

IN THE MATTER OF A PUBLIC PETITION UNDER ARTICLES 1, 3, 10, 37, 73, 74, 75, 79, 80,
157, 158 OF THE CONSTITUTION AND OTHER ENABLING LAWS

PETITION/MEMORANDUM TO THE ETHICS AND ANTI-CORRUPTION COMMISSION
(EACC) ON CLEARANCE OF MR NOORDIN HAJI FOR VETTING BY THE NATIONAL
ASSEMBLY FOR THE POSITION OF DIRECTOR GENERAL OF THE NATIONAL
INTELLIGENCE SERVICE

Parties

1. The National Integrity Alliance (NIA), a citizen-centered integrity and anti-corruption coalition comprising Transparency International Kenya (TI-Kenya), Inuka Kenya Ni Sisi, The Institute for Social Accountability (TISA), and the Kenya Human Rights Commission (KHRC) submits this petition in the public interest as follows;

Facts

THAT;

2. Mr. Noordin Haji's has been nominated to the position of Director General of the National Intelligence Service, information which is in public domain. Mr. Haji currently serving as the Director of Public Prosecution (DPP) under the Office of the Directorate of Public Prosecution.
3. The National Assembly on 20th May 2023 made a publication on its website^[1] informing the public of its intended vetting of the candidate and provision of avenues for public input in the process pursuant to Article 118 (1)(b) of the Constitution of Kenya.
4. The same notice informs the nominee, Mr. Haji, that he will be required to submit before the vetting panel letters/certificates of compliance from various institutions including the Ethics and Anti-Corruption Commission.
5. It is therefore expected that Mr. Haji will seek clearance from your office for his appointment.

Law

On presentation of petitions and actions thereof

THAT;

6. Article 37 of the Constitution bestows every person the right to among others, present petitions to public authorities.
7. Sections 38 of the Ethics and Anti-Corruption Commission Act provides for powers and functions of the EACC including power to receive complaints on the breach of the code of ethics by public officers, advise on matters within its functions, undertake preventive measures against unethical and corrupt practices, etc.
8. Section 6(9) of the Public Appointments (Parliamentary Approval) Act provides for the powers of any person, prior to the approval hearing, to provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.



9. Section 7 of the Public Appointments (Parliamentary Approvals) Act states that the issues for consideration in relation to any nomination shall be any constitutional or statutory requirements relating to the office in question; and the suitability of the nominee for the appointment proposed, having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which the nomination is being made.

On Public Participation

THAT;

10. Article 1 of the Constitution states that sovereign power belongs to the people of Kenya who may exercise it directly or through their democratically elected representatives.
11. Article 10 of the Constitution establishes national values and principles of governance which bind all state organs, state and public officers and all persons whenever they (a) apply or interpret the constitution, (b) enact, apply or interpret any law, or, (c) make or implement public policy decision.
12. One of the values under established under A 10(2) is participation of the people.
13. The question of public participation has been heavily litigated. Across all these litigations, the compulsoriness and meaningfulness of public participation have become established minimum standards.
14. It is on these and other basis that parliament has opened the window for public participation as part of its decision-making process.
15. We therefore anticipate that your office will, in the same spirit and letter of the Constitution and established jurisprudence, facilitate meaningful and mandatory public participation in your decision-making process, more specifically, during vetting of Mr. Haji.
16. However, as at the time of filing this memorandum/petition, we have yet to hear any information regarding your institution's call for public input. We have therefore decided in our own motion to file a memorandum on the process.

On suitability of Mr. Haji

THAT;

17. We understand that your institution's clearance will focus on Mr. Haji's suitability under Chapter Six of the Constitution.
18. It is our position that Mr. Haji does not meet the integrity test and has fallen short of constitutional standards under Chapter Six.
19. Our position is informed by Mr. Haji's questionable withdrawal of criminal charges against politically exposed persons mostly on grounds of "insufficient evidence to sustain the prosecution." Whilst the DPP has authority to withdraw cases for legal reasons, he also has a constitutional and legal duty to file cases only after sufficient evidence to sustain the prosecution is available.^[2]
20. Some of the questionable withdrawals by Mr Haji include the following;

