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KENYA

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A C K N O W L E D G E M E N T S

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CONTENTS

A B B R E V I A T I O N S

C.P.C.	.. .. ..	Criminal Procedure Code
E.A.	.. ..	East African Law Reports
Cr. App.	.. ..	Criminal Appeals
A.C.	.. ..	Appeal Cases
U.S.A.	.. ..	United States of America

TABLE OF CASES

TABLE OF STATUTES AND RELATED DOCUMENTS Page

NEWSPAPERS

1. Daily Nation

2. East African Standard

3. Weekly Review

INTRODUCTION

Certain issues have to be considered if the criminal law is to be enforced in a humane and sensible way. One of such issues is the system of our prosecution and its procedure. It is my feeling that little has been done to have a critical review of our prosecution system and how it is conducted especially in the lower courts. I have therefore decided to look at the various aspects of our prosecution system and how it is conducted in the lower courts. I have been inspired to write on this subject by the experience I got about this subject during my fourth-term programme.

It is either that our police officers and the police prosecutors are ignorant of the law or they don't take their work seriously or both. It is very likely that they are both ignorant of the law and at the same time don't bother to check their facts. After a suspect is arrested and taken to a police station, a charge sheet is drawn according to the provision of the law against which the offence committed do fall in. The charge can be made by an Inspector and above ranks, despite the fact that the charges are supposed to be drawn by high ranking officers like the inspector and above, the way some of these charges are prepared is quite deplorable. It is not uncommon to find a case in court where an accused is charged with the wrong provision of the law which is then contrary to the offence he has committed, and the end result of this is an acquital of a guilty person. It is the duty of the prosecutor to ammend or even change a charge which he thinks is wrong, but rarely do they do this due to inefficiency.

It is in court that a prosecutor shows his true worth. Because some Magistrates commence the trial with a feeling of antipathy towards the accused, it is very easy for the prosecutor to influence them still further against the accused. Anyone who has sat in a Magistrate's court knows of the innumerable ways in which prejudicial information can be conveyed to the Magistrates in a manner unacceptable to a qualified bench. A prosecutor who uses these tactics will certainly be successful, but he will soon acquire the undesirable reputation of being o

.../ 2

Persecutor. ~~prosecutor.~~ Most of our police prosecutors see their success in the number of convictions they attain in one day, and therefore mostly fall victims of the above tactics. The ideal prosecutor is the one who finds or regards himself as part of the court assisting the bench to learn sufficiently of the fact, to enable it to arrive at a judicial decision whatever that decision may be. Rarely do our police prosecutors do this.

It is the duty of the prosecution to be prepared with its case at the date of the hearing. It should be prepared to take care of the exhibits to be produced in court; attendances of the witnesses of the prosecution side and even those who may be of use to the defence; and finally it should know where and at what time they will be at the time of proceedings. This is another area where our prosecution has shown a lot of inefficiency It is rare if it is done to find the prosecution calling witnesses who will be favourable to the defence. Moreover the police do not also bother much with their witnesses. I say this simply because it is not uncommon to see a prosecutor asking for an adjourment because one or more of his witnesses did not turn up for the proceedings. It is true that sometimes it is ~~heard~~ hard to procure a witness to court, but in most cases you find that the prosecution had not even bothered to summon the witnesses to court or the witnesses have not been informed of the date and hour of trial. Such adjourments do a lot of injustice to the accused especially where he is in custody. Also justice delayed is justice denied.

These among many other deficiencies in our prosecution system, have inspired me to write about this subject with an aim of pointing them out and at the same time attempt to put some solutions forward which can rectify the situation.

In order to give a clear account of what I intend to write about, I have divided my dissertation into 3 chapters.

The first chapter will deal with the 'Prosecution Process' where I will discuss how prosecution is carried out from the time

.../3

a suspect is arrested to the time of judgement or acquital whichever results.

The second chapter will deal with the 'Decision to Prosecute' where I will discuss how those vested with the power to exercise a discretion whether to prosecute or not do exercise it. I will also discuss as to what crimes are prosecuted and which are not and what criteria do the police follow if any when deciding to prosecute same of the cases and leave others unprosecuted.

Finally, the third chapter will look at the effectiveness of our prosecution system; its shortcomings and then how it can be reformed if necessary. This chapter will carry a critical analysis of our prosecution system.

CHAPTER ONE - PROSECUTION PROCESS

HISTORICAL DEVELOPMENT OF THE PROSECUTION SYSTEM

The Kenyan prosecution system originates from England like any other department in our Legal system. To be appreciated fully how this system came into Kenya, I will first give a brief account of its historical development in England and then in Kenya.

There has never been in England any doctrine of the seperation of powers. The Crown is the fountain of Justice and the origin of all justice is the will of the executive that justice be done.

The crown first concerned itself with crime partly in order that the King's place might be maintained throughout the realm and partly because the commission of crime gave the crown opportunitues for perquisetes in the shape of fines. The justice of the King's Bench were the chief servants whom the crown appointed for this purpose. The coroner was the officer of the King appointed to investigate death, an incident which deserved particular attention because it was an especial source of profit. In discharging their tasks, judge and coroner used the same instruments - the inquest or enquiry made from people in the neighbourhood who must be expected to know the truth and who were put under oath to disclose it. These men formed the jury - the Coroner's jury or, before the judge, the grand jury of presentment. The one whom they 'presented' was the accused, and what they charged against him was embodied in a document: in the case of the grand jury called the "indictment," and in the case of the coroners jury called the "inquisition." On the indictment or the inquisition the accused would be arraigned and tried.

The first transformation came when juries became official bodies. Having started as men who knew all the facts and were bound to tell the crown what they knew, they became men who were supposed to know none of the facts and were required to act only on the evidence that was laid before them. The change was gradual, as late as the seventeenth century the grand jury was presenting of its own knowledge. But by the end of it they have ceased to discharge the administrative task of providing material upon which an accusation could be brought and had

become the body which had to determine judicially on material presented to it whether there was or was not a case that ought to be tried. The judge no longer enquired of the commission of crimes from those in the neighbourhood who were supposed to know. Consequently it had to be somebody else's business to make the enquiry and lay the results of it before the grand jury.

There was a period when this work was done by different people.[1] The Parish constable was a rudimentary form of a policeman. The job was unpaid, and members of the parish were selected by rotation to discharge it. No doubt the constable made an arrest when the accused was caught red-handed but he could have hardly done much in the way of investigation. This heavier duty was assumed by the justices of the peace. They were for many years the chief instruments of the local government and had many duties: 'Men of all work," as Sir William Holdsworth has called them.[1(a)] While justices of the peace looked or enquired into local crimes, offences of state were looked into by the higher servants of the crown, but (sic) the servants of state and in the privy council. The judges still retained a remnant of their former duties. Indeed, it shows the common origin of all these forms of enquiry that the judges are still 'ex-officios' justices for the whole of England and 'ex-officio' coroners.

The result of all these enquiries, whether they were made by the justices of the peace or by others, was laid before the grand jury in the form of the bill of an indictment. In theory anyone could put an accusation in a bill, lay it before the jury with supporting evidence, and invite them to call it a true bill.

The justices like the grand jury, before them, after the nineteenth century became a completely judicial body. They were no longer agents of the government to inquire into crime; they listened to the evidence that was brought before them and decided whether or not to commit for trial. This transformation would not have been possible if in the early part of the nineteenth century another organ of enquiry had not come into existence. The Metropolitan Police Act 1829 may be taken as marking the beginning of the creation of the police. It became their duty, as it is today, not only to arrest and charge the

suspect but to take statements from the witnesses for the prosecution and to collect evidence on which the justices are asked to commit. From here then, the police took over the work of the prosecution save from that one to be done by the Director of Public Prosecution and those done by private individuals and corporations.

The police prosecutions were conducted by a solicitor who was instructed by the police in the same way as he could be instructed by a private citizen concerned with litigation. Later a solicitor's department was created in 1935 at Scotland Yard and it now conducts all police prosecutions in the metropolitan area. Many ~~countries~~ counties now employ a county prosecuting solicitor whose services are at the disposal of the Chief Constable, and in many Boroughs the town clerk has a prosecutions department. The solicitor for the prosecution may therefore be a public servant employed for the purpose or a member of a firm which does much else besides criminal business. Whichever he is, he exercises the ordinary privilege of the solicitor in choosing the barrister who is to present the case in court. We can therefore say that the police are only part of the prosecution mechinery. In ordinary cases they initiate the prosecution and gather the material for it; but the case is prepared for trial by solicitors and counsel. They are as is well known in England two different profession, roughly speaking, the solicitor prepares the case for trial, though he calls the barrister for advice, on any difficult point and the barrister presents it in court.

KENYAN PROSECUTION SYSTEM

When Kenya was declared a protectorate by the 1895 East Africa order in Council, the prosecution system in England had already been quite well established as indicated above. Like most parts of our legal system, Kenya gradually adopted the English system of prosecution and what we have today in Kenya is a direct codification of the British or English systems. However the structure of the two systems is not quite similar. In both systems the Attorney General is at the top or is the head of the prosecution department. In England the office of the Attorney General is seperate from that of the Director of Public Prosecutions while in Kenya the Attorney General holds both offices, the Attorney General in Kenya also is the

Director of Public Prosecution. He is assisted by the Deputy Public Prosecutor; in Kenya except in the major cases, the police investigate the case, prepare it and finally prosecute it. But in England as indicated above there is the solicitor who prepares the case for trial and gives it to the barrister to institute the prosecution in court, the police only initiate the prosecution by gathering the material for the case.

