PETITION TO THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ON THE HIGH COURT JUDGMENT IN PETITION NO. E004 OF 2024 FREDRICK MULAA v OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS & ANOTHER; WYCLIFFE AMBETSA OPARANYA & 4 OTHERS (INTERESTED PARTIES)

SUBMITTED TO:

The Director of Public Prosecutions
Office of the Director of Public Prosecutions
ODPP House,
Ragati Road, Upper Hill.
P.O. Box 30701-00100.
Nairobi, Kenya

SUBMITTED BY:

The National Integrity Alliance (NIA);a citizen-centered integrity and anti-corruption coalition comprising Transparency International Kenya (TI-Kenya), Inuka Kenya Ni Sisi! The Kenya Human Rights Commission (KHRC) and The Institute for Social Accountability (TISA)[1].

SUBJECT: PETITION FOR APPROPRIATE ACTION BY ODPP FOLLOWING THE HIGH COURT JUDGMENT IN PETITION NO. E004 OF 2024 FREDRICK MULAA v OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS & ANOTHER; WYCLIFFE AMBETSA OPARANYA & 4 OTHERS (INTERESTED PARTIES)

INTRODUCTION

The Constitution of Kenya, 2010, fundamentally transformed Kenya's governance architecture by establishing integrity, accountability, transparency, the rule of law and good governance as binding constitutional requirements in the exercise of public authority. Articles 10, 73, 157 and 232, read together with the broader constitutional framework, require public institutions to exercise their respective mandates lawfully, independently and in a manner that promotes public confidence in the administration of justice.

The NIA respectfully submits this petition to the Office of the Director of Public Prosecutions (ODPP) pursuant to its constitutional and statutory mandate to institute and undertake criminal proceedings, take over and continue/discontinue criminal proceedings in accordance with Article 157 of the Constitution and the Office of the Director of Public Prosecution Act, and related guidelines and regulations.

This petition arises from the High Court judgment delivered on 2nd October 2026 in Mulaa v Office of the Director of Public Prosecutions & 6 others [2026] KEHC 14767 (KLR).

The proceedings concerned the ODPP's decision to review and withdraw its earlier decision to charge Wycliffe Ambetsa Oparanya in connection with allegations involving conflict of interest, abuse of office, money laundering and conspiracy to commit an offence of corruption.

The judgment raises significant questions concerning the exercise of prosecutorial discretion, the consideration of fresh evidence, the distinction between investigative and prosecutorial functions, and the legal consequences of a decision declared unconstitutional and quashed by the High Court.

In particular, the Court found the impugned prosecutorial decision irregular and unconstitutional, declared it null and void, and quashed it. The Court further found that the ODPP had usurped the investigative mandate of the Ethics and Anti-Corruption Commission (EACC) by considering fresh evidence without referring that evidence to the EACC for further investigation.

The court's decision warrants appropriate institutional consideration by the ODPP, particularly regarding the legal and procedural implications of the judgment, the

status of the fresh evidence, and the steps necessary to ensure that any subsequent prosecutorial decision is informed by a properly investigated evidentiary record.

NIA recognises that the Constitution vests prosecutorial authority independently in the ODPP. Accordingly, this petition respectfully requests the ODPP to give effect to the High Court's judgment, assess its implications for the impugned prosecutorial decision, establish whether the evidentiary concerns identified by the Court have been addressed, and take any further action warranted by the judgment.

The petition is grounded in the public interest in ensuring that allegations of corruption and economic crimes are addressed through lawful, impartial and accountable processes, while preserving prosecutorial independence.

CONSTITUTIONAL FOUNDATION OF THE PETITION

The ODPP's response to the judgment should be guided by the constitutional principles governing prosecutorial independence, the rule of law, accountability, public interest and the proper administration of justice.

(a) Article 10: National Values and Principles of Governance

Article 10 of the Constitution establishes the national values and principles of governance binding on all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution or any law, or make or implement public policy decisions.

These values include the rule of law, democracy, participation of the people, integrity, transparency and accountability.

The exercise of prosecutorial discretion is not exempt from these constitutional requirements. Although the ODPP enjoys independence in the exercise of its mandate, that independence must be exercised consistently with the Constitution.

Decisions concerning the institution, continuation or discontinuation of criminal proceedings should therefore be based on the evidence, and the constitutional considerations governing the administration of justice.

In the present matter, the High Court's finding that the impugned prosecutorial decision was irregular and unconstitutional calls for appropriate institutional consideration of the legal consequences of that decision.

NIA submits that the ODPP should demonstrate its commitment to the rule of law by reviewing the judgment, identifying any outstanding procedural or evidentiary issues and determining the appropriate course of action in accordance with the Constitution.

(b) Article 157: Powers and Independence of the Director of Public Prosecutions

Article 157 establishes the Office of the Director of Public Prosecutions and defines the constitutional powers and responsibilities of the Director.

