

PRIVATE PROSECUTION IN KENYA:

A CASE FOR REFORM

PR I V A T E P R O S E C U T I O N I N K E N Y A :

A C A S E F O R R E F O R M

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(ii)

DEDICATION

To all judges of Law, know all thee that:

"The fact that the Crown has, as it is to be expected and that private prosecutions, (as it also to be expected for they are usually public authorities) generally behaved with great propriety in the conduct of prosecution has up till now avoided the need for any consideration of this point, now that it emerged, it is to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused".

- Lord Delvin -

(in Connelly-v- DPP (1904)

A.C. 1254 at p.1354)

ABBREVIATIONS

- | | | |
|-----|-----------|---------------------------|
| 1. | All. E.R. | - All England Reports |
| 2. | A.C. | - Appeal Cases (Reports) |
| 3. | C.A. | - Court of Appeal |
| 4. | Ch.D. | - Chancery Division |
| 5. | C.P.C. | - Criminal Procedure Code |
| 6. | E.A. | - East Africa |
| 7. | Cap | - Chapter (of Statutes) |
| 8. | N | - Note |
| 9. | Q.B. | - Queens Bench |
| 10. | L.R. | - Law Reports |
| 11. | L.W.R. | - Law Weekly Reports |
| 12. | R | - Republic |
| 13. | Vol. | - Volume |

TABLE OF CASES

1. Abdulla v Kadogo (1936) E.A.C.A. 53
2. Abdulla Sulleiman & Others v R (1953) 22 E.A.C.A. 404
3. Achieng v R (1972) E.A. 37
4. Brooks v Bates 7 colo 576.
5. Ex parte Siddlebotham (1880) 14 Ch.D 459
6. Ex parte Charmbertaint Harvey v Confalt (1957) E.A.896
7. ✓ Gouriet v Union of Post Office Workers (1978) A.C. 435
8. ✓ Jopley Constaintine Oyeing v R (Criminal App.No.198 of 1990)
9. ✓ Kyagonga v Uganda (1973) E.A. 486
10. Makecha's case - Daily Nation No.17th 1983
11. Mahanlal Karamshi v Ambalal Chotobai (1954) 21 E.A.C.A. 480
12. Nunes v R (1935) 16 K.L.R. 26
13. Poore v R (1960) E.A. 644
14. R v Stapples (1899) J C P C
15. R v Edwards & Others S Cox 82.
16. R v Dunn (1843) L.& K. 730
17. R v Allen (1862) B & S. 850
18. R v Pandington Valuation Officer (1966) I Q B 380
19. ✓ R thro' Warum v Wanguhu Nga'ng'a - Private Prosecution No. (1983)
20. Radcliffe v Balthlomwe
21. ✓ Richard Kimani and S.M.Maina v Nathan Kahara - case.
22. No.7 of 1982 CMC at NBI (unreported)
23. ✓ Riddlesberger v Robson (1959) E.A. L.R. 84
24. Shiani v R (1972) E.A. 557
25. Sharpe v Wakefield (1891) A.C. 173
26. Tennessee v Davis (US) 10 Otto . 257
27. ✓ Zai Earnest Mwang'ombe & Others v R (1990) LWR 60.

TABLE OF STATUTES

1. Constitution of Kenya
2. Criminal Procedure Code, Cap.75
3. Magistrates' Courts Act
4. Official Secrets Act, Cap.187
5. Prevention of Corruption Act, Cap.65
6. Penal Code, Cap.63
7. The Police Act, Cap.84

FOREIGN STATUTES

1. Trials of Felony Act (1836)
2. Metropolitan Police Act (1829)

ORDERS IN COUNCIL

1. East African Order-in-Council (1895)

INTRODUCTION

Criminal Law is that branch of the law which ensures that justice is done and wrongdoers are punished. This is done by way of prosecution of the offenders. Prosecution may take two forms namely public prosecutions and private prosecutions. When one talks about private prosecutions one is talking about those prosecutions which are not instituted by the state through its officials, but of those prosecutions which are instituted by the citizens themselves. This dissertation is concerned with examining private prosecutions in Kenya, whether they actually play the role they are supposed to play. In the dissertation, we argue for the reform of private prosecution law.

In Chapter one, an analysis of prosecutions generally will be made. Prosecution will be defined and its scope discussed. The evolution and historical development of prosecutions will also be discussed. Since it is undeniable that much of Kenyan law finds its source either directly or indirectly in English law, the history of prosecution in England will be discussed for the reader to appreciate how the prosecution system adopted in

Kenya developed. In training the development of prosecution systems in Kenya, we shall examine the type of system that was in pre-colonial Africa and in particular Kenya. The development of prosecution in Kenya will be discussed henceforth upto the present day. Lastly, we shall examine the role of prosecution in the administration of criminal justice with particular reference to Kenya.

Chapter two will discuss private prosecution in Kenya. Firstly, a brief mention will be made on the need for private prosecutions in Kenya and secondly the law relating to private prosecutions in Kenya will be analysed. The last bit of the chapter will examine the problems of the law relating to private prosecutions vis-a-vis the practice.

In Chapter three, a case study is made relating to private prosecution in Kenya. The cases examined are those of Kihara's case and Jopley's case

These cases are amongst the most publicised decisions of a private prosecution and they brought to the notice of a lot of people the right of a private prosecution in Kenya. Thereafter, a comparative study will be made on the private prosecution systems between England and

Kenya.

Chapter four which forms our Conclusions and Recommendations is an attempt at designing the elements of a better private prosecution system in Kenya, in it we therefore argue the case for reform. Recommendations as to the usefulness of this right in Kenya and what can be done to make the right more useful will also be made. In Conclusion, we will be able to determine whether this right is just a myth or a real safeguard. We hope to contribute in the administration of justice and also educate the citizens on their rights. If after reading this work, the reader appreciates that there is a need for reform in the law relating to private prosecutions in Kenya, the purpose of this work will have been achieved.

CHAPTER I

PROSECUTION PROCESS GENERALLY

I: (A) THE NATURE AND SCOPE OF PROSECUTIONS

(i) Definition of Prosecution

The initiation of criminal proceedings and the prosecution of criminal matters forms a very important part in any legal systems. For effective criminal process, law should be brought into motion. Prosecution may be understood as that process whereby accusations are brought before a court to determine the guilt or innocence of the accused person. A criminal charge is made before a judicial officer or tribunal. Any person who makes or is actively instrumental in the making (or prosecuting) of such a charge is deemed to prosecute it, and is called the prosecutor ¹.

Prosecution may also be understood generally to mean proceedings with any suit or action at law. By a caprice of language, a person instituting civil proceedings is said to prosecute his action or suit, but a person instituting criminal proceedings is said to

prosecute the party accused.

This general understanding was applied in the case of Brooks-v-Bates² where the word 'prosecute' was explained to mean 'to proceed against judiciary'. But this wasn't the case in Tennessee -v- Davis³, where prosecution was defined in its usual sense to mean 'a criminal proceeding at the suit of government'. This was probably derived from the Latin word 'prosequi' which means to follow and/or pursue.

Prosecution is thus the process of bringing a criminal charge against a person in a court of law. The case is prepared and presented against a person having committed a crime. Prosecution is technically distinct from, but closely connected with the investigation of a crime, the search for and arrest of a person suspected of having committed a crime, and any preliminary hearing to determine whether or not there is sufficient evidence to justify putting the suspect on trial. These institutions are entrusted to different persons, the police on the one hand and primarily the prosecutor's office on the other. This separation is however not very distinct as the collection and organisation of relevant information and the dismissal of what is not relevant are

themselves what constitutes decision making.

There are two major characteristics of prosecutions, shown by the clear cut division between the two parties in the case. Firstly, there is the defendant who is the accused but until his guilt is finally determined, so the prosecutor has to prove the defendant's guilt beyond reasonable doubt. Secondly, there is the state which assigns the responsibility of conducting the case to the prosecution.

Prosecution is conducted by a prosecutor or prosecuting attorney. This is any attorney at law who represents the state or political body under which a criminal prosecution is brought. He is the officer of the court responsible for seeing that justice is done. His duty is primarily that of an adversary.

Mozley & Whiteley's Law Dictionary⁴ defines a prosecutor as "any person who prosecutes any proceedings in a court of justice, whether civil or criminal", but the caprice of language has confined the term so as to denote in general a party who institutes criminal

proceedings by way of indictment or information on behalf of the crown, who is nominally the prosecutor in all criminal cases. He is supposed to aid in the examination of witnesses and give such general instructions as they may be required but under a duty to retire while the jury is deliberating on the evidence of a matter under investigation.⁵

It is necessary at this point to consider the Kenyan situation in relation to this role of the prosecutor to aid in the examination of the witnesses and give general instructions as they may be required. Most Kenyan prosecutors examine witnesses leading them in favour of their cases. Most of the instructions which they give are usually towards conviction. It is necessary to note their familiar statement, to serve as any example to the others! Most prosecutors in Kenya don't retire while the court is deliberating on the evidence of a matter under investigation. They usually take part in such deliberations, which defeats the functions of the prosecutor.

The prosecutor's responsibility is to try cases or to seek pleas of guilty in appropriate cases both for

system efficiency and fairness to the individual . As an officer of the court the prosecutor should be more responsive to community attitudes. We wish to comment at this juncture that the prosecutor's office has been traditionally a stepping stone to higher office, at worst subject to misuse for political purposes, or more subtly, to assure a conviction record. This will form part of my work in a later chapter.

Prosecutions are mainly of two kinds, public prosecutions and private prosecutions. All criminal cases that go for trial in the courts are initiated in the name of the state (hence the title Republic (R) - v- "X"). These are principally called public prosecutions. Nevertheless every citizen has the right to start a prosecution and to set the criminal law in motion. This is a matter of regular practice, so that some cases where the police do not normally prosecute are regularly started as a result of private prosecutions. It is a routine matter for people who complain to the police of minor assault or battery to be told to go to the magistrate on their own and apply for a summons. This amounts to private prosecutions.

(ii) Scope of Prosecution

The decision to charge involves many of the same considerations that are important in making arrest and conviction decisions. Once the police have made an arrest and completed their procedures at the police station, the investigation of most crimes for practical purposes is over. Evidence of the crime is usually obtained most readily when and/or where the crime happened.

The police gather evidence of the crime and track down available leads as part of their initial response. So far as the police are concerned, an arrest is important in their responsibility for the criminal aspects of a case. Nothing that happens thereafter affects their accomplishment. In most cases, all the information on which the proof of guilt and a conviction actually depend is contained or indicated either in the police report or documents like witnesses' statements that accompany it in the police file.