WHO CAN PROSECUTE

Prosecutions are mainly of two kinds, the private prosecution and the public 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. Kamau'). 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. Smaller cases where the police do not normally prosecute are regularly started as a result of private prosecution. 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.[1] Under the provision of the criminal procedure Code[2], any magistrate enquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the Attorney General in this behalf shall be entitled to do so without permission.[3]

In Kenya a private citizen can or has the power to institute private proceedings, but the Attorney General can take over them or can discontinue them.[4] An example of this is a case instituted in the Kitui Magistrate Court by the people of Endau against their chief for theft. In that case a chief was alleged to have stolen money collected for self-help projects and since the government was not taking action against him, the people of Endau decided to institute private prosecutions.[5] However the case was withdrawn by the order of the Attorney General's Chambers.[6]

The right of private prosecutions, though it is only used to a limited extent, and though its use is not likely to be extended, is considered to be valuable and worth retaining. For example, in cases where employers are charged with breaches

of safety regulations in factories, it may be important for them to be able to take out a summons against the employee actually responsible for the breach of the regulations. Apart from this, it is important that the police should not have to involve themselves in minor incidents or family quarrels. They might feel bound to intervene if individuals had no rights to prosecute for assault. However, private prosecutions constitute only a small portion of the total prosecutions initiated in the country. Some of the government departments like the Income Tax Departments, Customs and Excise Duties Department, Price Control Department, may also have their own prosecutors instead of using the Public Prosecutors who are mainly the police.

[Public prosecutions are carried out by the Public Prosecutors, who are appointed by the Attorney General.[7] The Attorney General[8] by writing under his hand may appoint any advocate of the High Court or person employed in the public service not being a police officer below the rank of sub-inspector of police, to be a public prosecutor for the purposes of any case.[9] Every public prosecutor shall be subject to the express directions of the Attorney General.[10] The public prosecutor have power to appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal; and if any 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[11] under his directions. Public Prosecutors include the Attorney General, the solicitor-General, the Deputy Public Prosecutor, a State Counsel, any person appointed under Section 85 of the Criminal Procedure Codes or any person acting under the directions of the Attorney General.[12]]

THE ROLE OF THE PROSECUTOR

[Straightaway it can be stated that, the counsel for prosecution, a police prosecutor, or any other legally appointed prosecutor in a criminal case, should state all the relevant facts of the case dispassionately whether they tell in favour of a severe sentence or otherwise, but he should not attempt by advocacy to influence the court towards a more severe sentence.] For example, it is very common in our courts these days to hear a prosecutor saying that, the crime alleged to have been committed by the accused is a prevalent one and

for which a deterrent sentence is fitting, or if the case involved a public figure,[13] there is the usual reference to the fact that the person involved is a legislator who should uphold the law more religiously than other species of the mortal world, or if the accused is a holder of a big public office, there is the reference to the accused's higher degree of responsibility, and such other things. All these talk being geared to secure the maximum sentence the prosecutor can get.

The proper role of a prosecution is to see that the prosecution case is properly or fairly presented and that all the weaknesses in the defence are identified and fairly exposed to the court. According to this premise the object of the prosecutor is not to get a conviction, without qualification, but to get a conviction only if justice requires it. In the case of Shiani v. Republic,[14] the appellant had been convicted of fraud by the use of a weight, the particulars stating that he used a false weight. The prosecutor stated that the offence was serious and the Magistrate imposed a prison sentence. Mr. Justice Wicks in appeal said that ....."It is not the function of a prosecutor, as the court has more than once said, to tell the court his views. He is required simply to put the facts before the court. The court must decide how it views the case."[15] Similarly it was said in the case of Achieng v. Republic[16] that it is the duty of the prosecution to put the facts before the court and the court must decide on these facts.

The general convention is that, prosecution should not play any part in sentencing. But the convention in practice is plainly wrong that it does not deserve any serious attention Strictly speaking the prosecution has a hand in sentencing and this it does indirectly. The involvement of the prosecution in selecting charges, determining modes of trial and negotiating for charge of plea is intimately related to sentence. For instance if the prosecution decides to lessen a charge of robbery with violence which carries a death sentence to plain robbery which carries a lessor sentence, it has indirectly influenced the sentence.

What is important is that certain features of the traditional conception of the prosecution should be carried over to the sentencing stage. A prosecutor should not use passionate and loaded rhetoric in support of a conviction.

His proper task is to place before the court those features of the proved offence which suggest and draw attention to any relevant principles of sentencing. In any event information should not be proloferated for information sake. It is not simply a matter of providing the court with the fullest possible information about offenders, but should only provide the relevant facts of the particular case. A mass of background information can be collected with comperative ease, but irrelevant information is not only useless but possibly harmful.

The prosecutor should play an active role in the adjudication or in the criminal justice system. Unlike the court which usually plays a passive role, the prosecutor is not constrained to accept passively as his workload every matter that is presented to him. He can screen out matters referred to him by police agencies that fail to meet his standards and priorities. He can initiate and channel investigations into the types of matters that he views as having prospective priority. He has the power to choose which case to give special priority relative to others. He can give differential treatment to his cases, proportioning his time and resources among them based on his judgement of their relative importance

By properly exercising his role, the prosecutor performs a vitally important function for the court which the court is prevented from per forming for itself. He precludes random access to the courts limited adjudicative resources, and preserves these resources for the timely judgement of the matters to which the public attaches priority. This he does by spending on only the most important cases or those cases where public interest is involved and throwing away the petty cases which would only waste time and resources of the court or adjudicative system without serving any public interest. It is in this sense that the prosecutor serves as the guardian, protector, and custodian of the community's scarce resources for adjudication.

DUTIES OF PROSECUTOR

The duties of the prosecution include the preparation of the case and presenting it to the court. There are also some duties which the prosecution owes to the defence. The police are part and parcel of our prosecution system and in most cases especially in the magistrate courts, they carry out the duty of preparing the case for the prosecuting officers. This they do by arresting the suspect and interrogating him,

the evidence they get from him and the witnesses they call at the station is the one they give the prosecuting officer of which he will argue his case from in court. The police have powers to arrest without a warrant in certain cases, in other cases they must obtain a warrant from a magistrate.

Criminal cases are either heard or disposed of by magistrates or dealt with by them on a preliminary inquiry[17] as to whether the prosecution evidence, taken at its face value and without hearing the defence evidence, is strong enough to support the charge. If so the case will be committed for trial before a jury at a higher court.

Most of the cases are dealt with summarily by the Magistrates and a few of the more serious ones are commenced by the prosecutor making a complaint and applying for a summons which is served on the defendant, telling him the charge he has to answer, and the time and place when it will be dealt with. When a case is commenced by summons the accused is not arrested, but occasionally where it is alleged that he would not appear on the hearing of the case, the prosecutor may make an application for his arrest supported by sworn information.[18]

It is the duty of the officer in charge of a case to obtain statements from all the prosecution's witnesses, and to set them out in writing, including a statement of his own evidence if he can give relevant testimony, and to this must be attached a summary of the facts on which the prosecution will need to rely, set out clearly and concisely and in the correct order. This material may need to be studied before a decision is made as to whether there is to be a prosecution. The material will be certainly needed by the person who will conduct the case in the court, whether he is a state counsel or a police officer.

The officers report should include any relevant points that might account for the conduct of the accused, and should deal with any defects in the case from the point of view of the prosecution. The report should show how far the prosecution can rely on the officer's own evidence, and how far it relies on the evidence of others. The officer is advised not to be over-confident, but to continue to look for further evidence if this is needed.

The officer should try to anticipate the line of defence that the accused might take, and should be ready for any attempt by the accused to support his case with false evidence. This is rarely done for most of the officers are over-confident with their evidence. Before he goes to the court the officer-in-charge of the case must obtain information about the previous history of the accused including details of his previous convictions. He should seek the information he needs for this purpose from the accused, and verify it so far as possible from other sources.

It is an essential part of the preparation of the case to ensure that the prosecution witnesses are warned to attend court, and that all the exhibits which have to be produced are brought to court. If the accused is in prison and not represented, it may be necessary for the police to make arrangements to secure the attendance at court of the defence witnesses, if they are asked to do so by the prisoner.

Information about the previous history of the accused including details of any previous convictions must be made available to the court in the event of a conviction in order to assist the judge or magistrate or a bench of lay justices in deciding what penalty to impose. The information will be given in the form of evidence from the officer in charge of the case who may be cross-examined by the accused or the lawyer representing him. Police officers are advised not to introduce hear-say evidence, but it is quite common for an officer giving evidence, about antecedents to include in his statement information given to him by the accused, which in nature of things often cannot be checked. In the circumstances, the officer will usually explain to the court the source of the information and how far it has been verified.

It is the duty of the officer giving this evidence to the court to do so with absolute fairness and impartiality and to include any material that is favourable to the accused. The statement of the accused's record should be made available to his solicitor who should also be told about any previous conviction of the prosecutor, or the victim of the crime.

Finally the officer in charge of the case must make sure that the prosecution witnesses are all present in court. If they are not he must tell the prosecutor. He must make sure

that they are in the right place at the right time, and that they do not leave the court but remain until the case is concluded, unless the court allows them to be released earlier. He must make sure the prosecution witnesses claim their expenses. The officer in charge must take particular care that property has normally to be kept until the case is concluded, but in ~~specval~~ special cases, where the property is needed for a person's use or where the property is perishable it would be returned to the owner on his undertaking to produce it at the trial. The officer in charge of the case attending at court must assist the court and the lawyer (prosecutor) conducting the case in every possible way. But it is no part of his duty to try to score unfair points against the defence, whom he must assist provided that it is not inconsistent with his other duties and responsibility.

Having described the duties of the officer-in-charge of the case whose main duties as I have laid them are to prepare the case for the prosecutor in court, I will now turn to the duties of the prosecutor himself as he conducts the case in court.