Article 157(6)(7) and (8) empowers the Director of Public Prosecutions to institute and undertake criminal proceedings, take over and continue criminal proceedings instituted by another person or authority, and discontinue criminal proceedings at any stage before judgment is delivered, subject to the Constitution.

Article 157(10) provides that the Director of Public Prosecutions shall not require the consent of any person or authority to commence criminal proceedings and shall not be under the direction or control of any person or authority in the exercise of the powers conferred by that Article.

Article 157(11) **requires the Director to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of legal process.**

These provisions establish prosecutorial independence while simultaneously requiring the exercise of prosecutorial authority in accordance with constitutional standards.

The power to review a charging decision must therefore be exercised lawfully, rationally and consistently with the constitutional considerations prescribed by Article 157. Where a court has declared and quashed an impugned decision as unconstitutional, the ODPP must give due consideration to the legal consequences of that judgment and determine the appropriate next steps.

NIA recognises that the ODPP must independently assess the evidence and determine whether further prosecution is warranted. The purpose of this petition is not to

substitute NIA's assessment for that of the Director but to request a reasoned and lawful institutional response to the Court's findings.

(c) Article 157(4): Investigation and Information from Investigative Agencies

Article 157(4), read together with Section 5 of the Office of the Director of Public Prosecutions Act, provides that the Director of Public Prosecutions may direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and that the Inspector-General shall comply with such directions.

This provision operates within the broader Constitution governing the relationship between investigative agencies and the prosecutorial authority.

The ODPP's responsibility to assess evidence for prosecutorial purposes must be distinguished from the investigative work required to establish the factual basis of suspected criminal conduct.

In matters involving allegations of corruption and economic crime, the EACC exercises its investigative mandate under the *Anti-Corruption and Economic Crimes Act (ACECA), No. 3 of 2003,* as well as the *Ethics and Anti-Corruption Commission Act, No. 22 of 2011* and Article 79 of the Constitution of Kenya. Where evidence requires further investigation, the ODPP should facilitate the appropriate referral or engagement with the competent investigative agency.

The High Court's finding that fresh evidence was considered without referral to the EACC for further investigation even further highlights the importance of ensuring that any material requiring investigative verification is addressed through the appropriate institutional process.

Accordingly, NIA requests the ODPP to establish whether the evidentiary issues identified by the Court have been addressed and, where necessary, engage the EACC to facilitate further lawful investigative consideration.

(d) Article 47: Fair Administrative Action

Article 47 guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The ODPP's decision-making processes must comply with applicable constitutional and statutory requirements, including the obligation to act lawfully and fairly when exercising public authority.

Where a prosecutorial decision has been declared unconstitutional and quashed by a court, the legal consequences of that judgment must be addressed in accordance with the Court's orders and the applicable law.

NIA submits that any subsequent decision concerning the matter should be informed by a proper assessment of the available evidence, any necessary investigative follow-up and the legal requirements governing the exercise of prosecutorial discretion.

This does not require a predetermined prosecutorial outcome. Rather, it requires that the decision-making process be lawful, evidence-based and consistent with the applicable constitutional safeguards.

STATUTORY FRAMEWORK

(a) Office of the Director of Public Prosecutions Act, No. 2 of 2013

The Office of the Director of Public Prosecutions Act gives effect to Article 157 governing the ODPP and provides for the exercise of prosecutorial authority.

The Act reinforces the independence of the ODPP and the requirement that prosecutorial decisions be made in accordance with the Constitution.

The decision to institute, continue or discontinue criminal proceedings must be informed by the evidence, the applicable law, the public interest and the interests of the administration of justice.

The High Court's findings in the present matter require the ODPP to consider the implications of the judgment for the impugned decision and to determine the appropriate legal and procedural steps.

NIA accordingly requests the ODPP to review the judgment and ensure that any subsequent prosecutorial determination is made independently, on the basis of the available evidence and in compliance with the law.

(b) Ethics and Anti-Corruption Commission Act, No. 22 of 2011

The Ethics and Anti-Corruption Commission Act establishes the statutory framework governing the EACC's investigation of corruption and economic crimes and the exercise of its related functions.

The Act is relevant because the High Court expressly found that the ODPP had considered fresh evidence without referring it to the EACC for further investigation.

The ODPP should therefore establish whether the relevant evidence has since been referred to the EACC and whether any outstanding investigative issues require attention.

Where additional investigation is necessary, the ODPP should engage the EACC through the appropriate lawful channels, while preserving the independence of both institutions.

(c) Anti-Corruption and Economic Crimes Act, No. 3 of 2003

The ACECA Act provides the statutory framework for addressing corruption and economic crimes.

The underlying allegations against Wycliffe Oparanya in the proceedings and their applicability must be determined by reference to the available evidence,and the relevant statutory provisions.