Thus a police officer who captures an offender is often the same one to be the main witness for the prosecution, to testify that he apprehended the offender.

One would expect therefore, that once the police have completed their investigation, the criminal process could move swiftly to a conclusion. But this is rarely so because the police are allowed to retain in custody a person after arrest until they complete their procedures at the stations, especially investigations.

The police may conclude that the person will or will not be prosecuted. This decision to charge forms a substantial part of the prosecution process. Most often the decision is made after a suspect has already been taken into custody. In some instances, the effective decision is made when the police decide to ask the prosecutor to charge. Of greater importance however are the decisions made by prosecutors, acting through their assistants, whether to charge suspects already in custody, in response to requests made by the police that they do so. We will discuss this problem of the discretion to charge in a later chapter.

If the police decide not to prosecute, the criminal matter ends there and if they decide to prosecute, in most cases, they deliver the suspect to a magistrate who has authority to order him held in custody while the

criminal charges are determined or to release him on bail. It should be pointed out here that the detention of a person in jail or the imposition of conditions on his liberty while a criminal prosecution is pending does not affect the substance of prosecution so that prosecution proceeds as though no such detention or imposition of conditions had been made.

The arrested person is delivered to a magistrate and thereon or soon afterwards, a police officer or the victim of the crime at the request of the police files a complaint which complaint initiates the prosecution. Accompanied by evidence of probable cause, the complaint is sufficient to authorise holding of the defendant while the prosecutor decides whether or not to go forward with a prosecution. The defendant is usually charged with the most serious crimes that the evidence will reasonably support because the defendant can otherwise be convicted of less serious crimes.

When the defendant is called into court to inform him/her of the charge and to ask for the plea, what is usually called arraignment, the trial date is set. At this time the prosecutor nor the defence counsel has studied the case or made any significant preparation

for trial. The magistrate who will try the case knows nothing about it. The hearing date is based normally on the convenience of the lawyers and/or other reasons which the defence counsel may give. The prosecutor may also be similarly engaged, but usually he is more flexible as the case can be reallocated for trial to any of several prosecutors.

Even when the prosecutor has initially concluded that prosecution is justified by the evidence of probable cause and is in the community interest, that decision may later be changed. In some instances the prosecutor changes his mind in the light of new facts brought to his attention. When this occurs, and if the information had been filed, the prosecutor terminates the prosecution by entering a formal order dismissing the information.⁶ This order is known as nolle prosequi.

In some instances, and at some stages of the process, the prosecutor may dismiss the proceeding on his own initiative; in other jurisdictions, and more particularly after the information has been filed, he may need the consent of the trial judge. But this consent, when required by law is rarely withheld.

The withdrawal of prosecution after the accused has been called to make his defence in trials before subordinate courts in Kenya as provided by Section 87(b) of the Criminal Procedure Code ⁷ clearly summarises the process of prosecution.

Section 87 of the Criminal Procedure Code provides:

S.87 In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney General, at any time before judgement is pronounced withdraw ~~the~~ from the prosecution of any person, and upon withdrawal:-

- (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;
- (b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."

From the foregoing, it can be seen that prosecution process starts from the time a suspect is arrested to the time of judgement or acquittal. Prosecution may be commenced at any time after the commission of the ~~of~~ offence. This was the position in the case of Radcliffe v Bathlomwe ⁸. In this case, by S.14 of the Act for the Prevention of Cruelty to

animals, every complaint under the provision of the Act is to be made within one calender month after the cause of such complaint shall arise. On June 30, an information was laid against the appellant in respect of an act of cruelty alleged to have been committed by him on May 30. An objection to the jurisdiction of the justices having been made within one calender month after the cause of the complaint had arisen. It was held that the day on which the alleged offence was committed was to be excluded from the computations of the calender month within which the complaint was to be made, that the complaint was made in time and the justices had jurisdiction to hear the case.

Be that as it may, a prosecution properly so called is commenced when an information is laid before a justice, or, if there is no information, when the accused is brought before a justice to answer the charge, or, if there is no preliminary examination, before a justice, when an indictment is preferred. ⁹

A person who lays before a magistrate an information stating that he suspects and has good reason to suspect another, or who prefers a bill of indictment, is,

therefore engaged in a prosecution, and may be responsible for the prosecution even if though the charge made before the magistrate is an oral one, and even though after making the charge before the magistrate, or even without making one, he is bound over to prosecute and does so.

1. (B) : EVOLUTION AND THE HISTORICAL DEVELOPMENT OF PROSECUTION

The prosecution system practised in Kenya emanated from England just like any other branch in our legal system. I therefore find it important to trace the evolution and historical development of this prosecution system from the English legal system before turning to Kenya.

(i) Historical Development of Prosecution in England

In England, the crown is deemed to be the fountain of justice, to ensure that justice is not only done, but also seen to be done. The present administration of criminal law in England dates back to the twelfth century. By this time, there were four institutions with the business of obtaining proof of the commission of

crime and to institute the prosecution that followed. These institutions were; the judge and the grand jury; the coroner and his jury; the justices of the peace and the police. All these institutions were born from the executive and had to remain under it, until afterwards when they developed into free institutions.

As it is well known, in England there never existed separation of power doctrine. The crown being the fountain of justice assumed the power to punish those who broke the king's peace. The coroner, together with the judge could, in discharging their duties, carry out an inquest by putting people in the neighbourhood together under an oath and telling the truth about the alleged crime. They constituted a jury known as the 'jury of presentment'. The person 'presented' was the accused and was charged with an offence embodied in a document called an indictment' in case of the grand jury or 'inquisition' in case of the coroner's jury. The accused person was arraigned and tried on the indictment or the inquisition.

Initially juries were men who knew all the material facts and were found to tell the crown that they knew. Later and after they became judicial bodies, they became

men who were deemed to know none of the facts, and were required to act only on the admissible evidence that was laid before them. In fact as late as the seventeenth century, the grand jury was prosecuting on it's own knowledge, information and belief.

In the seventeenth and early eighteenth centuries, the work of inquiry into crime was done by the parish constable who was a rudimentary kind of a policeman. The constable made an arrest when the accused person was caught red-handed, but he could hardly do much in the way of investigations which was left to the justices of the peace.

While justices of the peace looked or inquired into local crimes, offences of the state were looked into by the higher servants of the crown, the servants of the crown, (state) and in the privy council. The judges still retained their former duties still as 'ex-officio' coroners. Ultimately, regardless of whether made by the justices of the peace or not, these inquiries were laid before the grand jury in the form of the bill of indictment. In theory anyone, could put an accusation in a bill, lay it before the jury with corroborating

evidence, and invite them to call it a true bill. This can be seen as what today is termed as private prosecution.

After the nineteenth century, the justices like the grand jury before them, became completely a judicial body. They ceased to be agents of the government/crown in inquiring into crime, far from that they heard the evidence adduced before them and determined whether or not to commit for trial. This even became more specific after 1554 and 1555 when statutes were enacted which laid down a procedure both for the justices and the coroner.

The justices could not commit for trial unless they thought there was a good case against the accused. Nevertheless their inquiry was still a private one, in which the accused had no rights. He was himself brought before the justices and had to answer questions put to him, but he was not to be present while the evidence of other witnesses was being taken or even to see their depositions. Justices often met in a private house and conducted their proceedings quite informally.

Later in 1836, the Trials of Felony Act was passed

which recognised some rights of the accused person. For instance the accused could now inspect the ~~dis~~^epositions of other witnesses and also that all witnesses are to be examined in the presence of the accused, who was at liberty to put such questions to the witnesses as he wished.

Two loopholes yet betrayed the proceedings. Firstly, the inquiry was not held in an open court, hence the public could be excluded from it. Secondly, the proceedings before the justices were not conclusive and if they (justices) discharged the accused, it did not prevent anyone from proceeding with the bill of indictment, nor did it prevent anyone from instituting a new proceedings before the justices themselves for committal.

The transformation which came up due to the above-named loopholes was brought by the Metropolitan Police Act 1829. The Act marked the beginning of the creation of the police. Proceedings could now be heard in open courts. At this time, nearly all prosecutions were in the hands of the police and they always proceeded by way of committal. All that was left therefore was for the

grand jury to review a case that had already been found sufficient by the police and the examining magistrate. The jury was almost left functionless and was consequently abolished in 1933. 10

Since the enactment of the Metropolitan Police Act, the police took over the duty of prosecution except that supposed to be done by the Director of Public Prosecutions and by private individuals and corporations. The police or a private citizen concerned with litigation would instruct a solicitor. The solicitor in turn would conduct the police prosecutor to take up the matter. 5

At this point, it is clear that the police are only a part of the machinery of prosecution. In the ordinary sense, they are the ones who initiate the prosecution and gather the materials for it. In England, but subject to the powers of the Attorney-General (solicitor-General) anybody is at liberty to prosecute, though people prefer to complain to the police and leave it to the police.

From the above history of the development of prosecution

system in England, it is evident that the grand jury prosecuted on its own knowledge, information and belief. Kenyan prosecutors should do likewise, prosecute on their own knowledge, information and belief. More so, anyone could put an accusation in a bill, lay it before the jury with corroborating evidence, and invite them to call it a true Bill, at liberty to prosecute. This concept of private prosecution is what the present writer will argue for Kenyan prosecution system at a later stage of this dissertation.

Thirdly, institutions concerned with the enforcement of criminal law in England, namely the grand jury, the coroner and his jury, the justices of the peace and the police were born from the executive but afterwards developed into free institutions. The implication of this for Kenya is that the institutions which are concerned with the enforcement of criminal law and notably the judiciary though borne from the executive should remain free from executive interference.

(ii) Historical Development of Prosecution in Kenya

Kenya was declared a British Protectorate by the 1895

East African Order-in-Council. Kenya eventually adopted the English prosecution system like most of our legal system, and today we have a direct codification of the English process. However, it should be noted that the structure of our system as it stands today is not quite similar to that of English system. For instance, the trial by jury did not come to Kenya automatically as part of the common law brought by the English settlers. In the case of R v Stapples¹¹ it was ruled against the contention that Magna Carta entitled a British subject to a jury trial in a foreign country.

Similarly, in Britain, the office of the Attorney-General is separated from that of the Director of Public Prosecutions (D.P.P), while in Kenya the Attorney-General holds both offices and is only assisted by the Deputy Public Prosecutor.