First and foremost the prosecution has to disclose all 6.
what it has found out or that has come into its knowledge during their investigations whether it is favourable to it or not. In the first place the prosecution is expected to produce all the obvious witnesses. By all the obvious witnesses I mean persons present at the scene of the crime and other persons who are obviously able to throw light on relevant events. The prosecution is expected to call such witnesses whether they fully support the prosecution's case or not. There is no formal rule of practice to that effect, but it follows inevitably from the nature of the burden that lies upon the prosecution. They have to satisfy the court beyond a reasonable doubt, and the absence of an obvious witness can very easily be used by the defence to suggest good ground for such a doubt. For example, the defence might say, "the prosecution have called A and B, who have told us that when they saw the incident they were in the company of C. Why have the prosecution not called C? Must it not be because his version of the incident would have differed from that of A and B, and since you have not heard it, does not that of itself suggest to you that there is ground

for doubt what actually happened? However, this does not mean that the prosecution is bound to call every person whom the police take a statement in the course of their inquiries, notwithstanding that they think his evidence to be quite immaterial or plainly untruthful. In the case of Abdullah Waneibuge s/o Kadongo,[20] the duty of prosecution with regard to witnesses calling into the court was laid by Sir Joseph Sheridan C.J. It was held in this case that the prosecuting counsel is not bound to call the witnesses who have made disposition (or statement); he is a minister of public justice and is only called upon to lay before the court such facts as he thinks the interests of justice demand. His duty is satisfied if he has in attendance such witnesses as he does not call, so that they can be called by the defence if desired. Similarly in the case of R.V. Edwards and others,[21] Justice Erle (as he then was) said, "My own impression is clear and I believe a majority of Judges have disctintly decided that the counsel for the prosecution is not bound to call all the witnesses at the back of the Bill. He is a Minister of public justice, and is called upon to lay such facts before the court or jury as he thinks the interests of justice demands."

Justice Alderson B. in the case of R.V. Woodhead[22] went further and said, "you are all aware I presume, of the rule which the judges have lately laid down, that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, should be called in court because the prisoner might otherwise be misled; he might from their names being on the bill have relied on your bringing them here, and have neglected to bring them himself. You ought therefore to have them in court, but they are to be called by the party who needs their evidence. This is the only sensible rule." So we can see from the above decisions that the prosecutor though required to call the witnesses in court, can exercise his own discretion not to call all of them and no one can force him to do so. The prosecution cannot be expected to make as part of their case evidence which they consider irrelevant or untruthful, the most they can be expected to do is to offer the witness to the defence and thus retain the right to cross-examine him. The rule of practice so far developed does not positively require the crown to do more than give the name of the witness.[23]

Any previous convictions affecting the characters of a prosecution witness which are generally within the knowledge of the prosecution but cannot readily be ascertained by the defence.[24] The prosecution must make it available to the defence. Also the prosecution must make available to the defence any known convictions of the complainant - that is, the person against whom the crime has been committed - or of any other witness if the convictions are relevant to the charge or to the credibility of the witnesses. There must also be supplied to the defence a copy of any report made by the prison doctor about the state of mind of an accused person in custody;[25] this may help a defence of insanity.

In the same way the police are expected to make inquiries from anyone whom the accused may name in his statement to the police as knowing some material fact. One of the advantages of making a statement to the police - a great advantage for an innocent man - is that he can name persons who may be able to support his story and invite the police to go and see them straight away. If the police should fail to do so, the prosecution's chances of getting the jury to disbelieve the accused's story at the trial would be greatly diminished. It is recognized that to a large but undefined extent the prosecution have the duty of making inquiries for the benefit of both sides[25(a)] This flows from the principle that the duty of the prosecution is to get at the true facts and bring them, before the court and not just to obtain a conviction.

Finally there is then the most obvious duty of the prosecutor and this is the conducting or presentation of the case against the accused in court. Under the provisions of the criminal procedure code,[26] it is the duty of the advocate for the prosecution to open the case against the accused person, and he shall call witnesses and adduce evidence in support of the charge. The prosecutor guides the prosecution witnesses in their giving of evidence and whenever they make vague statements, it is his duty to collect them to clear out the doubt which would be created by such statements. All this he does by way of asking questions which are intended to guide the witnesses to bring out the true picture of the incident on trial. However, the prosecutor should not ask questions which will obviously or are intended

.../ 16

purposely to make the witness sway his evidence to suit the purpose of the prosecutor - by this I mean the prosecutor should not ask leading questions. After ~~calling~~ calling all the witnesses for the prosecution, and the accused person says that he does not mean to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution has the duty to sum up the case against such accused person.[27]

A prosecutor may also initiate a prosecution when he has the knowledge of a crime. If a prosecutor comes across a crime being committed he has the power to arrest the victim and charge him with the offence. This comes about due to the concept that all the citizens have an obligation to combat crime and may arrest such people whom they may think are committing a crime. Secondly most of our prosecutors are police officers and therefore, while not in court they are obliged to carry out the normal duties of the police officer. However, it seems that (and this is true in most cases) the prosecutor's duties towards any particular case begins only after the police have made a charge after arresting a suspect or after a complaint is made.

This chapter has been intended to look at the prosecution process as starting from the time an accused is charged with an offence until the time the case is heard in court and sentence is due to pass. The next question to be considered is whether the police do prosecute or even charge a person on every offence they come across. This question can only be answered by venturing into the decision to prosecute and this will be my aim in the next chapter

THE DECISION TO PROSECUTE: CHAPTER II

It is, perhaps, natural that those responsible for enforcing the criminal law should be reticent in disclosing how widely they use their discretion, and be cautious in describing the factors that influence their decisions. When some offences are ignored and some offenders are not brought before the court, there must always be suspicion of unfairness, and administrative officials making such decisions in private are liable to be attacked either for showing partiality or for condoning wrong-doing. Such charges are not easy to refute. Yet the law, although it must be administered impartially, cannot be enforced indiscriminately. It would clearly be intolerable if every breach of law, regardless of the circumstances, were relentlessly prosecuted in the courts.

The danger of ill-informed criticism is more likely to rise from lack of information than from disclosure of the considerations which prosecuting authorities must take into account if the law is to be enforced ~~fiarly~~ fairly and humanely. Many questions present themselves for discussion. To what extent is discrimination practised, and on what grounds can it be justified? Why are some offenders brought before the courts while others are excused, and why are some crimes prosecuted and others overlooked? Are uniform policies laid down? What safeguards exist to ensure that decisions are not taken arbitrarily or influenced by improper pressures, or, indeed, dictated by administrative convinience?

The discussion which will ensue in this chapter will attempt to answer the above questions, though not exhaustively probably satisfactory. But before starting to answer the questions, I must point out that the discretion to prosecute or not, has been judiciarilly, morally and socially recognised. Although there are no authorities in point, in Kenyan case, there are several authorities from English law of which has a great influence over our court systems.[1] In England, it is acknowledged that the police and other enforcement agencies must be allowed to use a measure of discretion. The notion that the police must arrest everyone suspected of committing an offence has never been entertained. The same thing happens

in Kenya. It is true, that a police officer, under the oath of service is bound, but he does no more than affirm that he will "to the best of his power, cause the peace to be kept and preserved, and prevent all offences against the persons and properties of the state's subject.[1(a)]" He is not placed under a duty to prosecute all and sundry indiscriminately.

The English authorities for allowing the police discretion, both in deciding whether to report offences or whether to prosecute after investigations are not difficult to find. For example in 1935 Mr. Herbert Williams, the Member of Parliament for Croydon South, asked the Home Secretary what statute authorised the police to issue cautions instead of summonses for 113, 817 motoring offences.[1(b)] Sir John Simon replied, "The practice of dealing with alleged offences of a minor character by warning instead of by prosecution is of long standing and is based on the view that in the case of minor infractions of law it is possible to maintain due observance of the law without subjecting members of the public to police court proceedings, in all cases and at the same time to reduce the burden of both Magistrates and police. I am not aware of any express statutory authority for this practice but it has been reviewed by the High court and no exception was taken to it"

Since then there have been other pronouncements in the courts. When Miss Pat Arrowsmith was prosecuted in 1963[2] for obstructing the highway during her campaign for nuclear disarmament and protested that she had been unfairly singled out, the Lord Chief Justice remarked, "The police cannot prosecute every obstructor of the highway but must exercise a wise discretion when to prosecute."

The Royal Commission on the Police[3] went further and said that, "one of the main duties of the police of England and Wales was the responsibility for deciding whether or not to prosecute persons suspected of criminal offences. Textbook writers find no objection in principle to the use of discretion on the part of the police. R.M. Jackson puts it in this way.[2(a)]

> "When we talk about crime there is apt to be an assumption that the State is not merely entitled to intervene, but that public authority ought to

take proceedings. It is common belief that if the police know that a crime has been committed and have sufficient evidence they must prosecute. That is not so, but the public very properly expect that whenever there is sufficient evidence of serious crime the matter should come up before a law court."

The latest authority can be found in the judgements given in the Court of Appeal in RV. Metropolitan Police Commissioner exparte Blackburn.[4] Mr. Blackburn the Member of Parliament for Stalybridge and ~~Byde~~ Hyde, had been dissatisfied because the police had decided not to prosecute gaming clubs in London. He applied for writ of mandamus to compel the Commissioner to enforce the law. It cannot be said that the court settled beyond all doubts whether it was in their power to make such an order, but the judges clearly accepted the right of the police to exercise a 'wide discretion' in carrying out their duty of enforcing the law. LORD DENNING, Master of Rolls, said, "It is for the Commissioner to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made or a prosecution brought. In the same case LORD JUSTICE SALMOND said, "Of course the police have a wide discretion as to whether or not they will prosecute in any particular case." The court, however, regarded it as objectionable that the Commissioner should issue a direction, as a matter of policy, that no action should be taken against gaming clubs. This ruling of course did not change the general principle laid in other cases, that the police have wide discretion whether to prosecute or not.