The ODPP should ensure that any prosecutorial decision relating to those allegations is based on evidence that has been lawfully obtained, appropriately evaluated, and, where necessary, independently verified through further investigation.

Where additional investigation is required, the ODPP should facilitate the appropriate referral to the EACC or other competent investigative agency before making a determination that depends on the unresolved material.

GROUNDS FOR THE PETITION

This petition is founded on the following grounds:

i. The High Court judgment declared the impugned prosecutorial decision unconstitutional, null and void, and quashed it.
ii. The ODPP ought to analyse and determine any further steps required following the judgment.
iii. The ODPP should coordinate with the EACC to ensure that matters requiring further investigation are addressed without compromising either institution's constitutional mandate and independence.
iv. In the interests of accountability and transparency, the ODPP should provide NIA with a written response within fourteen (14) days, outlining the steps taken or proposed in response to the judgment, to the extent lawfully disclosable, having regard to the exemptions in Section 6 of the Access to Information Act,2016 and without prejudicing ongoing or anticipated proceedings.

LEGAL ANALYSIS

Whether the fresh evidence should be referred to the EACC for further investigation

The central issue arising from the judgment is the legal and procedural consequences of the quashing of the impugned prosecutorial decision and whether any outstanding evidentiary issues require further consideration before the ODPP makes a subsequent prosecutorial determination.

The significance of the judgment lies not merely in the fact that the Court quashed the impugned decision, but also in its express finding that the ODPP considered fresh evidence without referring it to the EACC for further investigation.

That finding raises a material question concerning the evidentiary foundation upon which the impugned decision was made and whether the relevant material received the investigative scrutiny necessary to establish its authenticity, reliability, completeness and potential legal significance.

Article 157 of the Constitution vests prosecutorial authority in the ODPP. The exercise of that authority includes the responsibility to assess the available evidence and

determine whether criminal proceedings should be instituted, continued or discontinued, subject to the Constitution and the law.

However, prosecutorial independence does not eliminate the need for decisions to be informed without a proper evidentiary foundation. Where material issues require further investigation, the ODPP must consider whether referral to the relevant investigative agency depending on the nature of crime is necessary before a decision that depends on that material can properly be made.

NIA emphasises that the judgment does not, in itself, establish that the fresh evidence proves the commission of an offence or that Wycliffe Ambetsa Oparanya is criminally liable. Nor does the quashing of the impugned decision automatically establish that criminal charges must be reinstated or that prosecution must necessarily follow.

The appropriate response is for the ODPP to consider the judgment in its entirety, and, in complying with the judgement, determine further investigative or prosecutorial steps. Where additional investigation is required, the ODPP should facilitate the appropriate referral to the EACC.

Conversely, if the ODPP determines that no further prosecutorial action is warranted, that determination should be based on an independent assessment of the evidence, in consultation with the EACC especially with the fresh evidence brought by the suspect's advocates, the Court's orders and the relevant public-interest considerations.

NIA therefore submits that the appropriate response is neither an automatic reinstatement of charges nor an uncritical continuation of the impugned position. It is a lawful, independent and reasoned determination that gives effect to the judgment and addresses any outstanding evidentiary concerns.

PRAYERS

WHEREFORE, the National Integrity Alliance respectfully petitions the Director of Public Prosecutions to:

i. **Formally consider the High Court judgment.** Review the full judgment, especially since the ODPP was not represented in the proceedings and

determine its legal and procedural implications for the impugned prosecutorial decision.

ii. **Coordinate with the EACC.** Engage the EACC, where necessary, to clarify the status of the fresh evidence, facilitate any required investigative referral and ensure that outstanding evidentiary issues are addressed within the respective constitutional mandates of the two institutions to influence the decision to charge.

iii. **Provide a reasoned response where no further prosecutorial action is considered necessary.** Where the ODPP determines that no further prosecutorial action is warranted, provide an explanation to EACC of the basis for that position to the extent lawfully disclosable, without compromising prosecutorial independence, privileged information or ongoing proceedings.

iv. **Provide a written response within fourteen (14) days.** Respond to NIA within fourteen (14) days of receipt of this petition, indicating the steps taken in response to the judgment.

CONCLUSION

The petition equally does not seek to influence the ODPP to reach a predetermined prosecutorial outcome. NIA recognises that the Director must independently assess the evidence, the EACC's report and determine the appropriate course of action.

Nevertheless, the public has a legitimate interest in understanding whether a significant judicial finding concerning the exercise of prosecutorial authority has received appropriate institutional attention.

The ODPP is therefore requested to provide a written response setting out, to the extent lawfully permissible, the steps taken or proposed to address the judgment, whether the relevant evidence has been referred for further investigation where necessary, and whether the legal and procedural implications of the Court's orders have been considered.

Submitted by the undersigned members of National Integrity Alliance:

1. Transparency International Kenya
2. Kenya Human Rights Commission

3. Inuka Kenya Ni Sisi!
4. The Institute for Social Accountability