The coming of settlers to Kenya therefore provides the back-ground to the introduction of foreign criminal prosecutions. A system of courts and a prosecution process was thus established by the British. There however existed a separation of the British courts and the native courts, which did not endure for long so that in the years immediately proceeding independence, the

colonial masters started intergrating the courts in Kenya. This was completed when the Maqistrate's Courts Act ¹² of 1967 was passed.

In Kenya, save in major cases, the police prosecutor investigates the case, prepares it and finally prosecutes. In England, however, there is the solicitor who prepares the case for trial and gives it to the barrister to institute the prosecution in court. The police may only initiate the prosecution by gathering the necessary material for the case. But generally, the two systems are essentially the same so far as the Attorney-General is the head of the prosecution department.

Perhaps the most important of the practices and procedures planted in our system was the adversary litigation, buttressed by the introduction of police force and a legal profession quite akin to the British one. The historical development of the prosecution process in Kenya is therefore treaceable from the English legal system introduced in Kenya vide the 1895 East African order in council. Nevertheless attempts have been made to accomodate our local circumstances, for instance we do not have the trial by jury but instead, all serious

criminal trials before the High Court are with the aid of three assessors who assist each other in the case.

In order to appreciate what impact the colonial masters had in Kenya's prosecution system, it will be worthy to discuss briefly the type of prosecution which existed in Kenya in particular and pre-colonial Africa in general.

(iii) Prosecution in Pre-Colonial Africa

The African societies were many. There was no uniform system of law. The kind of economy existing was basically subsistence. Among the Africans and especially the acephalous societies like the ones we had in Kenya, there were no centralised systems of courts or prisons or governments. The society was communally based. It was the duty of every member of the society to assist in maintaining peace and order. Most functions of the society were done communally or collectively. 13

There was no individualism as among the English, the whole community was bound by the realisation that each belonged there and each had a role to play.

The societies were governed by a system of customs and traditions or beliefs. If a person broke any of these, he would be punished. The aim was to maintain the equilibrium, penalties were directed not against specific infractions but to the restoration of this equilibri-

um. 14 These communal sentiments led to the consideration of offences being not only in terms of their effect on individuals but their effect on the entire community. There was no distinction between civil and criminal law as was known in European concepts. Every member of the community had a duty to report any breach of law but for breach of private rights, the victim had a right to seek justice, which would normally be enforced on behalf of the whole community but not on his behalf as an individual.

It is therefore clear that there was a very weak system of prosecution in pre-colonial Africa. This is evident only to the extent that private persons did report breaches of public law and to seek justice by adducing evidence to prove the guilty of the accused.

1. (C) THE ROLE OF PROSECUTION IN THE
ADMINISTRATION OF JUSTICE

The basic question underlying this sub-topic is; why do we need prosecution in our criminal justice process? Of what importance is prosecution towards the administration of justice?

Firstly, the prosecution aids the court towards arriving at a just and fair decision. This can be considered as the prime role of prosecution. The prosecution should state all the relevant facts of the case dispassionate- lywhether they tell it in favour of a severe sentence or not. It should not attempt by advocacy, to influence the court towards a more severe sentence, so that language leading to severe sentence should be avoided.

The prosecution should see that the case is properly and fairly prepared and presented and that all the weaknesses in the defence are identified and fairly exposed to the court. The object of prosecution is therefore not to get a conviction without justification but to get a conviction only if justice requires it. In the case of Shiani v R. ¹⁵ the appellant had been convicted of fraud having used false weight. The prosecutor stated that the offence was serious so that the magistrate should impose a prison sentence. Mr. J Wicks in appeal said:

"It is not the function of a prosecutor, as the court has more than once said, to tell the court his view. He is required simply to put the facts before the court. The court must now decide how it views the case". ¹⁶

This was also upheld in Achieng v R ¹⁷

where it was stated that the duty of the prosecutor is to put the facts before the court so that the court now decides on these facts.

The prosecution should play an active role in the adjudication of /on the criminal justice system. Unlike the court which usually plays a passive role, the prosecutor is not constrained to accept passively every matter that is presented to him. He can screen out matters referred to him that fail to meet his standards. He can initiate and channel investigations into the matters that he views as having special priority. He has the power to give differential treatment to his cases proportioning his time and resources based on his judgement.

The prosecution therefore allows for matters for which the public attaches priority, in order to preserve the limited adjudicative resources, spending being done only on those matters where the public has interest. Petty cases which would only waste the court's time and resources are discharged. Thus the prosecution serves as a guardian, protector and custodian of the community's scarce resources for adjudication.

The prosecution has to satisfy the court beyond reasonable doubt. This means that the absence of an obvious witness can easily be used by the defendant to suggest good ground for such a doubt. However, this doesn't mean that the prosecution is bound to call every possible witness. In the case of Abdulla v Kadogo,¹⁸

Sir Joseph Sheridan C.J. held that the prosecution counsel is not bound to call the witness who has made depositions (or statements). Similarly, in the case of R v Edwards & Others,¹⁹ Mr. Justice Erle (as he then was) stated that the counsel for the prosecution is not bound to call all the witnesses stated in the Bill. He described the prosecutor as a minister of public justice who is called upon to lay such facts before the court or jury as he thinks the interests of justice demands.²⁰

In this chapter we attempted to look at the prosecution process generally, and the role that this process plays in the administration of justice. The next question to be considered is private prosecution in Kenya, which will form the substance of my next chapter.

FOOTNOTES = CHAPTER ONE

1. Halsbury's Laws of England, 3rd ed. vol.25
 p.349.
2. 7 Colo 576,580.
3. (US) 10 Otto 257,269.
4. E.R.Hardy Mozley & Whiteley's Law Dictionary
 10th ed.
5. 24 AM Jist Grand J.& 43.
6. The law relating to dismissal of charges and
 practices of prosecution is discussed in chapter
 11.
7. Cap.75, Laws of Kenya.
8. (1892) 10.B 161
9. Supra No.1 vol. 10 pg.340.
10. Administration of Justice Act, 1933.
11. (1899) J.C.P.C. (unreported case of Southern
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12. Act No.17 of 1967.
13. Jomo Kenyatta: Facing Mount Kenya,
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 p.195.
14. J.H.Driberg 'The African Conception of Law'.
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15. (1972) E.A. 557.
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17. (1972) E.A.37 at p.40
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19. S.Cox 82

20. Abid at pg.82

CHAPTER II

PRIVATE PROSECUTION IN KENYA

This chapter is basically concerned with the law relating to private prosecution in Kenya and the problems with this law vis-a-vis the practice. Before discussing these issues, it is however necessary to mention the need for private prosecution in Kenya.

2: THE NEED FOR PRIVATE PROSECUTION IN KENYA

In theory, the responsibility for setting the criminal law in motion rests on every individual. The general rule in Kenya is that every citizen has a duty to maintain law and order.¹ He also has a right if not an obligation to bring a prosecution when a crime comes within his knowledge. It is democratic to ensure that the citizens have a duty to maintain law and order. Lord Shaw Cross expressed this view when speaking to the House of Commons in 1951 as follows:

"We have to secure and preserve our individual liberty and security by evolving a system under which these birth-rights depend ultimately not upon an executive however benovolent, nor upon a judiciary however wise, but upon the active support and final judgement of our

fellow citizens".²

What Lord Shaw is saying is that individual liberty and security can best be attained by the initiative of the individual citizens as opposed to the executive or judiciary. We conceive this further to mean that this can be achieved by inter alia, private prosecutions. It is with such kind of reasoning that Kenya really needs this system of private prosecution.

There has been a widespread abuse of discretion on whether to prosecute or not to prosecute, manifesting itself in numerous illegal arrests, detention, unwarranted prosecutions and situations where acts of criminality go unheeded. The prosecutor however has no discretion to refuse to prosecute in cases where adequate incriminating evidence is at hand. This rule excludes from the monopoly of over prosecution by the public authorities. A prosecutorial system that is subordinate to a quasi-minister (like the Attorney-General in Kenya) would and is subject to political pressure to abuse its considerable powers of prosecution and non-prosecution. This is the situation existing in Kenya, which calls for private prosecutions.

In Kenya, the right of private prosecution is essential

to counteract attempts by wealthy and influential people to stifle prosecutions where offences by them are alleged in reports to the police. This right being a constitutional safeguard should be protected. All prosecutions should not be left in the hands of the state, which state may refuse to prosecute. There is a legion of reasons why the prosecuting authorities may not institute criminal proceedings. These are political considerations, social status, bias, inertia inefficiency, ineptitude, corruption, indifference and others. In such circumstances, the right of private prosecution is the only limited ammunition left in the hands of the private individual. This right is a useful safety valve in case the state fails to take action. It acts as a useful barrier to higher officials and wealthy individuals. Noting this point, the learned judges in Nathan Kahara³ case said:

"In Kenya, the right of private prosecution is essentially to counteract attempts by wealthy and influential people to stifle prosecutions when offences by them are alleged in reports to the police . . . the right of private prosecution is a constitutional safeguard."

It is further submitted that the protection of the right to private prosecution is important in that one affected by illegitimate activities is more strongly

motivated to mount a prosecution than one who just does so because it is part of his duties. Thus the theory of free enterprise may be applied in this analogy in that a person acting in his own self-interest has a greater motivation to do so.

In Kenya, there are very few police stations scattered all over the country. This should be a good reason for allowing private prosecution which may even prove a greater deterrent to commission of crimes, because citizens would act under the caution that there is always somebody ready to prosecute them if they engage in criminal activities.

The most frequent offences which become the subject of private prosecution are assault and trespass. There are in addition offences of a minor nature in which the police quite properly take the view that it is not in the public interest to prosecute for instance assault. Also for matters concerning the local authorities, if the local authority in question has been negligent in executing its duties and thereby cause some damage to a citizen and which case is not taken up by the police prosecutors, private prosecution may take effect. A

case in point is the case of Nathan Kahara where the City Commission had failed to prosecute the then mayor of Nairobi Mr. Nathan Kahara for fraudulent allocation of certain plots, whereof private individuals took over the prosecution.

Private prosecution then is a right which every individual in Kenya possesses, should the prosecuting authorities grow cold feet and fail to institute criminal proceedings for whatever reason. It is a right which keeps the Attorney-General on his toes knowing too well that if he fails to initiate action, responsible citizens indignant at those who flout the law will take action, and he may only exercise his residuary control.

2: (B) THE LAW RELATING TO PRIVATE PROSECUTION IN KENYA.