Criminologists and Sociologists have accepted readily enough that discretion is extensively used in enforcing the law, but in the absence of information from official sources their theories have largely been based on American writings.[5]

In the Kenyan situation, the police also have wide powers of exercising the discretion whether or not to prosecute. Evidence can be offered by traffic charges made by our police officers to the motorists. It has been or it is the practice of most of our police officers that they issue summons to those drivers who fail to give "chai" to appear to court at a certain date to answer a charge on the traffic offence;

.../20

whereas those drivers who give "chai" go free whether or not their vehicles are roadworthy. This though a misuse of discretion shows that the officer has the right to decide who to issue with a summons or who not, therefore, he has the discretion to start the prosecution or not because if he decided not to issue those summons there will be no prosecutions

In my interview with a court prosecutor in one of the Resident Magistrates' Court, who is himself a police Inspector, he told me that it is the discretion of the officer in charge of the police station whether to institute a prosecution or not. The first step after an arrest has been made is for the officer in charge of the police station, probably an inspector to decide whether or not to accept the charge which in practice means, authorising the writing of a charge sheet specifying the offence, which should be read to the accused: he should be cautioned before he makes a statement that everything he says would be used as evidence against him in a trial.

In deciding whether or not to accept the charge the station officer acts in an independent capacity. He has not been concerned in making the arrest; he has to satisfy himself that there is adequate evidence of a criminal offence for which a power to arrest has been provided. If the evidence comes from a private person, as for instance if a shop-lifter is arrested by a shop assistant, the station officer will probably seek to protect himself by requiring the witnesses to sign the charge sheet as the person making the charge. This precaution will do nothing to absolve the station officer from his responsibility but it does sometimes have the effect of deterring a private person from pressing a charge when he realises it is he who will have to prove the case in court. If the station officer considers that further enquiries are necessary before accepting the charge he may bail the accused person to report back to the police station on a given date. This requirement may later be withdrawn, but if it is not failure to report will render the accused liable for arrest. All these powers are vested with the Station officer and he is expected to exercise them independently. This shows that, he has the discretion whether to prosecute or not.

DISCRETION BY THE PUBLIC ~~PROSECUTION~~ PROSECUTORS

Up to this stage I have only discussed the police powers to the question whether or not to prosecute. This discussion can be pushed further by asking whether after the police have made their decision to prosecute, the case will be automatically prosecuted in court, or there is someone else whose decision to prosecute or not is also needed? The answer to this question is that the exercising of the discretion whether to prosecute or not does not end up with the police, it has to be exercised further by someone else.

After the police have made up their decision to prosecute, a charge is entered by them and one of the copies of the charge sheet which will contain the name of the accused and the particulars of the crime is taken to court where a file is to be opened for that particular case. Another copy is given to the police prosecutor who is in the department of prosecution in that station. It is not neccessarily that the officer in charge of the prosecution department in the particular police statinn will prosecute the case personally in court. If the case is a complex one or it is a sensitive case, it may be prosecuted by a State Counsel, or the Deputy Public Prosecutor or even the Attorney General himself.[6] At this stage the Public Prosecutor has no alternative except to appear in court on the mention date of the case. After the case has been mentioned the prosecutor under the Criminal Procedure Code[7] has the power to withdraw the ~~prosecuting~~ Prosecutions from the court before the judgement is pronounced. The withdrawal may be done with the consent of the court or on the instructions of the Attorney General. This kind of withdrawal can only be done in the surbordinate courts. It is on very rare occasions when the court may refuse the consent of the withdrawal of the prosecutions once the prosecutor requests for it.

On doubtful cases and those cases which are complex and legal advise is needed, the police prosecutors write to their Senior State Counsel at the provisional headquarters for advise. The State Counsel gives his instructions basing them on the recommendations of the particular case given to him by the police prosecutor. In this way the police prosecutor has a chance to influence the State Counsel to authorise the withdrawal of the prosecutions.[3] We can therefore conclude

.../22

that even the prosecutor in the surbordinate court has to a certain extent some part to play in the exercising of the discretion whether or not to prosecute.

Under constitutional provisions, the Attorney General has power in any case he considers desirable to institute criminal proceedings against any person before any court[9] in respect of any offence alleged to have been committed by the person.[10] Similarly he has power to discontinue any proceedings in court by entering a nolle prosequi.[11] The power to take over proceedings instituted by any other individual[12] and to discontinue them, is vested in the Attorney General to the exclusion of any other person or authority by the constitution. But in practice the Attorney General being a very busy man[13] and therefore has pressure of work, he can delegate these powers to the law officers in his chambers. In exercising the powers set above, the Attorney General is not subject to the discretion or control of any other person or authority. This in theory is meant to ensure that there is impartiality in the exercise of the powers. It is clearly seen that this power of the Attorney General to issue a nolle prosequi gives him and his Law officers (State Counsels) a wise discretion on decision whether to prosecute or not. Although the case may have been taken to court for hearing, the moment the Attorney General or his law officer who normally is the Senior State Counsel enters a nolle proseque the proceedings of that particular case ends up there. To that extent the Attorney General or State Counsel has determined the fate of the prosecution of that case and in this way has exercised a discretion whether to prosecute or not. We can therefore say that according to the above discussion the discretion of the decision to prosecute is exercised by both the police and the public prosecutors but to a larger extent by the police.

PRINCIPLES UPON WHICH DISCRETION IS EXERCISED

There is no laid down procedure which the police should follow in order to exercise their discretion whether or not to prosecute, infact the exercising of the discretion depends on the facts of the individual case and the personal views of the one who is exercising the discretion. However there are some general priciples which are to be considered when one is

exercising the discretion. The discretion has to be very carefully exercised for the way it is to be exercised constitutes a very important factor in the administration of the criminal law.

The first question to be considered or decided is whether there is sufficient evidence to warrant a prosecution; but it is also important to consider whether the prosecutinn is likely to succeed because it is bad for the administration of justice if many prosecutions are undertaken when there is no reasonable hope of obtaining a conviction. Sometimes, however there may be special reasons for launching what is legally a weak case, when the defendant is morally guilty and the legal point is an arguable one. Thirdly, there is the question of public interest. For example, it is no argument against prosecuting say a solicitor that the result of the prosecution may be to shake public confidence in solicitors. The law can be no respector of person or body of persons. However, some proper considerations of public interest arise and these are to be considered below.

POLITICAL CONSIDERATION

Government have to accept that from time to time, prosecutions will cause them embarrassment. Instead of this embarrassment, the government decides to drop the prosecution even where there is no doubt the culprite will be found guilty by a court of law if prosecuted. This mostly happens when the prosecution will involve top government officials or top politicians whose prosecution may ~~being~~ bring the government in ridicule to the public. There has been several reports of scandals in our daily newspapers of which some of our top government officials or top politicians are involved but rarely if any, are these people prosecuted(13(a) The reason given for failure to prosecute in such cases is that it is not to the public interest to prosecure. A very good example is the 'Mungai case' or the 'Ngoroko' affair. Mungai who was an Assistant Commissioner of Police in the Rift Valley Province during Kenyatta's reign and for some few months in the Nyayo government had been accused of training a squad in the Rift Valley under the ~~protxt~~ pretex that, the squad will be used

.../24

to curb the stock thefts which were rampant then in the Rift Valley, but the squad it was alleged was specially trained to assassinate some top politicians and government officials including the then Vice President Daniel Arap Moi soon after the death of Kenyatta. Mungai ran away after the affair surfaced and a warrant for his arrest was issued. He however, came back to Kenya from his self-exile voluntarily and was arrested at the Jomo Kenyatta International Airport. Later the nation was shocked by a report in one of a daily's headlines[13(b)] by the then AttorneyGeneral Charles Njonjo which said that the government had decided not to prosecute Mungai. The daily quoted Njonjo saying "Everyone in Kenya is aware of the disappearance of Mr. James Mungai, former Assistant Commissioner of Police (Rift Valley). Mr. Mungai returned voluntarily to Kenya from Switzerland on December 20, 1979. I have considered the whole matter of Mr. Mungai's disappearance and the 'Ngoroko' affair and I have decided that it would not be in the public interest to prosecute Mr. Mungai... I have directed that the directorate of criminal investigations and police file on this matter be closed."

Though the Attorney General's statement above would like us to believe or accept that the Mungai's prosecutions were thrown away due to public interest, there is also a tendency for the public to think that there were some shadowy things sorrounding the 'Ngoroko' affair of which if Mungai was to be prosecuted could have been revealed to the public and the result would not have been sweet. At the time of Mungai's disappearance there were allegations that other people not in the police force were involved in the 'assassination' plot. Most of these people were alleged to be still in the government when the prosecution was thrown away.[14]

Another example of the Attorney General's discretion is where a spy is caught betraying secret information to hostile powers. There would be demands to know why security precautions have proved ineffective[14(a)] in the parliament. The prosecution of a spy might reveal the weaknesses of the government security means and therefore careful discretion has to be exercised here, whether to prosecute or not. However spies are dangerous

.../25

to the internal and external security of the state that in most cases they have to be prosecuted despite the dangers which would result due to the prosecution.[14(b)] Treason and its allied offences of sedation, mutiny and others are only pro ecuted at consent of the Attorney General. This is so in order to allow careful scrutiny of the case before it is brought to court. The treason[14(c)] case of Muthemba is a good example of this. In the judgement of this case Justice Simpson of the High Court of Kenya criticised what he called, 'inadequate investigations' by the authorities before the case was brought before the court, saying the whole prosecution had been ill-advised."

A discussion of prosecution in which political considerations come to the force would not be complete without a reference to trade disputes, since the threat of industrial strife is almost as damaging to the welfare of the nation as the threat to war. A sensitive political instinct is needed to judge whether criminal proceedings against strikers are likely to bring about a settlement or provoke more trouble. For example on May 15th 1950 [14(d)] major arrests of trade union leaders took place. These arrests prompted the famous Nairobi Strike of May 16th 1950 which eventually spread throughout the country. The strike continued for about two weeks and was called off on the 25th of May 1950. This strike encouraged more union membership to be enrolled. We can see in this example that instead of the arrests to end up the strike as it was intended by the government authorities, it prompted it and thus provoked more trouble than would have been expected had the arrests not been made.