No	Case Parties	Charges	Case Stage	When the case was dropped	Justification used by DPP
1	Geoffrey Mwangi (former CEO, NHIF) and 17 others	<p>Loss of public funds relating to the award of an NHIF contract to an online payment company, Web Tribe Limited, for provision of an integrated Revenue collection system for NHIF.</p> <p>Conferring a benefit of Sh253 million to the company.</p>	Hearing	January 2023	<p>The DPP cited lack of sufficient evidence to sustain the charges.</p> <p>In July 2022 Mr. Mwangi had attempted to have the charges against him terminated, but the DPP argued that the decision to charge him was based on sufficient evidence. The court then dismissed Mr. Mwangi's request, holding that the DPP had demonstrated that the decision to charge was based on sufficient evidence and was not instigated by any other motive other than the public interest.</p>
2	R. V Ben Chumo & others	<p>Wilful failure to comply with procurement laws</p> <p>Conspiracy to commit an offence</p> <p>Aiding the commission of a felony</p> <p>Conspiracy to defeat justice</p> <p>Fraudulent acquisition of public property</p>	Hearing – at least 34 witnesses had been heard & about 4 were remaining	October 2022	<p>The DPP alleged that the DCI failed to conduct proper investigations and avail sufficient evidence that could secure a conviction.</p> <p>This goes against decision to charge guidelines and prosecutorial practice requiring evidence to meet threshold before filing.</p>
3	Rigathi Gachagua & 9 others	<p>Conspiracy to commit an offence of corruption</p> <p>Money laundering</p>	Hearing	November 2022	<p>DPP alleged insufficient evidence due to incomplete investigations</p> <p>This goes against decision to charge guidelines and prosecutorial practice requiring</p>

		Fraudulent acquisition of public property Conflict of interest			evidence to meet threshold before filing.
4	R v Dr. Ken Tarus (former KPLC MD) & 8 others	Conspiracy to commit an economic crime by failing to comply with the procedures and guidelines relating to procurement Wilful failure to comply with the law relating to management of public funds as the accounting officer of KP	Hearing		The DPP alleged that after reviewing the evidence tendered, no offence had been revealed against Mr. Taurus. This goes against decision to charge guidelines and prosecutorial practice requiring evidence to meet threshold before filing.
5	Aisha Jumwa (CS Ministry of Public Service, Gender and Affirmative Action)	Committing to conspire fraud by misappropriating CDF funds in 2018		October 2022	DPP alleged insufficient evidence to sustain the prosecution. This goes against decision to charge guidelines and prosecutorial practice requiring evidence to meet threshold before filing.
6	R V Mary Wambui (Communications Authority of Kenya chairperson) and Purma Holdings Limited & another	Faced 2 criminal trials; A tax evasion case & illegal possession of a firearm:	Submissions	Tax evasion dropped in January 2022 Firearm case dropped in Dec 2022	DPP told the court that there were negotiations with KRA. Tax evasion is a criminal offence and should be able to proceed on its own. No information on reasons for dropping case

7	R v Michael Kamau & 2 others	Abuse of office and failure to comply with guidelines relating to the management of public funds	Hearing; 9 witnesses already testified	May 2023	DPP informed the court that he had insufficient evidence to sustain the charges after review of the evidence. This goes against decision to charge guidelines and prosecutorial practice requiring evidence to meet threshold before filing.
8	R vs Moses Lenolkulal & 10 others	Abuse of office and conspiracy to commit an economic crime	Hearing	Application to withdraw made in October 2022. Application to withdraw abandoned within days.	DPP informed the court that he had insufficient evidence to sustain the charges after reviewing the evidence available. A few days later, DPP abandons his application for withdrawal and informs the court that the evidence is sufficient.

21. It is our position that the above actions/omissions have fallen short of the following provisions;
- i. Failure to exercise authority in a manner that promotes public confidence in the integrity of the office contrary to Article 73 of the Constitution of Kenya;
 - a. The withdrawal of prosecution of cases against politically exposed persons fails to inspire public confidence in the DPP's commitment to execute his mandate effectively and satisfactorily.
 - b. The DPP's actions have demonstrated a failure to act in the public interest and in the interests of justice.
 - ii. Lack of objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by favouritism, other improper motives, or corrupt practices contrary to Article 73(2)(b) of the constitution
 - a. The DPP's withdrawal of charges against specific individuals who have clear political connections without withdrawals against their co-accused as evidenced in several instances points to blatant favouritism, and failure to ensure fairness and uniformity in the prosecution of all cases.
 - b. The DPP's withdrawal of prosecution of cases affecting a category of people, within a set timeframe, is discriminatory behaviour which casts doubt on his independence.