In this sub-topic, we shall be concerned with the law relating to private prosecution in Kenya. In discussing this law, it will be necessary to deal with other procedural requirements of prosecutions generally as provided by the Criminal Procedure Code or any other statute, which also applies to private prosecutions.

The right of citizens to set criminal law in motion is guaranteed by law.⁵ It is a constitutional safeguard in the hands of the citizens essential to help enforce the law. In the words of Lord Diplock:

' The right is a useful constitutional safe guard against capricious, corrupt or biased failure or refusal of police forces and the office of the Director of Public Prosecutions to prosecute offenders against the criminal law' ⁶.

In the same case his noble brother Lord Wilberforce expressed similar words reported at page 477;

" The individual who wishes to see the law enforced has a remedy of his own. He can bring private prosecutions. This historical right which goes right back to the earliest days of our legal system though rarely exercised in relation to indictable offences and though ultimately liable to be controlled by the Attorney General (by taking over the prosecution, and if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against merits or partiality on the part of the authority'.
(emphasis supplied)

In Kenya, the right of private prosecution is impliedly guaranteed by the constitution and the Criminal Procedure Code. Section 26 of the Constitution provides:

3. " The Attorney General shall have power in any case in which he considers it desirable so to do;

(a) - -

Sec (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority;

inc (c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority".

Section 88 of the Criminal Procedure Code, the section implementing the constitutional right of private prosecution conferred by the constitution provides:

1. "A magistrate trying a case may permit the prosecution to be conducted by any person . . .
2. Any such person or officer shall have the same power of withdrawing from the prosecution as provided by Section 87 . . .
3. Any person conducting the prosecution may do so personally or by an advocate."

The phraseology contemplates and provides for the right of individuals to prosecute. In particular, this is indicated by the phrases "take over criminal proceedings instituted by any other person" (under section 26 (3)(b) of the constitution); 'discontinue criminal proceedings instituted by any other person; and may do so personally' (under Section 88 (3) of C.P.C) It is my submission that this any other person includes both natural and artificial persons.

There are instances where the sanction of the Attorney

General is needed before proceedings can be instituted. These are provided by different statutes and mostly include crimes or charges under which the state has final authority and all prosecutions are conducted at the mercy of the state. These include crimes such as sedition under the penal code.⁷ The Prevention of Corruption Act⁸ also requires written consent of the Attorney General before proceedings are commenced under the Act.

The sanction to prosecute constitutes a condition precedent to the institution of a prosecution. The magistrate trying the case has to satisfy himself that such consent has been granted before hearing the case.⁹

Where such consent is not granted it appears that the private individual has no remedy because the law is very clear that unless and until the Attorney General's consent is obtained, no prosecution may be commenced in respect to those offences.

The Attorney General can control all criminal prosecutions through the entry of nolle prosequi. This is an exclusive right given by the constitution and the Criminal Procedure Code. Section 26(3)(1) of the Constitu-

tion states:

"The Attorney General shall have power in any case in which he considers it desirable so to do . . . to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority".

Section 82(1) of the Criminal Procedure Code provides in part;

"In any criminal case and at any stage thereof before verdict or judgement, as the case may be, the Attorney General may enter a nolle prosequi. . ."

The origin of this right is that it was natural for the Crown in England in whose name criminal proceedings were instituted to reserve the right to terminate the same proceedings at will.

When the Attorney General enters a nolle prosequi this means he is not willing to prosecute. This is not the same as withdrawing the case under Section 87 of the Criminal Procedure Code. The nolle prosequi operates sine die of the proceedings. This was explained in R v Dunn ¹⁰ by Holt C.J

"The entering of nolle prosequi was only putting the defendant sine die and so far from discharging him from the offence, that did not discharge any further prosecution upon that very indictment, but that withstanding, new process may be made out upon it".

The nolle prosequi is entered by the Attorney General

by stating in court in writing that the Republic does not intend to continue with the proceedings as per Section 82(1) of the Criminal Procedure Code. Once the nolle prosequi is entered the accused person is discharged in respect of the charge, but this does not bar subsequent proceedings on the offence. This was explained in Poole v R¹¹ where a nolle prosequi had been entered but a new information on the same terms as the first charge was laid. The appellant contented ^d inter alia that the trial was a nullity because the Attorney General had entered a nolle prosequi in respect of the first information. The Privy Council held that the entry of nolle prosequi did not discharge the proceedings so as to preclude the filing of another charge based on facts disclosed during the first hearing.

It is our submission that there is a potential conflict between the Attorney-General's power to enter a nolle prosequi and the right to private prosecution. The reason upon which the Attorney General was granted such overwhelming powers over private prosecutions was that individuals, especially those of political or economic ability, should not be allowed to manipulate

and abuse the prosecution process by preferring 'frivolous' or 'vexatious' proceedings against the lesser fortunate members of the public. Yet in Kenya every private prosecutor has to show he has locus standi and a sufficient interest in the matter upon which he wishes to prosecute before the court allows him to do so. This makes any subsequent assertion that the same proceedings are 'frivolous' or 'vexatious' extremely ridiculous.

Before a private prosecutor (citizen) can initiate the prosecution he must obtain permission from the magistrate trying the case. This is provided by Section 88(1) of the Criminal Procedure Code which provides in as far as it is material:

"A magistrate trying a case may permit the prosecution to be conducted by any person but no person other than a public prosecutor or other officer generally or specifically authorised by the Attorney General in this behalf shall be entitled to do so without permission".

The rationale for this rule appears to be the need to scrutinise charges in order to make sure that no 'frivolous' or 'vexatious' proceedings are brought to court.

In order to know whether or not the Attorney General will prosecute, the individual should wait for reasonable time after the expiry of which he can conclude that the Attorney General is not prosecuting and can go ahead to institute private prosecution.

The private citizen then becomes responsible for conducting the trial and he may do so personally or by an advocate.¹² In Nunes v R¹³ the issue was whether the private prosecutor was entitled to appear on appeal, the Attorney General having intimated that he did not propose to take part in it. In this case permission to prosecute was never asked for but the court held that by the magistrate allowing the trial to proceed, he gave the magistrate allowing the trial to proceed, he gave his permission.

In Kyagonga v Uganda¹⁴ the High Court of Uganda held that though no formal leave of court for the prosecution was recorded, by allowing the complainant to lead evidence must mean that such leave was given to him. The courts have decided that permission to institute a

proceeding may be drawn from the parties conduct, if no objection is raised to the absence of formal permission. Until after the close of the prosecution case such permission may be inferred from the fact that the trial has been allowed to proceed so far. 15

If the magistrate/judge refuses to permit private prosecution the assumption is that the magistrate/judge has exercised the discretion to either grant or refuse such permission wisely. To this ^{extent} ~~extend~~ the private prosecutor cannot challenge this decision. But he can ask an official prosecutor to take up the prosecution. Our submission is that this last alternative is of no use since in the first place, these official prosecutors failed to prosecute. This renders the alternative nugatory even if the official prosecutor takes up the prosecution because most likely, he will drop it owing to the reasons which made him fail to prosecute from the very beginning.

The private citizen wishing to conduct a prosecution has to establish a locus standi, that is to say his legal basis to conduct or prosecute the accused. The private

citizen has to be the victim of a crime or he must show some direct interest in the proceedings. ¹⁶ In Ex parte Siddebotham ¹⁷, James L.L. explained that the complainant must be:

"A person who has suffered a legal grievance, a man whom a decision has been pronounced which wrongfully deprived him of something wrongfully refused him something or wrongfully affected his right to something".

The position of the aggrieved party is that he has to have some personal interest, he must not be a stranger in the matter. The courts will not listen to a 'mere busy body who is interfering in things which do not concern him'.

Private citizens taking the form of any other person in accordance with Section 89(2) of the Criminal Procedure Code have the same power of withdrawing from the prosecution as any other officer provided the provisions of Section 87 shall apply to withdrawal by that person. Section 87 gives the effects of such withdrawal. Firstly if the withdrawal is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge shall not operate as a bar to subsequent proceedings against him on ac-

count of the same facts. Secondly, if the withdrawal is made after the accused person is called upon to make his defence he shall be acquitted.

A public prosecutor has the power to appear and plead without written authority before any court in which any case of which he has charge is under committal proceedings, trial or appeal. If a private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution and the advocate so instructed shall act therein under his directions by virtue of section 88 of the Criminal Procedure Code.

Perhaps it is necessary to explain a 'watching brief' at this point. This is a situation whereby a counsel is invited to watch or observe certain proceedings in order to protect the interests of a party to those proceedings. The counsel takes notes of the proceedings but is not entitled to address the court on any issues arising therefrom. He/she may only advise the party whose interests are being protected. In relation to private prosecutions, a private prosecutor may invite a counsel to a 'watching brief'. We strongly encourage this practice because the party would benefit from the coun-

sel's advice.

The Attorney General may take over and continue or discontinue any such criminal proceedings that have been instituted or undertaken by any other person or authority.¹⁹ The rationale for the state's taking over or being a party in criminal proceedings has been given by Delvin Baron in his book, History of Prosecution in England. He says that the crown concerned itself with crimes and the enforcement of regulations against it firstly so that the king's peace (state in Kenya's situation) in the realm might be maintained. The Crown felt that it was its duty to maintain peace for the benefit not only of itself but also of the public as a whole. Secondly, it also came to the realisation of the crown that the ~~fines~~^{fines} imposed as punishment for a criminal offence could be a good source and generator of income to the treasury of the crown. ²⁰ These two rationales are still as present today as they were in the early history of prosecution both in England and in Kenya.

Where individuals want to prosecute, the law does not provide for any assistance to do it right. But normally, the individual can seek the advice of a magistrate

or lawyer or even public prosecutor. These people are likely to give him guidelines as to how to go about initiating the proceedings.

2: (C) PROBLEMS WITH THE LAW AND THE PRACTICE

Having discussed the law relating to private prosecution in Kenya, it is inevitable to discuss the problems of this law vis-a-vis the practice. It is in light of this sub-topic that the reader can appreciate what has limited private prosecution in Kenya despite the fact that the right of private prosecution exists as provided by the Constitution.

There has been a feeling that the right of private prosecution does not exist in Kenya and that Section 26 of the constitution is in conflict with Section 88 of the Criminal Procedure Code in as far as the right of private prosecution is concerned. This was what was held in the case of Nathan Kahara²¹ where the phrase 'any other person' was held to mean the Attorney General. Thus the learned judges of appeal vested the Attorney General with the monopoly right to institute

criminal proceedings. Thus the learned judges implied that our law was unclear on ~~to~~ the meaning of any other person. This decision has caused considerable concern among jurists and it is my submission that this interpretation of the law was/is manifestly erroneous as I shall demonstrate in this dissertation in a later chapter.