A very recent example is that of the doctors' strike last year (1981) which brought chaos all over the republic. When the doctors refused to go back on duty following an altimatum issued by the Minister of Health, the government took a serious step and police were authorised to arrest doctors who refused to go back to work and charge them with contravening section 34(1)B of the Trade Disputes Act. About twenty doctors were arrested within two days and some of them charged. Despite these arrests hundred of doctors still adamantly defied the

government's directive to go back to work. In a dramatic move police in Mombasa began arresting and locking up doctor's wives in an attempt to get them to say where their husbands were. Infact one such wife spent a night in police custody with a three months old baby without food.[15] This did not make things any better and finally the government had to give in by convening a meeting with Kenya Medical Association at which it was decided that the doctors return to work as soon as possible on the understanding that there will be no more arrests or prosecutions and that the government will give considerations to the doctor's demands.

Due to these arrests most of the members of public had started to sympathise with doctors and had started to blame the government for the several deaths which were increasing everyday of the strike as the contributing factor. This also prompted a very serious demonstration in the University of Nairobi where students were sympathising with their fellow medical students sent away in connection with the doctor's strike. Finally it was an embarrassing situation to the government to give in at the end ~~of~~ to the doctor's request after having demostrated first to the public its strength to suppress the strike by arrests, but all ending to failure. It could have been better had the government tried to save itself from the embarrassment by trying to solve the dispute peacefully. Congratulations should go to the then Attorney General who never issued the consent for the prosecution of the arrested doctors for most likely the result of the prosecution would have resulted into more serious repurcusions.

In conclusion, criminal law is no longer regarded as a suitable weapon for ending labour disputes. The concern today when a strike is in progress is to prevent intimidations and to see that the public order is preserved. It is seldom necessary to arrest strikers for the unlawful picketing, since it is the practice of the police and strike leaders to meet and come to a working arrangement on what can be permitted. Nevertheless, clashes and ugly scenes are always likely to break out. Strikers in the heat of the moment or when stirred up by agitators may obstruct or attack those continuing to work,

or they may try to prevent supplies being delivered. In such a case there is no alternative except to let loose the fierce G.S.U. squard to disperse the strikers and if necessary make some few arrests here and there. This should be done with the motive to get things under control.

OBSOLETE, CONTROVERSIAL & UNPOPULAR LAWS

The discrimination and responsiveness to the public mood which must be shown in dealing with offences against the State and public order are equally required in enforcing the law relating to the whole range of criminal offences.

It is understandable that those responsible for making decisions are reluctant to disclose the reasons which influence them. When asked by a member of Parliament why no prosecutions has been instituted, the classic reply given by every Attorney General is that a prosecution would not be in the public interest[15(a)] There are sometimes good grounds for reticences; it would be cruel, for instance, to disclose that no action had been taken because the offender was in the last stages of an incurable disease. The main objection, however, of giving specific reason for dropping a prosecution in a particular case is that it will inevitably be adduced as a precedent in future occasions.

Nevertheless, sufficient material is available to examine under general sub-headings some of the reasons why prosecutions are considered undesirable altough there is ample evidence of guilt.

OBSOLETE LAW

Some jurists have taken the line that if a law is on the statute book it should be enforced. By turning a blind eye to a law that has outlived its usefulness the executive power is not only usurping the functions of the legislature but obscuring the need for abolishing an unwanted law. However there are some laws that remain on the statute book through governmental inertia which could not be enforced without offence to public opinion. Where the law is so much out of accord with public opinion that the police do not prosecute under it,

one would expect an active legislature to repeal the law, for its existence is always a possible source of anomaly and injustice in individual cases.[16] However, the work of repealing or amending a statute is slow and laborous. In the outcome it can be expected that new legislation will abolish many absolete statutes which have fallen into disuse. But the law cannot be modernised without going through the ponderous legislative machine; parliamentary time is precious and members are so eager to pass new laws that they cannot spare little time to survey those that are still lying among the accumulated debris of the centuries. Wilcox A.F. says that "In such circumstances the police in England do not consider themselves to have aby obligation to rake about in the dust to find archaic offences - blasphemy ~~apostary~~ apostacy, profane swearing or desecration of the sabbath, which they can prosecute."[17]

Occasionally an Act long forgotten is revived... in the case of R.V. Brittain[18] the Forcible Entry Act 1381, passed in the reign of Richard II was chosen for the prosecution of three men who had forced their way into a house where a party was being held. An appeal to the House of Lords against conviction and setence of 9 months imprisonment was dismissed.

ATTEMPTED SUICIDE

Sometimes or in some offences the police base their discretion on public opinion, that is they pick out for prosecution cases where most people would agree that some action is called for. Most of the people have nothing but sympathy for the distraught souls who had been driven into moments of despair to end their lives. In such cases the police usually does not make an arrest except in the cases where it is clear that unless restrained the person would immediately renew the attempt.

BIGAMY

In the cases of bigamy where nobody has been decieved and the man and his second partner are living together happily, well knowing that their marriage is illegal, nothing but harm would be achieved by taking proceedings against them. Even in cases where the bigamous wife learns for the first time that her supposed husband is still married, she is usually willing to stand by him. Moreover the true wife is sometimes

content to accept the situation, she does not want her husband back and welcomes the opportunity of using the evidence of the bigamous marriage as grounds for divorce. However it is a different matter when a man has deliberately decieved a woman and rapped her into a bogus marriage she would not have contemplated had she known that he was already married. Rarely in Kenya, if any, is the section providing for bigamy in our penal code is used, this is simply because the largest number of the Kenyan society recognise polygamous marrieges where bigamy will play no purpose.

INDECENCY

The idea of bringing a prosecution when an adolenscent boy commits as act of indecency with a girl under sixteen is repugnant to most parents. The girl herself is often as much to blame as the boy and the consideration uppermost in the minds of the police if the offence comes to notice is whether the girl is in need of care and control. Most of the charges are brought against mature men who take advantage of young girls, but occasionally it is necessary to prosecute a gang of youths who attack and indecently assault a girl of their own age.

Even where indecent assaults take place without consent, girls and women are often unwilling to undergo the ordeal of giving evidence in court, and in such cases it is usual to drop proceedings.

ABORTION

This is contraversial law and the decision to prosecute is usually tricky to make. However when cases are brought to the knowledge of the police it is seldom difficult to decide whether or not a person should be prosecuted for procuring an abortion. Nothing is to be gained by bringing before the court, a young woman of eighteen living in lodgings away from home who has terminated her pregnancy by taking a pill. But in a case where a girl of say nineteen pregnant by a married man of twenty six first tries to end up her pregnancy by pills but fails, she later discovers a woman abortionist at the neighbourhood and she goes to her, the woman performs the abortion using a syringe with a solution of soap and water,

with the result that the foetus is killed but remains in the womb. She is later hospitalised and in fear that others might suffer the same or even die she discloses the name of the abortionist. Here there should be no hesitation to prosecute for the girl herself has consented to an illegal abortion and therfore is guilty of an offence. But when a professional abortionist is charged it is seldom considered necessary to prosecute the woman on whom the operation has been performed.

OBSCENITY

Sometimes the police decide against prosecuting obscene literature or libels due to the public interest. It is true that once there is a prosecution of an obscene book, play etc, the public especially those people who had no opportunity to have seen the book before the prosecution gets more eager to see it than before. If the prosecution fails it ends up in earning the writer a few more thousand shillings from the sales. So instead of the prosecution achieving what it was intended to, that is to curb the reading of the material, it encourages it in the big way.

LAW UNDER REVISION

Police usually do relax prosecutions on laws which are under review by the parliament. Also after a new law has been enacted it takes time before prosecutions based on it are started.

DRUNKENNESS

This is another area where the enforcement of the law is quite hard, and the more harsh the rules to curb the offence, the more the offence increases. The public at large usually does not see anything wrong with drinking and therefore rarely are the police informed about the illegal drinking places. Evidence for this can be seen by looking at results of the presidential directive in 1979 that local brew or illicit brews will not be licenced any longer and the act of brewing the illicit stuff, was declared illegal. It is evident that illegal brewing of the local brew has increased much of late compared to the old days ~~prior~~ prior the presidential directive. However the police do exercise their discretion as to whether or not to arrest and prosecute by condering the circumstances

of the drunkenness and the victim. Rarely do police officers take an old drunkard to court for prosecution.

UNPOPULAR LAWS

If the law is so unpopular it is held in general comtempt and it cannot be effectively enforced by the police who are dependent on the goodwill and support of the public. It is a matter of acute embarrassment to the police to have to decide whether and how far to enforce repressive and unpolular legislation of doubtful policy. If they determine not to prosecute on a particular class of case, they are open to the charge of assuming the function of the parliament. Perhaps it is a fair reply that the police are compelled to assume the function of the parliament when parliament does not properly discharge it. The Royal Commission on police powers and procedure in England[19] of 1929 talking on the subject of law against lotteries and street betting said that "the present state of the law is altogether anomalous, and so out of harmony with public opinion, that the attempts to enforce it are bound to react on the morale of the police."

MARTYRDOM

A sensible reason for refraining from bringing a prosecution is to avoid giving a person with an obsession an opportunity of airing his grievance in public or providing a plat form for someone who wishes to pose as a martyr and gain publicity for his own cause.

On Christmas Day in 1950 Ian Hamilton, a student at Glasgow University stole from the chapel of Edward the Confessor in Westminister Abbey the historic "stone of scone." Its rightful place he considered, was in Scotland, and he eventually succeeded in depositing it in the ruined Abbey of Arroath, slightly damaging it in the process. The stone was recovered and replaced in Westminister Abbey, but Hamilton and his accomplices were denied the opportunity of appearing in court as the champions of Scottish nationalism.