- c. The DPP has publicly confessed to acting under influence and bowing to pressure to file cases without sufficient evidence contrary to Article 157(10) of the constitution.
 - d. Failure to make proper legal judgement on the ripeness of cases for trial and subsequent withdrawal of cases without any substantial change in evidence or circumstances. Whereas the law allows the DPP to withdraw cases, such decision must be guided by public interest, the interests of justice and, the need to avoid abuse of the legal process. It is important to note that none of these reasons were expressly given by the DPP to inform the withdrawals. Most withdrawals have been on evidentiary basis, which is an indication of failure to apply expert analysis prior to the decision to charge.
 - e. Failure to undertake objective analysis of cases and ensure evidential thresholds have been met, before making the decision to charge.
 - f. Failure to review the cases involving decision to charge based on the threshold test within fourteen days of making the decision, leading to wastage of public resources.
 - g. Failure to ensure the right person is charged with the correct offence, backed by evidence.
 - h. Failure to ensure that the investigation file is sufficiently composed before pursuing prosecution, thus failing to make an informed decision to charge
- iii. Gross misconduct or behaviour
- a. The DPP's actions in withdrawing prosecution of cases against politically exposed persons have demonstrated a failure to ensure the quality of prosecutorial decisions and act with independence, integrity and professionalism in the administration of justice, therefore wasting public resources including human and monetary resources expended in investigations, prosecution and adjudication processes.
 - b. Exercising preferential treatment in handling prosecution of some cases of politically exposed persons as highlighted in this petition. The withdrawal of prosecution of cases affecting a category of people, within a set timeframe, is discriminatory behaviour amounting to gross misconduct or misbehaviour.
 - c. Abuse of prosecutorial powers entrusted to the DPP, through failure to ensure that there is sufficient evidence to provide a realistic prospect of conviction against a suspect on each charge, before making the decision to charge.
 - d. Acting in contravention of the Constitution, ODPP Act 2013, and ODPP's Guidelines on Decision to Charge 2019. Despite the provisions of the law and developed guidelines and policies to prevent the institution of criminal proceedings in cases with insufficient evidence, the DPP has acted in contravention of these policies and guidelines as highlighted in this petition, therefore leading to abuse of the legal system and erosion of public trust in the system.

Prayers

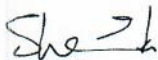
WHEREFORE, your humble petitioners seek the following prayers;

- i. EACC facilitate public participation during its vetting/clearance of Mr. Haji in accordance with the Constitution and other enabling laws and jurisprudence.
- ii. EACC considers and acknowledge this and other petitions on the vetting/clearance of Mr. Haji in its vetting/clearance report to the National Assembly on the aforementioned.
- iii. EACC considers and acknowledges the position of the petitioners on the suitability of Mr. Haji in its vetting/clearance report to the National Assembly on the aforementioned.
- iv. EACC makes a finding that Mr. Haji is unfit to hold office on the basis of Chapter Six of the Constitution of Kenya.
- v. EACC give feedback/response to the petitioners urgently due to the urgency of the matter.

DATED at Nairobi this24.....day ofMay2023

PETITIONERS

Transparency International Kenya



Sheila Masinde, Executive Director, Transparency International Kenya (TI-Kenya)
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Kenya Human Rights Commission



Davis Malombe, Executive Director, Kenya Human Rights Commission (KHRC)
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The Institute for Social Accountability



Diana Gichengo, National Coordinator, The Institute for Social Accountability
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Inuka Kenya Ni Sisi!



Kawive Wambua, Deputy Chief Executive Officer, Inuka Kenya Ni Sisi!
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^[1] http://parliament.go.ke/sites/default/files/2023-05/0000276538-01_THE%20NATIONAL%20ASSEMBLY.pdf

^[2] ODPP, Guidelines on Decision to Charge (2019)