Where sanction of the Attorney-General is a precedent condition to the institution of a prosecution, as a matter of statutory requirement, this is aimed at scrutinising the charge and ensuring that only good and not defective charges appear in courts.

In granting or refusing to give his consent, the Attorney-General does not have to give reasons. This can operate negatively because the Attorney General can usurp the powers of the individuals. It is also not laid down under what circumstances consent will be refused. From experience, we find that the granting of consent takes unnecessarily long period of time. When the private citizen decides to initiate criminal proceedings, it is because the public have failed to act, so it becomes meaningless when he has to wait for

consent which he is not sure will be granted to him/her.

Where the Attorney General refuses the consent to prosecute, it appears that the private individual has no remedy. This is by virtue of Section 26(8) of the Constitution which states that in exercise of the powers conferred upon him (which include the power to give or refuse consent), the Attorney General shall not be subject to the direction or control of any person or authority, so that the courts would have nothing to question about such refusal of consent. It is hereby submitted that the Attorney General's power should be subject to at least direction if not control by the courts. This will become clear in our recommendations' section.

The entry of nolle prosequi is not a pardon for the accused who may still be charged for the same offence. The problem here is enshrined in Section 26(8) of the Constitution as stated above, that is to say that the Attorney General is not subject to the direction or control of any other person or authority.

The courts seem to have accepted this view that the power of the Attorney General is not subject to review.

In the case of R v Allen ²² Cockburn C.J expressed this view saying:

"It is undoubted power of the Attorney General as representative of the Crown in matters of criminal judicature to enter a nolle prosequi and thereby stay proceedings. No instance has been cited and therefore may be presumed that none can be found in which after a nolle prosequi has been entered by the Attorney General this court has taken upon itself to award fresh process or has allowed any further proceedings to be taken on the indictment . . . "

Where an individual can prove satisfactorily that the nolle prosequi is merely meant to negate the prosecution, at least, in theory the courts ought to quash this nolle prosequi. But in practice, this would be difficult since the court would state that the Attorney General is acting within his powers as provided by the law, so that in most cases, the court will not even enquire into the validity of the nolle prosequi. Usually, prosecution stops on the entry of a nolle prosequi, so that the aggrieved party may not even be allowed to challenge it. We are strongly against this position and hold that nolle prosequi should be subject to challenge by the party against whom it is entered.

The Attorney General can enter a nolle prosequi without

first hearing the parties concerned. In a civil case as the plaintiff, he can also enter a nolle prosequi. The nolle prosequi is a way of disposing of any technically imperfect proceedings. This was a way of exuding the citizens' right to initiate criminal proceedings. It was also based on the fact that any imperfect proceedings for extortion of money were being brought to the courts. A prosecution should not be oppressive to the accused person. The Attorney General interferes with criminal prosecutions as a matter of public policy. However, it is our submission that this right has been misused even in areas where the prosecutions are public. One cannot clearly say what kind of prosecutions will be stayed, the nolle prosequi has been used in very different ways and more particularly wrongly. The implication of this to private prosecutions is that such prosecutions may be terminated at any time before judgement is delivered.

The next problem is that of seeking permission from the magistrate trying the case as required by Section 88(1) of the Criminal Procedure Code. Where the matter is in the High Court, the usual procedure is still to obtain or seek leave to prosecute from a subordinate court

within whose jurisdiction that matter falls before proceeding with the prosecution in the High Court. Where this is not possible the High Court judges may be taken to fall within' the Magistrate trying the case' and permission may as well be sought from them.

The Criminal Procedure Code restricts the right of private prosecution by requiring the private prosecutor to obtain the permission of the magistrate trying the case. There are of course good policy reasons to require individuals who wish to commence private prosecutions to obtain such permission. The vital one is to scrutinise the charges in order to ensure that 'frivolous' and/or 'vexatious' suits are not brought before the court. Section 26 of the constitution does not provide for such permission. We humbly submit that the requirement of permission contained in the Criminal Procedure Code is of doubtful constitutional validity. Can a provision in an ordinary statute qualify a right granted by the fountain law i.e. the constitution in a manner not provided for nor contemplated by the fountain law? We submit that the requirement of permission should have been provided for in the constitution.

In deciding whether to grant permission or not, the

magistrate trying the case has to make an inquiry to find out whether or not a report has been made to the Attorney General or the police. The reason for this would appear to be further control of private prosecution and that private prosecutions are not the priority. There has to be a failure on the part of the public officials before the right is made use of.

The magistrate has a discretion here, but this discretion should be exercised ^{judiciously} judicially. He should show or indicate that he appreciated the discretion or that he made the decision in the proper exercise of his discretion. "There is no formal laid down rules" as to when the permission is to be granted or refused. The magistrate has the power to refuse or grant the permission where he deems fit. This subjects the granting or refusal of the permission to individual bias and possibly corruption. We submit that the granting or denial of such permission should not be left at the discretion of the courts but should be controlled by formal laid down rules. ~~judicially~~

With locus standi, we don't know whether the line of

interest has been very restricted while on the other occasions, it has been liberally interpreted. For instance, under English law it has been held that every responsible citizen has an interest in seeing the law is enforced.²⁴ This is sufficient interest. This is not the case in Kenya as observed by the Privy Council when it held that public rights can only be asserted by the Attorney General as representing the public.²⁵

The attitude of people towards the prosecution and enforcement of criminal law as part of the duties of the police and the department of Public Prosecutions has also limited the use of private prosecutions. This fact is supported by the Police Act ²⁶ Section 14 of the Act provides:

The police force shall be employed in Kenya for the maintenance of law and order, the preservation of peace and protection of life and property, the prevention and detection of crime, the apprehension of offenders and the enforcement of all laws and regulations with which it is charged".
[emphasised supplied]

The private citizens do not see it as part of their duties to initiate criminal prosecutions. Such an attitude has its origins in the colonial era when the law was imposed and the machinery for its enforcement was also created. The law was seen as an instrument of

oppression, the police were the major department used in prosecution and this attitude has not been changed. The police department consequently feel that by the citizen deciding to initiate proceedings, they are undermining their position. They are therefore not very helpful and do not give much assistance.

In practice a private citizen who wishes to initiate a criminal prosecution has to meet the costs of the proceedings. The citizen will also involve themselves in expenses of hiring legal services. This makes private prosecutions so expensive that very few people are able to afford them, since in Kenya the majority are the poor people.

The private citizen conducting a prosecution is at a disadvantage because he faces the problems of the law as discussed hereinabove as well as having to satisfy the court with all the mentioned requirements which are not required in an ordinary police prosecution. This makes the citizens exercise of his constitutional right difficult and for these reasons very few prosecutions are made.

Secondly , we have seen that private prosecutions are usually for offences which are really more personal than public, probably because the citizens have to have a locus standi . But it brings one to the conclusion that private prosecutions are really not playing a very important role in Kenya's criminal law.

FOOTNOTES - CHAPTER II

1. Cap.75, Section 34, Laws of Kenya.
2. Edwards: The Law Officers of the Crown, Sweet & Maxwell (1964) Pg.400.
3. Case No.7 of 1982 CMC at Nairobi (Unreported).
4. Cap.75, Laws of Kenya.
5. The right can be inferred from S.26(3)(b) and (c) of the Constitution and S.88(1) and S.89 of the Criminal Procedure Code, Cap.75, Laws of Kenya.
6. *Gouriet v Union of Post Office Workers* (1918) A.C. 435 at 498.
7. Cap.63 S.82 (2) provides that no person shall be prosecuted for the offence without the written consent of the Attorney General.
8. Cap.65, Laws of Kenya, S.12
9. *Abdulla Suleman & Others v R* (1953) 22 E.A.C.A. 404.
10. (1843) C & K 730.
11. (1960) E.A 644.
12. Section 88(3) Criminal Procedure Code.
13. (1935) 16 K.L.R.26
14. (1973) E.A. 486
15. *R. through Devji Kanji v Davendra Valji Hali* (1978) K.L.R 178, (C.A)
16. Foulkes D: Introduction to Administrative Law

London Butterworths 1978, 4th Edition, pg.187.

17. (1880) 14 Ch.459 at 465.
18. L.Denning in R.v.Pandington Valuation Officer Ex parte Peachery Property Corp. (1966) 1 Q B 380.
19. Constitution of Kenya, Section 26(3)(b).
20. Karlen, Dalmar, Angle: American Criminal Justice Clarendon Press Oxford 1967 pg.19.
21. Supra n.3
22. (1862) B & S.850 at 854.
23. Makecha's case: Daily Nation Nos.17th, 1983.
24. Lord Denning: The Discipline of the Law,pg.122
25. Gouriet's case, supra n.3 at pg.472
26. Cap.84, Laws of Kenya.

CHAPTER III

LEADING CASES ON PRIVATE PROSECUTION IN KENYA.

In this chapter , it is proposed to discuss two recent cases of a private prosecution in Kenya. The cases are intended to show how the courts have in practice interpreted the law relating to private prosecution. Both cases contributed greatly towards the position of private prosecution in Kenya's Criminal Law. These cases are the case of Richard Kimani and S.M Maina-v-Nathan Kahara¹ (The Nathan Kahara case) and the case of Jopley Constantine Ogieng-v-Republic² (Jopley's case). A brief comparison will thereafter be made between Kenya and England on private prosecution.

(I) THE NATHAN KAHARA CASE:

In this case, the accused was charged with seventeen counts of conspiracy to defraud contrary to section 317 of the penal code, in the alternative seventeen counts to commit a misdemeanour contrary to section 394 of the penal code. The charges were filed in court by way of private prosecution under section 88(1) of the criminal procedure code. The accused was the mayor of Nairobi and the complainants were ~~the~~ city councillors. The Conspiracies alleged concerned the allocation of certain plots in the city which was alleged to have been done

fraudulently with the intention to defraud the public. The proceedings in the Chief Magistrate's court were done by the advocate for the complainants who applied for leave to prosecute as required by the law. The leave was granted. The accused pleaded not guilty to all the counts but there were some preliminary questions to be settled.

The accused's counsel argued that the complainants had no Locis Standi in the matter, that no complaint was lodged with the Attorney-General or the police before the application to conduct a private prosecution was made. The counsel for the accused also argued that the Attorney-General consent to prosecute was essential or at least his refusal to prosecute must precede the setting in motion the machinery of private prosecution.

