary's commitment to providing high-quality services to the public. The e-Judiciary System is a key component of the Judiciary's efforts to improve its efficiency and transparency. It is a tool that will help the Judiciary to better serve the public and to ensure that justice is done.

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