USE OF UNFAIR METHODS

If unfair methods have been used in catching criminals it is better for all concerned that the prosecution should be dropped rather than that an attempt should be made to secure a conviction. Good examples of this are where an agent

~~provocatous~~ provocateurs are used in order to get criminals. Also where an accomplice who turns out to be the witness of the crown in a case where a dangerous criminal is being prosecuted is granted immunity from prosecution in return for giving the evidence.

TRIVIAL AND TECHNICAL OFFENCES

Finally there are many trivial and technical laws which the police would not enforce.[20] Minor motoring offences are often dealt with by a warning, and a motorist slightly exceeding speed limit at night when the roads were clear would be surprised if he was prosecuted. Similarly minor assault cases are usually dropped at the station after a word by the police to the complainants and respondents.[21] Parking offences may also be dealt with in a reasonable and tolerant way. At any time in any urban area there are thousands of vehicles which are not parked in restricted streets, but which could be said to be obstructing the highway.

MISUSE OF DISCRETION

Having outlined some of the general principles on which discretion is based, it is now appropriate to mention something about the various cirsumstances on which discretion can or is usually misused by those who exercise it.

It has been mentioned in the above section of this chapter that, police officers do misuse their discretion of whether or not to prosecute by using it to obtain bribes. It is a common experience to those who use public transport[20(a)] especially in the rural areas that most of the cases that reach a court of law on traffic matters are those cases where the vehicles owners refused to bribe the police officers on the highway. It has become a common practice, and it is accepted by the vehicle owners especially "Matatu" commuters that every morning each vehicle must pay a fee of at least Shs.10 or Shs.20 This fee is intended to exempt the particular "Matatu" from any traffic offence prosecution the whole of that day. This has led to overloading of passenger vehicles and usage of unroadworthy vehicles, without any regard to the security of the passengers, hence the numerous road accidents which do occur everyday in our Kenyan roads. Other areas where the discretion has been used to procure bribes by the police officers

/24

include the illegal brewing of changaa and traditional liquor, prostitution and other social offences.

We have seen above, that the Attorney General and his immediate officer as public prosecutors do have the discretion to prosecute or not. Under the constitutional provisions[22] the Attorney General has the power to discontinue any proceedings in a court at any stage before the judgement is made, instituted or undertaken by himself or any other person or authority. This he does by issuing a nolle prosequi. This power of the Attorney General to issue a nolle prosequi gives him a very powerful discretion on whether to prosecute or not. If then this discretion of the Attorney General is misused very adverse effects will be felt in the action of executing judicial services. The Attorney General although being a civil servant is also a politician and is more inclined to lean in favour of the government than carry out impartial decisions.[23]

There have been cases where nolle prosequi has been entered to exonarate political collegues. In certain cases corruption has been alleged. A study of frequent entries of nolle prosequi will indicate that there has been an abuse of this right. The press has since 1965 been reporting various cases of entries of nolle proseque which involved prominent people. On the 24th of April 1969 for example, a report appeared in a local daily[24] "Councillor Acquitted" In that case a Nairobi Councillor who was charged with the offence of theft by servant was acquitted in a Magistrates Court after the prosecutinn withdrew the case. Inspector Kyanzi said to Mr. J.R. McCready that he had been instructed by the Attorney General's office to enter a nolle proseque in respect of charges against Sendate. No explanation to the issuance of the nolle prosequi was given.

A similar report of the use of nolle prosequi appeared in the same local newspaper.[25] The headlines were "Three freed on Exchange Control case takes a turn." Rashid H.M. Patel who was represented by Mr. B. Georgiadis and P.H. Trivedi and D.W. Viran both represented by A.R. Kapila and R. Shah were discharged after the entry of a nolle prosequi by the Deputy Public Prosecutor, Mr. Hobbs. There was no further explanation.

It was only stated that these people were discharged after an entry of a nolle prosequi. Nothing further was explained to the public so that they can understand the true position. Such a state of affairs is incompatible with the proper exercise of the discretionary power. Then another headline appeared in the same local newspaper[26] "£25,000 bribe rumour refuted, Asian jailed." The rumour was that a bribe of £15,000 was offered to a C.I.D. officer Mr. Baine as an inducement not to oppose bail. Mr. Baine later suggested that the bribe be increased to £25,000 to induce the Deputy Director of Prosecutions Mr. Hobbs. Mr. Hobbs explained that what concerned the Attorney General was that a large sum of money has exchanged hands to secure a nolle prosequi. It was widely rumoured in town that large sums of money had exchanged hands. He recalled that in the course of normal acceptable plea bargaining on friday the question of nolle prosequi was raised for the first time. Because of the rumour, he put the matter to the Attorney General and said, "The Attorney General wishes me to say that if any one is under an impression that curruption served this nolle prosequi, there is a absolute no truth in it."

The reputation of the Kenyan police has on many occasions been tarnished. When the police are asked to investigate a case they do so, and after making a charge aginst a suspect the case is withdrawn at the last moment. The powers of the Attorney General are sometimes used to let the criminals off.

The 1976-78 coffee thefts cases illustrate clearly that people commit the same offences. Some are prosecuted and others have nolle prosequi entered. A case in point is that involving two Members of Parliament - Godfrey Muhuri Muchiri and Jesse Mwangi Gachago. The two were charged with the lorry driver of stealing 485 bags of coffee in transit from Malamba to Mombasa. The driver was discharged after the prosecution entered a nolle prosequi.[27] Superitendent Nene - a Personal Assistant of the Commissioner of Police Mr. Bernard Hinga provided an escort for the lorry carrying the stolen coffee. The Chief Magistrate was of the view that Superintendent Nene was an accomplice. He even said that Nene should be charged through the Attorney General's office.[28] Up to now the Attorney General has never

charged Nene. Muhuri Muchiri said in court that the case was a political one against him.[29] I think what he said though rejected by the Magistrate had truth in it. In my view this case is a clear illustration that prosecution powers have been used to subdue political opponents.

HOW CAN THE DISCRETION BE CONTROLLED?

Once it is accepted that there has been a misuse of discretion, and if the law is to be enforced effectively and sensibly some measure of discretion is essential, it must be immediately be asked how that discretion is to be controlled. In the case of Sharpe v. Wakefield[30] Lord Halsbury declared: Discretion means, when it is said that something is to be done within the discretion of the authorities that something is to be done within the rules of the authorities, that something is to be done within the rules of 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.

Nobody, however, has been able to formulate rules fettering discretion. The reason is not far to seek: discretion means the freedom to break rules and no clearcut regulations can be imposed to determine the extent to which this freedom can be used. However, there are ways and means which can effectively be used to check the use of the discretion and the following are some of them:-

(i) JUDICIAL CONTROL

Perhaps the most powerful influence on prosecution policies is exerted by the courts. Magistrates and Judges can show their displeasure when trivial or oppressive charges are brought before them by inflicting a nominal penalty or giving an absolute discharge.[31] Due to this prosecution will soon become discouraged if their efforts are achieving no significant effect.

Judges will not hesitate to express their disapproval if they feel that a prosecution was ill-advised.[32] Critical observation from the bench are usually given wide publicity, particularly when such words as 'monstrous' 'Scandalous' or

or ridiculous are used to describe the charges brought by the prosecution. Public reaction to headlines in the press and the news bulletins must be taken seriously by the authorities for the law cannot be enforced effectively in opposition to public opinion. Public scrutiny of this kind is beneficial and must go along way towards ensuring that the law is not being enforced with undue harshness.

SUPERVISION BY PARLIAMENT

Members of Parliament are able to raise questions with the Attorney General about decisions to prosecute or not to prosecute crimes which come within his limited sphere of responsibility. Ministers too, are accountable to Parliament for the enforcement of the ~~lway~~ law by their departments. Parliament may also control the exercises of police activities by appointing specific committees to probe any questionable activities being carried out by the police. Other controls include public opinion. Police officers do pay heed to criticisms made by the public, complaints of injustice especially when wrongdoers seem to have escaped prosecution through negligence or ineptiness are taken up with avility in newspapers and radio programmes. Delegation of authority, police coordination, training, supervision, etc also do check the exercise of discretion.

CONCLUCION

Although it is possible to group under sub-headings as listed above, the various factors to be taken into account when considering whether to bring offenders before the courts or to take some alternative action, individual cases seldom fall neatly into one category. In practice several factors of varying weights must be balanced against each other. I have touched on some of the considerations which sway decision to prosecute or not in one way or the other, but I cannot claim to have exhausted them. The subject needs a more systematic discussion and closer study by senior officers, critics and commentators than I have attempted to do.

To those concerned with the protection of the public against arbitrary actions by the executive it may seem discouraging

to reach to the conclusion that discretion cannot be fettered by rules. I would therefore ask institutions concerned to apply effective measures to curb the misuse of the discretion whether or not to prosecute.

CHAPTER III

CRITICAL ANALYSIS OF OUR PROSECUTION SYSTEM

INTRODUCTION

I have discussed in detail, in the last two chapters how the prosecution exercise is carried out, and how the decisions to prosecute is made. In both chapters, it has clearly come out that, the police are the major people in the matters of prosecution and also to a large extent, are the people who make the decision whether to prosecute or not. In other words, our prosecution system is mainly under the police force.

In the present chapter, I am going to look critically at the question of whether the police are the suitable people to be entrusted with our prosecution systems or otherwise. I will carry the analysis systematically starting from the time when a suspect is arrested until the time of judgement.

My criticism should not be seen as a total condemnation of the present system; it is only aimed at pointing out where the eystem has failed and as to what should be done to rectify the situation. Our present system can be commended for the good work it has done in our courts which has contributed to the good reputation our courts have in their duty of discharging justice. Most of our police prosecutors are very good at their work and have carried it out quite effectively. Infact some of the lawyers (advocates)[1] whom I have spoken to about their opinion as to the quality of the police prosecutors, have even gone to the extent of saying that some of the police prosecutors carry out their prosecutions better than many State Counsels, who are qualified lawyers.