The complainants countered these arguments by relying on Section 88(1) of the criminal procedure code which gives the citizens the right to bring to court a private prosecution. They also tried to establish that under the common law and Kenyan law their right was established and recognised without showing any personal injury. ^{L.} Locis Standi was not necessary and if was then

the councillor and members of public had the interest in the matter which was of public nature and which they were duty bound to protect.

The then Chief Magistrate, Mr. A Rauf gave his ruling and dismissed all the charges against the accused. The reason he gave was that the Attorney-General had the ultimate and undisputed control over the prosecutions. The Chief Magistrate agreed with Mr. Chunga who appeared as amicus curiae. He held that a private prosecution will not be allowed to assume the role of the Attorney-General whose duty is to initiate prosecutions. Here we see that the state counsel was wrong because the private citizen when he initiates a prosecution does not assume the responsibilities of the Attorney-General. He is merely helping in the administration of justice in ensuring that law breakers are brought to light.

The Chief Magistrate erred in holding that before a citizen can initiate a private prosecution he needs the consent of the Attorney-General. This is because the kind of offences which the statute require consent did not extend to cover those which require consent or

sanction of the Attorney-General are offences related to or against the state and serious offences as murder or incest.

The Complainants after this decision asked the High Court to exercise its powers of revision, to revise and or quash the ruling and refer the case to the Magistrate with orders to hear the case. The complainants appealed but not against the ruling because in section 348(A) of the Criminal Procedure Code, only the Attorney-General may appeal from an order dismissing a charge. The Attorney-General was invited to appear as amicus curiae since a number of important questions or points of law arose.

The main ground of appeal was that the learned Chief Magistrate erred in law in holding expressly or impliedly that the Attorney-General's consent to prosecute or his refusal to prosecute must precede the setting in motion of the machinery of private prosecution or at least the Attorney-General and or the police must always be involved in the process.

Revision of the High Court.

The High Court ruled that the powers of the Attorney-

General are laid down in the constitution and that before he can control a private prosecution, he must take it over. The Attorney-General has the duty to prosecute in crimes against the State and in the present case the alleged fraud is against the public.

The High Court ruled that the private citizen has a right to initiate criminal proceedings where necessary. The court quoted an English decision where Lord Wilberforce said:

"The individual in such situations who wishes to see the law enforced has a remedy of his own, he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and if he thinks fit entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of the authority".³

The court noted that the situation in England is very similar to ours (Kenyan) and the right of private prosecution is guaranteed to every citizen.

The learned Chief Magistrate erred in complying with the request of Mr. Chunga to dismiss the charges and

discharge the accused on the ground that the Attorney General has undisputed control over all prosecutions without considering how such control is exercised. This has already been discussed in chapter two.

Mr. Chunga argued that permission to prosecute may only be granted by a magistrate hearing the trial. The High Court held that in the context of Section 88, a magistrate or the court trying the case starts by taking the plea, when the accused personally pleads to the charge. It is at this stage that an application may be made for permission to prosecute. In the present case the permission seems to have been granted before the trial because the accused person was not before the court. The Senior Resident Magistrate therefore had no jurisdiction to grant or refuse permission.

When granting permission to conduct a private prosecution, the magistrate has a discretion which should be exercised judicially. The Senior Resident Magistrate when granting the permission did not show or indicate that he appreciated the discretion or that he made the decision in the proper exercise of his discretion. Here the court was saying that when a magistrate gives a go-ahead to a private prosecution he has at least to say

that he is doing it in his discretion. The High Court did not expound on whether or not it wanted reasons for the granting or refusal of the discretion.

The High Court also held that the question of locus standi was important, how the complainant involved did suffer any personal injury or damage. In our present case, the High Court did not say whether the complainants had an interest or not but we can infer from the decision that the complainants did actually have a locus standi; that being councillors, they would suffer damage on their reputation if plots were being allocated fraudulently. It was therefore their duty to see the affairs of the council were managed fairly.

The High Court should have settled the issue of locus standi because we do not know whether the issue of interest should be restricted or liberally interpreted as it has been on several occasions.

This case is an important case because it has settled finally that citizens have a right to initiate criminal prosecutions although this was not in issue because the court had settled this question earlier and allowed

citizens to conduct private prosecutions. 4

But the court settled a few questions on the principles to be applied when an application to conduct a prosecution was made. The case did justice in reviewing the decision of the chief magistrate.

II. JOPLEY'S CASE

Mr. Jopley Constantine Oyieng (Mr. Oyieng) lost his job in the civil service in circumstances which he considered to constitute a criminal offence committed by his work-mates with the design of rendering him jobless.

In 1980 and 1987 Mr. Oyieng unsuccessfully sought the permission of the chief magistrate to institute private prosecution under Section 88(1) of the Criminal Procedure Code, whereupon Mr. Oyieng filed a criminal application in the the High Court (Ararong) grounded on Section 67 and 84 of the Constitution. The High Court dismissed the application on a preliminary ground, that the application was incompetent.

Mr. Oyieng appealed to the Court of Appeal (Nyarangi, Platt, Apaloo JJ.A). In dismissing the appeal, the Court of Appeal said inter alia:

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"In the instant case, the appellant was pursuing a right to file a private prosecution. Only the Attorney-General has the right under Section 26 of the Constitution to institute criminal proceedings. No similar right is extended to a private individual and it is obvious that Section 88(1) of the Criminal Procedure Code does not override Section 26 of the Constitution. Section 26(3) contemplates prosecutions by authorised parties in respect of which the Attorney General may act as provided in the subsection".

Thus the learned judges of Appeal vested the Attorney General with the monopoly right to institute criminal proceedings. This decision has caused considerable concern amongst jurists and lovers of liberty - the interpretation of the law by the Court of Appeal is, with the greatest respect manifestly erroneous as we shall demonstrate in this discussion.

In so far as it is material Section 26 of the Constitution of Kenya provides for the Attorney-General powers in relation to criminal proceedings. In particular he may continue or discontinue proceedings instituted by 'any other persons or authority'. Section 88 of the Criminal Procedure Code, the section implementing this constitutional right of private prosecution conferred by the Constitution emphasises on the phrase 'any person' in relation to proceedings.

We have stated the above sections because the Court of Appeal interpreted the sections in the Jopley's case to deny Kenyans the right of commencing criminal proceedings in our courts. The court also held that Section 26 of the Kenya Constitution and Section 88 of the C.P.C. were in conflict.

Taking a miniatial examination of each of the words used in Section 26 of the Kenya Constitution, there is nothing to support the proposition propounded by the Court of Appeal. On the contrary, the phraseology contemplates and provides for the right of individuals to prosecute. What does the phrase 'take over criminal proceedings instituted by any other person under section 26(3)(6) mean? What does the phrase 'discontinue criminal proceedings instituted by any other person mean? Take over or discontinue from whom? There is no precise provision in the Kenya Constitution or other statutes which defines the words 'any other person' to mean the Attorney General and the Court of Appeal did not cite any such provision or a single decision to back up its proposition.

We submit with respect, that the Court of Appeal erred

in holding that there was a conflict between Section 26 of the Kenya Constitution and Section 88 of the Criminal Procedure Code in as far as the right of private prosecution is concerned. Under the Kenya constitution, criminal proceedings can be instituted by any of the following namely the Attorney General; other authorities such as immigration officials, labour officers etc., and any other person, both natural and artificial.

Admittedly, by the exercise of the residuary power, the Attorney General can of course prevent the right of private prosecution being effectively exercised in any particular case. That notwithstanding, we submit that the only gloss over the right to institute private prosecution, is the ultimate control vested in the Attorney General. This position, that the realm of criminal prosecution is not the exclusive presence of the Attorney General was clearly spelt out in the

Gouriet case⁵ by Lord Viscount Dilhorne at page 490 D when he said:

"There are a number of statutory offences for the prosecution of which the consent of the Attorney General or of the Director of Public Prosecution is required but apart from those offences any one can if he wishes start a prosecution without obtaining any one's consent. The enforcement of the Criminal law does not depend on the Attorney-General alone".
(emphasis supplied)

Using the literal rule in Statutory construction we submit, with utmost respect to the learned judges, that the court of appeal misapprehended the law. Subject to our comments above the criminal procedure code is not in conflict with the Kenyan Constitution on the issue of whether or not a private individual can commence criminal proceedings in our courts. Indeed the legislature took the pain to distinguish between a private and a public prosecutor. The legislature thus stated:

"Public prosecutor" means a person prosecuting for or on behalf of the republic or for or on behalf of a public authority. "Private prosecutor" means a prosecutor other than a "public prosecutor".⁶

Before the decision of the Court of Appeal in the Jop-ley's case, it had been taken as an established principle of the law that a private individual can enforce criminal law in our courts. The decision under review threw out alot of uncertainty on this principle. Fifty six years ago, the Supreme Court of the Colony Protectorate of Kenya in the case of Paul David Nunes v R ⁷ held that there was not only the right of private prosecution in Kenya, but that permission to commence private prosecution proceedings may be implied although permission was not formally asked for or granted, if a magis-

trate allows the trial to proceed. This position was restated in the case of Republic through Devji Kanji v Devendra Valji Halai⁸. The court said:

"We are.... satisfied that a private prosecutor as a party to proceedings in the High Court has a right of appeal to this court subject to the residuary control by the Attorney-General over every criminal case under the provisions of section 82 of the criminal procedure code."

The courts have often restated that the right of private prosecution is available in Kenya. In the case of Riddlesbarger-v-Robson⁹ the Court of Appeal for Eastern Africa stated this right. Other decisions emphasizing the same right are those of Mohanlal Karamshi Shar-v- Ambalal Chotobai Patel and Five others¹⁰ and Kyagonga-v- Uganda¹¹

Of course the above decisions preceded in point of time the promulgation of the 1963 Kenya Constitution. A mischievous argument could therefore be put forth, that with the commencement of the Kenyan Constitution, the right of private prosecution was annulled. However if the founding fathers of this nation intended to take away the precious right of commencing private prosecu-

tion they would have done that by use of plain and express words in the Kenyan Constitution. None are found in the Kenyan Constitution. Reasoning analagous to this, was used by the High Court (Simpson C.J., Todd, J. Gachuhi J.) sitting as a Constitutional court in the case of Zai Ernest Mwangombe other-v- R¹². We submit that reasoning is sound and should be applied to counter any suggestion that the right to institute private prosecution belongs to a bye gone era - the colonial era.

Reading the Jopley decision, one notes that none of the above cases was cited to the Court of Appeal. Perhaps if the cases had been cited to the court, it might have reached a different decision. We may never know whether the omission to cite the above decision or any other indicia of the level of advocay, or the tragic consequences of practicing law in jurisdiction that has abandoned law reporting. What is clear, however, is that the Jopley decision was reached per incuriam and in total disregard of the prevailing authorities. If the Court of Appeal intended to overturn all the decision herein cited, nothing would have been easier than to say so.



The Court of Appeal decision in the Jopley's case is deplorable. It threatens to cut a class of men and women who are fully aware that the prosecuting authorities will not institute criminal proceedings for whatever reason, may deliberately and with impunity transgress the criminal law even in the face of responsible citizens who have interest in the due compliance with law but are now rendered impotent by the decision of Court of Appeal. It is now a blow to the rule of law. It is a retrograde step in an age when the people are clamouring for greater freedoms and liberties.

The sad affair is that the decision is from the highest court in the land. It binds all the courts in the lower judicial hierarchy. There are good reasons for the Court of Appeal itself to depart from the decision especially on the basis of the doctrine of precedent. We submit with deference, the courts should never follow this decision. It is bad in law. It is arguable that the Court of Appeal had no jurisdiction in the first place to interpret Section 26 of the constitution. Section 67 of the Kenyan Constitution vests the Court of Appeal with the jurisdiction of interpreting the Constitution. Lower Courts need not feel bound by the decision

in Jopley's case.

PRIVATE PROSECUTION IN KENYA AND ENGLAND:

A COMPARATIVE STUDY

The essential functions of the prosecutions are the same in England and Kenya. In both countries prosecutors have three major tasks to perform ; first, they must make a decision on whether or not to bring criminal charges against an alleged offender ; second, they must put the accusation into proper form and have it before the proper judicial authorities ; and third, they must present to the court evidence tending to establish the guilt of the accused.

In both countries the prosecution is theoretically on an equal footing with the defence, with each side presenting its evidence to the court and the court acting as an impartial umpire in reaching a decision based solely on the evidence presented to it by the parties. These systems are markedly different from those in continental Europe, where the judges are expected to investigate a complaint and find the facts for themselves.

In both countries, most citizens are satisfied to let the police or police solicitors initiate criminal proceedings so that private prosecution is negligible in volume. There can be no doubt that the proportion of all prosecutions started by police are far more numerous than any other kind. The few strictly private prosecutions are likely to be undertaken by large commercial firms- Banks, Insurance Companies and the like for offences that interfere with their business. There is also a small class of minor offences which are normally privately prosecuted, the most notable example being assault.

Despite these similarities, Kenyan and English methods of prosecution, and more particularly private prosecutions are profoundly different, which different~~ke~~ occasions a better system of private prosecution in England as compared to Kenya.

Firstly, in England, even when the prosecutor is a policeman, as he is in most cases, he prosecutes by virtue of his right ~~as~~ a private citizen and not by virtue of his office. This is seen in the way cases

tried summarily in the lower courts are named. The title of a case reads as if it were a private suit between two parties. The complainant (who is probably a police officer) and the defendant. This is different in Kenya so that when the prosecutor is a policeman, he prosecutes by virtue of his office and not by virtue of his right as a private citizen, which makes the public to shy away from private prosecutions.

English police are theoretically in the same position as private complainants. If they decide that an offender shall be prosecuted, they prefer charges against him in the name of one of their officers. That officer then goes to court to conduct the case for the prosecution. The alternative is for the police, like the private complainants to retain a solicitor or barrister to present the case in court. This is becoming more and more common especially with the extension of free legal aid, the defendant is likely to have a lawyer in his side and the police likely to be well represented.

All this is contrary to the Kenyan situation especially when one considers the fact that free legal aid is rare if at all available. This makes legal argumentation

difficult for the private prosecutor.

Both in Kenya and England, the Attorney-General has potentially a considerable amount of control over criminal cases. There are a number of offences which cannot be prosecuted without his permission, including cases in which the government is itself interested for example violations of the Official Secrets Act ¹³ and also non-governmental offences such as incest, where the right of private prosecution may be abused. The Attorney General also has the power to stop any criminal action by entry of a nolle prosequi - an order directing that the case be terminated.

In England, the Attorney-General's power to enter a nolle prosequi is in practice rarely used being employed for the most part only when some technical reason makes it impossible to dispose of a case in any other way. This is not the situation in Kenya where the Attorney General's power to enter nolle prosequi has been arbitrary used to terminate cases.

This section has gone far to show how Kenya's private prosecution law should be compared with that of England. The relevance of this comparison in this chapter

is that Kenya should adopt the prominent features of the law relating to private prosecution in England . Some problems, as those experienced in either Nathan Kahara's case or Jopley's case may not be encountered.

FOOTNOTES = CHAPTER III

1. Private prosecution No.7 of 1982 and Revision No.11 of 1983.
2. Criminal Appeal No.45 of 198 reported in The Nairobi Law Monthly No.28 December 1990.
3. Gouriet v Union of Post Office Worker (1918) A.C.435 at 477.
4. R . Exparte Chamberlaint Harvey v Confact (1957) E.A.896.
5. (1918) A.C. 435 (supra No.3).
6. Section 171(4) of the Criminal Procedure Code.
7. (1935) 16 KLR 126.
8. (1978) KLR 178
9. (1959) EALR 841 at 845, the Court of Appeal for Eastern Africa stated:

 "But special provision is made in Section 88 to enable the crown to act through a complainant in cases in which a public prosecutor does not wish to act . . ." [emphasis supplied]
10. (1954) 21 EACA 486
11. (1973) EALR
12. (1990) LWR 60
13. Cap. 187 Laws of Kenya - Part II of the Act deals with the protection of the safety and interests of the public.

CHAPTER - IV

TOWARDS A BETTER PRIVATE PROSECUTION SYSTEM IN KENYA

4: [A] CONCLUSION

The main concern of this dissertation has been to evaluate private prosecution law and practice in Kenya.

In chapter one, we dealt with the prosecution process generally. Prosecution is defined as the process of bringing a criminal charge against a person in a court of law. This is done by a person called the prosecutor or a prosecuting attorney. He is supposed to be an impartial umpire of the court.

Prosecutions were seen to be of two types, public and private prosecutions. The former entails all cases that go for trial in the name of the state while the latter entails all cases where prosecutions are initiated by private citizens. The prosecution process is seen to start from the time a suspect is arrested to the time of judgement whether conviction or acquittal.

It was also observed that the prosecution system practised in Kenya emanated from England. This made it

necessary to trace the evolution and development of English prosecution law, so as to have a greater understanding of the same in relation to Kenya. Kenya was declared a British Protectorate by the 1895 East African Order-in-Council after which Kenya adopted the English Prosecution System. The last section of the chapter examined the role of prosecution in the administration of justice, the more vital one being that of aiding the court to arrive at a fair and just decision. It does this principally by the adjudication of the criminal justice system.

Chapter two was basically concerned with the law relating to private prosecution in Kenya and the problems with this law vis-a-vis the practice. A brief mention was made on the need for private prosecution in Kenya where it was seen that private prosecution is a right which every Kenyan possesses, should the prosecuting authorities grow cold feet and fail to institute criminal proceedings for whatever reason.

We studied in detail the law relating to private prosecution by first establishing that the right of private prosecution is guaranteed by the constitution and

implied by the Criminal Procedure Code . We saw the requirements precedent to the institution of private prosecutions which include; consent of the Attorney General (in some cases); permission of the magistrate trying the case and locus standi. We saw the problems which limit private prosecutions which include; the misconceived feeling that the right of private prosecution does not exist in Kenya and that Section 26 of the constitution is in conflict with Section 88(1) of the Criminal Procedure Code; the granting or refusal of the Attorney General's consent to prosecute, the granting or refusal of permission by the magistrate trying the case, the problem of locus standi; the Attorney General's power to enter nolle prosequi; the cost of initiating private prosecutions and the societal attitudes generally.

In chapter three, a detailed examination was made on case law relating to private prosecution in Kenya. The two leading cases namely Kihara's case and Jopley's case were examined. These cases brought into light how Kenyan courts regard the right of private prosecution and more particularly that the courts are unwilling to recognise the right. The cases further exposes the correct interpretation of the law relating

to private prosecution in Kenya. Thereafter a comparative study was made between Kenya's private prosecution system and that of England. It was observed that English private prosecution law is far better and efficient vis-a-vis that of Kenya, as a consequence of which recommendation was made for Kenyan courts to adopt the private prosecution system of England.

There is indeed alot of recommendations towards a better private prosecution system in Kenya. This is the case for reform and will be dealt with hereinbelow.

There is a discernible trend in Kenya towards centralisation of all prosecutions in the Attorney General (i.e. the state). It may be stated that the distinction between public and private prosecutions have been increasingly loosing meaning owing to the demise of the latter prosecutions in the face of inter alia, the power of the state to enter a nolle prosequi.

The writer's contention is that this right only exists in theory and not in practice. Eminent English jurists have also expressed the same view. K.W.Lindstone referring to what their Lordships said in Gouriet's case

said:

"Such is th theory, the reality is different. The right of private prosecution is in fact exercised only by those who have the skill and resources for investigation . . . The truly private individual seldom has the necessary skills and resources to institute such a prosecution. His freedom to do so is very limited".

It is hereby submitted that the executive does not in fact recognise the existence of the right of private prosecution. In Gouriet's case, the learned State Counsel thus submitted that the private prosecutor will not be allowed to assume the responsibility conferred on the Attorney General. This trend is what the author has all through this work been arguing to reverse.

4. (B) THE CASE FOR REFORM

The foregoing chapters have led the present writer to come to the inevitable conclusion that private prosecutions have not played an important role in Kenya's criminal law, they have not been a corrective measure in the lands of the citizens, but have been the privelege of a few citizens who can afford to institute them. We would therefore recommend that a few changes be made to make private prosecutions more effective.

Firstly, the feeling that the right of private prosecution does not exist in Kenya and that Section 26 of the Constitution is in conflict with section 88 of the Criminal Prosecure Code in as far as the right of private prosecution is concerned should never arise. The phraseology of Section 26 of the constitution contemplates and provides for the right of individuals to prosecute. We recommend that Kenyan courts should recognise under the constitution that criminal proceedings can be instituted by any of the following, that is to say the Attorney General, other authorities such as labour officers etc and any other person both natural and artificial .