However, there is no system which can be a hundred per cent efficient and our prosecution system is no exception, i.e. there is a percentage of inefficiency. It is this per centage of inefficiency which has motivated my criticism.

DEFECTS OF OUR PROSECUTION SYSTEM

As indicated above, most of the prosecutions in our courts are done by police prosecutors. It would certainly appear to the stranger that the police run the Magistrates' courts throughout the country, and one of the chief reasons for saying this is that a police officer prosecutes in nearly every case.[2]

Of course one would say that the sight of an Inspector on his feet, gently and responsibly conducting the case before the court is, no more likely to give a stranger the impression that the police are running the court, than is the defending counsel to give the impression that it is the defence which is doing so. But in a court where the matter has been investigated by the police; where the proceedings have been taken by the police, and the complaint[2(a)] is laid by the inspector personally; in which a vital part of the prosecution evidence will be given by the police; where the case is prosecuted in court by the police, a member of the public is likely to get the impression that the police are running that court. This impression created to the public can lead to them to think that there is no decision which can be made by such a court which is against the police who seem to be manning the court and therefore no justice can be done to the Members of the public in a conflict between them and the police.

POLICE PROSECUTORS - TRAINING AND THEIR DISADVANTAGES

When conducting my research, I was told by one of the prosecutors that once a police officer is appointed to take the du ties of a prosecutor, he is taken for a course where he is trained of the court procedure, and how to conduct prosecutions. What I learnt from this prosecutor is that there is no teaching of the general principles of law at this course and if there is any it is very basic, so far as the points of law are concerned, our police prosecutors are not conversant. Many people have[4] expressed their feelings that, it is wrong for an unqualified police officer to argue points of law with a qualified advocate. This can be counter-argued that an average competent police inspector, knows (or at any rate should know) quite enough criminal law to enable him to argue points of law with the average advocate; such an argument can be based on the fact that, in their training these officers are expected to sit for examination papers to that effect, and in any case if the point of law is beyond the scope of a competent inspector, then the case probably ought to have been presented by a state counsel from the beginning. However the test of legal knowledge of the prosecutor must involve more than a comparison of qualifying examination papers as between the police and the advocate, the first essential rule to an understanding of law, is a thorough grounding in general legal

principles, which of necessity is denied the qualifying police officer. Competency in a prosecuting advocate is not merely essential to discharge the duty to the public but, what is no less important, to the defendant is to ensure a fair trial. Whilst there are lawyers whose knowledge of the rules of evidence leaves much to be desired, it is at worst higher that of a police officer. There is no doubt that lawyers, by reason of their training and experience are much better qualified, than the police officers. Many criminal cases in the Magistrates courts involve complicated points of law on which the police advocate is unable to adequately assist the Bench.

The unrepresented defendant is sometimes at a disadvantage when faced by a police officer advocate.[5] A professional prosecut would be more likely to appreciate and bring out points which might assist a defendant to discover and reveal matters in mitigation. Inadequacy of disclosure to the defence in Magistrates courts, where the accused does not have the benefit of pre-trial proceedings or the service of witnesses' statements on him, as he does where he is tried on indictment is a fairly common source of complaint.[6] Some Magistrates say that on occasions, they feel that the police do not give the court all relevant information.[7] Equally important is that, guilty persons may escape conviction owing to the inability of the police officer advocate to present the case, and especially to cross-examine effectively.[8] I remember in my fourth term practicals, a number of accused used to go free, not because they were innocent but just because the prosecution could not be able to prove its case properly.

Most lawyers and particularly those in private practice, are trained to have an independence of mind and an appreciation of the true role of an advocate. The police officer prosecutor, is subject to a number of disadvantages. Frequently he, himself, has authorized the prosecution, even if he was not responsible for the original investigations. In addition, the officer conducting the prosecution, may feel to blame if he fails to shield the officers giving evidence, from criticism

and errors.[9]

The honest, zealous and conscientious police officer, who has satisfied himself that the suspect is guilty, becomes psychologically committed to prosecution and thus to succeeful prosecution. He wants to prosecute and he wants to win. When the police officers mix themselves up in the conduct of a prosecution, they acquire a bias infinitely stronger than that which must under any circumstances naturally attach itself to their evidence.[10] In consequence you might see a senior police officer being inhibited in refusing to prosecute in order not to damage police morale, whereas an independent prosecutor would not be influenced by such considerations. However, the ideal prosecutor, be he qualified or not, is one who dissociates himself from the organisation causing the prosecution, and regards himself as part of the court assisting the Bench to arrive at a judicial decision whatever that decision may be.

POLICE PROSECUTORS AND THE DECISION TO PROSECUTE

The decision to prosecute does not, and should not always fall to be determined, solely by the likelyhood of a conviction. Public policy and individual circumstance are rightly to be taken into account.[11] As I have said above in the 2nd chapter, the decision to prosecute is not an easy decision to make. It is by no means, in every case where a law officer considers that a conviction might be obtained that, it is thought desirable to prosecute the case. Sometimes there are reasons of public policy, which make it undesirable to prosecute the case.[12] Perhaps the prosecution would enable him (the defendant) to present himself a martyr or perhaps he is too ill to attend trial without great risk to his health, or even to his life; all these factors enter into consideration. The police are ill-equipped by outlook, training and fuctions to weigh these factors objectively: nor should they be expected to do so.

The question of whether to prosecute partakes of nature of a judicial decision since, although the accused may eventually be acquitted, the bringing of a charge on insufficient evidence can have disastrous consequencies on a man's domestic life and career, particularly if he is held in custody pending trial.[13] It is difficult for investigation to achieve the

.../5

necessary detachment and unfair to expect them to do so.

The dominance of the police in the prosecution process exposes them to temptation. They may seek or be prepared to bargain with a suspect, promissing to refrain from prosecuting, or to let him down lightly or to "put in a good word with the Magistrates," or to grant him bail (or not to oppose it) or not to prosecute his wife. There is no need to quote any example here for most of us know or are aware that, it has become the order of the day in our police force. I am not projudiced to say that most of the cases brought to court, by the police are those which, a negotiation for a bribe between the officer and the suspect has failed. This had led to an abuse of the power by the offficers which has been vested into them by the government and it has been discussed in detail in chapter two. This risk of abuse, however, well intentioned the motives, is manifest in such a situation.

POLICE AND THE MAKING OF CHARGES

It is only an inspector and above who can charge. Once a suspect is taken to the police station a charge sheet is made where the particulars of the accused, and those of the crime he is charged for are entered. The way the police officers carry out this task, cannot escape some criticism. It is not uncommon to see criminals being acquitted by the court, not because that they are not guilty, but because a wrong charge had been entered aginst them so that when the case comes for hearing the evidence given becomes irrelevant as to what is in the charge sheet.[14] I remember one case[15] which came before the District Magistrate Court at Muranga, when I was there for my fourth term programme, where a woman who had caused disturbance in a primary school by threatening to ~~break~~ beat a teacher, and making noise all over the compound, was accused or allegedly accused of this offence. In the charge sheet the charge was "trespassing on private property" but the evidence which was tendered in court only proved that the woman really did cause disturbance in the school, and in fact abused teachers, but nothing like trespass was mentioned throughout the prosecution's case. The court held that, considering the evidence given in court, the charge of trespass which was before the courts was not proved, and therefore the accused was discharged. The Magistrate advised the police to

charge the accused with the correct charge if they wanted to. Another good example, is a case[16] in the Kiambu Resident Magistrate court, where a school teacher had been charged with " inciting school students to riot" In his ruling while acquitting the teacher, the Kiambu Resident Magistrate said that the charge sheet had been done in an ambinguous and unintelligible fashion. The Magistrate advised that, police officers who draft charge sheets, should seek professional advice. He advised that there was need for those who prepare charge sheets especially the difficulty ones to seek professional advice. These two examples clearly indicate that the way the police officers prepare charges cannot be said to be the best.

Of course, the task of charging someone of an offence cannot be said to be an easy one. In one respect, the task of a man advising an accused, is simple than that of the prosecutor, or whoever makes the charge. The former is aware of the charge against his client, and his research is limited to the legal aspects of that offence; he first reads the charge and then reviews the facts. An inspector who is drawing a charge, receives a mass of facts and has to discover an appropriate offence in order to charge.

The prosecutor as a court officer, is first concerned when the statements of the potential witnesses are placed before him, perhaps together with the suggested charge or charges. Although certain charges are laid so frequently that they have become routine,[16(a)] it is essential to realise that this is the most important moment in the case from the prosecutor's point of view; he can ammend the suggested charge, or make another fresh one, or can even do away with the charge. It is obvious that no one can blame him if his witnesses fail to come up to expectation, or "to proof" but if there never has been sufficient evidence to justify the charge at all, or if, for example, the charge should have been dangerous driving and not driving without due care and attention, the prosecutor can blame no one but himself for the Magistrate's decision.

This task of making charges can only then be carried out probably better by qualified lawyers who will be able to make the correct charges without any difficulties. If this is not

possible where the prosecutor is a qualified lawyer, and the police makes a defective charge, he will be able to detect the mistake and thus charge or ammend the charge before he brings it to court.

FURTHER DEFECTS OF OUR PROSECUTION SYSTEM

The Kenyan system of prosecution is accusatorial and not inquisitorial. It has developed into a context between the two sides with the court acting as sort of an umpire.[16(b)] This method will undoubtedly be a danger in that, it may obscure or distort the very different role which the prosecution should play, as compared with that of the defence. The nature of the trial procedure brings out the combative and competitive elements and it is only too understandable that the prosecution should also tend to see the result in terms of the winning or loosing. To declare that this is wrong, is not to plead for inefficient or half-hearted prosecution, or to deny the importance of a vigorous exposure of the genuine weaknesses of the defence. What is important is that, the pressure to obtain a conviction should be limited to that which properly arises from the facts and evidence. It should not be increased by personal involvement or personal feelings. These cannot be eliminated entirely, but every effort should be made to remove any factor which would tend to reinforce the natural human desire that "our side" should come out best. In my view this is the approach which should govern the prosecution process.