The second issue relates to the requirement of consent of the A.G. as precedent condition to the institution of a prosecution whether public or private. The original aim of this requirement was to scrutinise the charge(s) and ensure that only good and not defective charges appear in court. We humbly submit that this original aim is too insignificant vis-a-vis its consequences, most remarkedly being the denial of such consent. We recommend that the law be changed to require the Attorney General to give reasons for granting or refusing

the consent. This would ensure that justice is occasioned because the affected party will be in a position to challenge such reasons. This would also erode the possibility of usurping the powers of individuals. The law should specifically lay down circumstances under which consent may be refused. It should also specify that this consent be communicated within reasonable time and preferably set a maximum period within which the consent should be communicated.

The practice in Kenyan courts has shown that courts will not question the decision of the Attorney General if he refuses to grant his consent. This may be partly because the courts are part of the government machinery.² We recommend that courts do question the Attorney General's decision in this respect. This should even be strongly observed in Kenya where there is allegedly separation of powers.

The Attorney General as the director of public prosecutions has extremely wide powers in disposing cases, especially his power of nolle prosequi which is not subject to review of any other organ. The

Attorney General may invoke his powers of nolle prosequi to veto private prosecutions. In the case of R(through John Harun v Wanguhu Ng'ang'a),³ no sooner did he take over the prosecution than he entered a nolle prosequi to dispose of what was in my view a perfect private prosecution. Thus whereas nolle prosequi secures advantages for the state in public prosecutions, it fatally vitiates the right to private prosecution. The effect of the retention and exercise by the state of the overriding power of the nolle prosequi over private prosecutions has been to drastically reduce the number of private prosecutions.

There is therefore need that the law regarding nolle prosequi be altered by imposing the duty of accountability on the state in the conduct of prosecutions, or at least to give sense, logic and ethic to the power of nolle prosequi. Writing of England, Edwards has recommended control by legislation, thus:

"Legislation will be required, if it were thought necessary to resolve the outstanding illogicality still attendant to the entry of nolle prosequi in criminal cases".⁴

It was suggested in particular in Kenya that reasons ought to be given whenever a nolle prosequi is entered.⁵ Mr. Oginga Odinga stated:

"My request is that the Attorney General should ensure that before applying (for) any entry of nolle prosequi, there should be an appropriate explanation to the public so that they can understand why such application should be made. This will also help to justify the application of nolle prosequi."6

For the purpose of terminating proceedings, we submit that nolle prosequi is a superfluous power, since there are other equally effective legal mechanisms for withdrawal of proceedings by prosecutors and by the Attorney General. A precise example is Section 87 of C.P.C. which accords any public prosecutor the power to withdraw any criminal proceedings, with the consent of the court; or alternatively upon the instructions of the Attorney-General. We recommend that all prosecutions in subordinate courts ought to be terminated by or under Section 87 (C.P.C.) and not by nolle prosequi. This is more so especially that practice has shown that prosecutors have been known to request the Attorney General to enter a nolle prosequi instead of otherwise withstanding the proceedings under the said section, simply because they wish to avoid an acquittal of the accused person.

The reason upon which the Attorney General was granted such overwhelming powers over private prosecution was that individuals, especially those of political or economic

ability should not be allowed to manipulate and abuse the prosecution process by preferring 'frivolous' or 'vexatious' proceedings against the lesser fortunate members of the public. Yet in Kenya, every private prosecutor has to show that he has locus standi and a sufficient interest in the matter upon which he wishes to prosecute before the court allows him to do do. This makes any subsequent assertion that the same proceedings are 'frivolous' or 'vexatious' extremely ridiculous. Moreover, an accused who suffers injury from a 'frivolous' or 'vexatious' private prosecution can always bring an action in the tort of malicious prosecution against the private prosecutor. There are in my view enough safeguards against abuse of process in the field of private prosecutions which make any interference by the state to control such prosecutions fundamentally unjustifiable.

Section 26(8) of the Constitution provides that in the exercise of the functions vested in the Attorney General by sub-section (3) of the same section (relates to Attorney General's powers to institute and undertake criminal proceedings; to take over and continue any such proceedings; and to discontinue at any stage

before judgement is delivered any such criminal proceedings) the Attorney General shall not be subject to the direction or control of any other person or authority.

One of the state's justification for taking it upon itself to prosecute is that it has the necessary skill and resources. It is also true that even where a private individual has those necessary skills and resources his efforts have been frustrated by the state. The Kahara case will suffice as an illustration. We recommend that the Attorney General should be subject to the direction if not control of the courts. This is because the courts are well acquitted with the case and are therefore in a better position to assess about its prosecution and can advise accordingly whether the Attorney General's taking over, or continuing or discontinuing of the case is necessary.

The requirements of initiating a private prosecution require that a citizen should have a locus standi, an interest in the matter. The line of interest has been very restricted in some cases, while in others it has been liberally interpreted. The situation in Kenya seems to be that adopted by the privy council in the case of Gouriet v Union of Post Office Workers ⁷

that public rights can only be asserted by the Attorney General as representing the public. This has led to the right being used for minor cases such as assault and not very serious offences which really affect the well being or security of the public generally. This is because it is not spelled out or written down as to what constitutes a sufficient interest in a case. We recommend that this interest be the same as that under the English law where it is said that every responsible citizen has an interest in seeing the law is enforced.⁸ This should be considered a sufficient interest.

The next recommendation relates to the requirement of the permission of the magistrate trying the case. This is required by Section 88(1) of the Criminal Procedure Code. The Constitution doesn't require such permission which casts doubt on the constitutional validity of this requirement. To this extent we recommend that Section 88(1) of the Criminal Procedure Code be amended accordingly to avoid conflict with the constitution. Furthermore, there are no laid down rules as to when the permission is to be granted or refused. This is wrong because it leaves private prosecution at the discretion of the courts. If this is to be the case, as it seems to be the situation currently

prevailing then this discretion must not only be exercised judicially but must also be controlled. We recommend that this discretion be exercised in accordance with strict rules, the rules of reason and justice and according to law. In relation to this point, Halsbury L.J. once stated:

"Discretion means when it is said that something is to be done within the discretion of the authority; that something to be done within the rules of reason and justice, and not according to private opinion, according to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular".

Though this decision is not binding on us, it is of strong persuasive value. Alternatively if this permission is not to be left at the discretion of the courts, we recommend that the law should specify some rules upon which it may be granted or refused.

We strongly recommend that the magistrate's permission be implied from the conduct of the parties. In Kyayonga v Uganda¹⁰ the High Court of Uganda held that even though no formal leave of court for the prosecution was recorded, by allowing the complainant to lead evidence must mean that such leave was given to him. It is our submission

that this should always be the case, that permission to institute a proceeding may be drawn from the parties' conduct. If no objection is raised to the absence of formal permission, until after the close of the prosecution case, such permission should be inferred from the fact that the trial has been allowed to proceed so far.

Before granting the permission to institute private prosecution, the trying magistrate is required to make inquiry to the Attorney-General or the police. This is aimed at making sure that there has been a failure on the part of the public officials to prosecute before the right of private prosecution can be made use of. We recommend that the right of private prosecution in such cases, should be exercisable notwithstanding that there has been a failure to prosecute on the part of public officials or not. The right should not be subject to this very unnecessary qualification.

The private citizen who wishes to initiate a criminal prosecution has to meet the costs of the proceedings. The citizen will also involve himself in expenses of hiring legal services. This makes private prosecutions so

expensive that very few people are able to afford them. The expense of bringing a private prosecution is too much for the average citizen. One writer has remarked that:

"For many centuries, the main responsibility rested with the private citizen whose sense of public duty must have been sadly dampened by the realisation that the costs of bringing a criminal to justice had to be met out of his pocket".¹¹

And the British Commissioners of the criminal law in their 8th report published in 1845 concluded that:

"The existing law . . . is by no means so effectual as it ought to be, the duty of prosecution is usually irksome, inconvenient and burdensome, the injured party would often rather forgo the prosecution than incur expenses of time, labour and money . . ." ¹²

Even if the private prosecutor successfully prosecutes he may not recover all his costs. Another very detrimental stand as regarding the costs which the court adopted in R Ex.parte C.H.Brain v Confait ¹³, is that the private prosecutor be called upon to pay the crown (state) the costs of appeal where the accused is acquitted. The Court of Appeal noticed this mischief and held that the trial court had no power to order a private prosecutor

to pay the state such cost. This would otherwise have been a dangerous stand, thanks to the Court of Appeal.

Regarding the cost of private prosecution, we recommend that a fund be established by the government to meet these costs. All expenses likely to be met in private prosecution should be paid from this fund, which would go along way to encourage private prosecutions. We do not think that this will occasion too many private prosecutions so that some do amount to 'frivolous' and malicious prosecutions because of the various safeguards we discussed earlier. Furthermore the availability of such funds will ensure that the right of private prosecution is not left as a preserve of the wealthy individuals since everybody now will be able to afford the cost.

The attitude of the people towards the prosecution and enforcement of law has also played an important role in limiting the use of the right of private prosecution as observed earlier. This attitude is twofold on one side to the citizen and on the other to the police and other public prosecutors generally. The citizens feel and regard the enforcement of criminal law as part of

the duties of the police and the department of public prosecution. They feel that they have nothing to do with prosecution. The police and other public prosecutors generally feel that by the citizen deciding to initiate proceedings, they are undermining their position because they regard this as their reserved duty to which no other person is entitled.

We recommend that this attitude should change for effective private prosecution. The judiciary should educate the masses on the right of private prosecution, that it can also participate in the prosecution and consequent enforcement of law and order. The police and other public prosecutors generally should be informed of the need to change their attitudes, that assistance from private prosecution would aid in effecting criminal law. Only after this attitudinal change should there be expected increased private prosecutions.

The author is not arguing that a system of prosecution by the private individuals is enough in ensuring that justice is done. This is due to the kind of society which we have in Kenya today, a society where public prosecutions alone may occasion injustice and a society whereby private prosecutions would be inadequate

to ensure maximum enforcement of criminal law. So the dual system consisting of both public and private prosecution systems which we have in Kenya is good and highly recommended. But to ensure proper and effective functioning of this actual system and in particular with relation to private prosecutions the recommendations discussed hereinabove should be effected.

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9. Halsbury L.J. in Sharper v Wakefield (1891) A.C. 173
10. (1973) E.A. 486
11. Supra N.4 pg. 384
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13. (1957) E.A. 296.

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