The existing procedure do confuse two quite distinct and disparate functions and responsibilities, namely, the vigorous investigations of crime and the cool careful objective assesment of the whole of the evidence and probabilities needed for the correct decision as to whether a prosecution should be started or, if started, continued.

The procedure also offends against the principle that, the prosecution should be plainly seen to be independent, impartial and fair: concerned only with the pursuit of the truth not with winning or loosing. This is of cardinal importance in an accusatorial system.

I have been greatly impressed by the Scottish prosecution system,[17] and I would rather admit that I have borrowed a good portion of my recommendations from this system. I therefore

consider it worthwhile to outline briefly this system before I lay my recommendation and conclusions.

THE SCOTTISH PROSECUTION SYSTEM

This system has operated a Public Prosecutor's system for many years. There, except for very minor crimes, both the decision to prosecute and the conduct of the prosecutions are the sole province of the Lord Advocate and his staff who are quite independent of the police. The police cannot initiate prosecutions. The police officer advocate is unknown. The relevant facts of the Scottish System may be summarised as follows:-

(a) The Lord Advocate is responsible for all prosecutions (including those in our country are conducted by Government Departments and other public bodies). He is assisted by the Solicitor-General and six advocates - Depute or Crown Counsel, who are practising advocates holding part time appointment. A change of Government is normally followed by a change of the Law Officers and Crown Counsel.

(b) The Lord Advocate appoints Procurators -Fiscal who are responsible for the launching of prosecutions in all courts except Burgh. Burgh police and justices of the Peace Courts which have jurisdiction only in very minor cases. With a few exceptions in rural areas, procurators-fiscal are whole time officers. They may be advocates or solicitors.

(c) The police have to report all cases to the Procurator-Fiscal, who must decide whether the evidence justifies a prosecution. He may call for further evidence or in cases of difficulty he may consult Crown Counsel.

(d) The Procurators-Fiscal conduct all summary and committed proceedings in Sheriff summary courts and normally conduct proceedings on indictment in Sheriff and jury courts although an Advocate-Depute may do so in all important cases. One of the Law Officers or an Advocate-Depute conducts prosecutions in the High Court.

(e) Applications for warrants are made by the Procurator-Fiscal and he is also responsible for deciding whether to oppose the granting of bail.

(f) The Procurator-Fiscal may himself interview witnesses, but not the accused, and take statements from them. If a witness refuses to give information, the Procurator Fiscal may seek the assistance of a Magistrate who can cite a witness to attend and if he proves contumacious, commit him to prision.

(g) The Procurator-Fiscal will have Deputes who will deal with the various aspects of the work. They will normally have a "spell" lasting weeks or months in which they will specialise in a particular field, such as summary duty which involves receiving reports of crimes and offentes from the police or other agencies and conducting summary trials before the Sheriff: or "precognition" that is the interviewing and taking of statements from witnesses in cases which are to be tried on indictment or dealing with reports of alleged offences from government departments. In county districts the Procurator-Fiscal or his Depute will have to cope with a much wider variety of problems. If a case is reported to the Procurator-Fiscal and he considers that the evidence then available does not justify a prosecution, he may return it to the police with instructions to follow up certain lines of inquiry or seek additional evidence. Conversely if the Procurator-Fiscal considers that the Material placed before him has been "selected" so as to justify a prosecution he may direct a further inquiry and investigation. The police (Scotland) Act 1967 S.17 provides that "..... in relation to the investigation of offences the Chief Constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor." It is the practice where the accused is not legally represented for the Procurator-Fiscal to call witnesses "adverse" to the prosecution case and if need be to examine them full in chief.

(i) The tests to be applied by the Procurator-Fiscal as to whether or not to prosecute are well settled. They are set out in Renton and Browns "Criminal Procedure[18] in these terms:-

1. Whether the facts disclosed in the information constitute either a crime according to the common law of Scotland or a contravention of an Act of Parliament which extends to that country.

2. Whethere there is sufficient evidence in support of these facts to justify the institutions of criminal proceedings.

3. Whether the act or ommission charged is of sufficient importance to be made the subject of a criminal prosecution.

4. Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged.

5. Whether there is sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him.

6. Whether the case is more suitable for trial in the civil court in respect that the facts raise a question of civil rights.

These tests are not exhaustive but they offer a general guide line or guidance.

(j) Overall, the policy is determined by the Lord Advocate and Circulars are issued by the Crown Office to the Procurator-Fiscal. Their Society is often consulted on matters of policy before decisions are reached by the Lord Advocate. The Procurator-Fiscal's discretion as to whether or not to prosecute is subject to specific exceptions imposed by the Lord Advocate: and Government cases cannot be refused without being first referred to Crown Counsel.

(k) The Procurator-Fiscal is required to make regular monthly reports to the Crown Office as to the number of cases being handled, the time taken to

deal both with the initiation of proceedings and bringing proceedings to a conclusion and the number of cases in which the decision taken was not to prosecute. Thus the Lord Advocate is able to have an overall picture of how the system is working and whether any control or regulation is necessary.

It will be seen that there are two fundamental differences between the functions and position of a Procurator-Fiscal and a Kenyan Prosecutor. First the Procurator-Fiscal is independent of the police. He is appointed by the Lord Advocate and such instructions as he may receive come from the Lord Advocate and not from the police. On the other hand, a Kenyan Prosecutor takes his instructions from the police who are his clients and in most cases he himself is a police officer (except where a State Counsel appears as the prosecutor). Secondly, the decision as to whether a prosecution should be commenced or continued or whether bail should be opposed rests with the Procurator-Fiscal and not the police.

The advantages claimed for the Scottish system are:-

That it is convinient and economical; that it promotes a high degree of uniformity of produce and practice; that it encourages impartiality and that it promotes efficiency. It is said that prosecution in Scotland benefits greatly from the existence of trained prosecutors with independent public status and professional traditional and that with the increasing complexity of modern society and modern laws a higher degree of specialisation and expertise is called for.

RECOMMENDATION

Accordingly my recommendations are as follows:-

(a) That there should be established a Department of Public Prosecutions to be responsible for the decison to prosecute and for the conduct of prosecutions.

(b) In principle the Department should be responsible for all the prosecutions. In practice it will be necessary to limit it into respects.

(i) By leaving the prosecution of trivial and routine type of offences in the hands of the police though as far as possible the conduct as distinct from the initiation of such proceedings should be undertaken by the staff of the Department. It is appropriate

that exact demarcation is difficult and will result in occasional anomalies, especially as it may be necessary to draw the line differently in different areas owing to local problems of staffing or the prevalence of a certain kind of offence. The line would be drawn by the Director in the form of Regulations: with discretion to Assistant Directors to modify these with the Director's permission, to meet local conditions. It is to be expected that the line would be altered from time to time in the light of experience and so as to extend as rapidly as possible, the Departments responsibilities. The police would have the right to hand over particular cases to the Department and the Department would have the power to call in cases where it felt this to be desirable.

(ii) By leaving the prosecution at present dealt with by the Government departments and the public bodies in their hands. Ideally these too should come under the Department of Public Prosecution, but it is appreciated that these may not be a practicable proposition for some considerable time is required. I regard it as important that the actual conduct of prosecutions by these bodies should be in the hands of advocates and not ordinary emmployees.

(c) I am not proposing that private prosecutions should be abolished. But I consider that the right of private persons to initiate a prosecution should be preserved, with the reservations that the Departmnt should have the power to take over the conduct of such a prosecution as it thought fit. At the same time, I stress that it is desirable that where the Department of Public Prosecutions is satisfied that the prosecutions should be intiated, it should be willing to initiate and conduct the proceedings itself and not seek to persuade a private individual or company to accept the responsibility of doing so.

(d) The Department of Public Prosecutions would be entirely independent of the police. It would be headed by a Director and would be under and subject

to the control of the Attorney General who would be answereble to Parliament for its functions. This would also be seen a step to release the Attorney General from the duties of Director of Prosecutions, a duty which he does not carry effectively[20] due to his political involvement which carries almost all his time. Rarely does the Attorney General appear in court in his capacity as Director of Public Prosecutions.[21] The Department should be financed by the Attorney General's Department.

(e) The Department has a ready-made basis in and could conviniently be organized and developed out of the existing staffs of the Attorney General's Chambers.[22] In addition to having a strong central organization it would have regional and local offices throughout the Republic headed by the Assistant Directors. It will probably be necessary to have an officer, at least at District Level, who would be able to deal on the spot with the minor matters and all those which require immediate decision or attention.

(f) The Department would be staffed by lawyers assisted by a clerical staff of unqualified law clerks or legal assistants. It should be possible to provide status, remuneration and a career structure which would attract men and women of the right calibre. Every effort should be made to facilitate movement between the Department and the practising profession outside. I would like also to see academic lawyers taking advantage of the opportunities for practical experience which would be offered by a spell of the department, particularly if it were possible to utilise the services of lawyers on a part-time basis. I see no reason why members of the Department should not be eligible for the appropriate judicial appointments.

(g) The Department staff would have the same rights of audience as are afforded to the staff of the Attorney General's Chambers and would have full power to instruct and take the advise of Counsel.

(h) In addition to receiving information and evidence from the police, they would be entitled to pursue further inquiries either by obtaining declarations or statements from witnesses if necessary on oath or by suggesting additional lines of enquiry to the police.

CONCLUSION

My conclusion is, that appropriate changes should be made following the recommendation I have listed above, and a system of public prosecutions should be established, subject to any other necessary inclusions of suggestions and corrections by others. Fortunately it will not be necessary to start from scratch and build up an entirely new system. The existing set up is capable of being developed.

I am not in a position to cost the new organization but I would point out that the increase in cost may be more apparent than real. It will be to a larger extent, involve a transfer of work and will release police officer for the job which they have been trained. Any increase may be offset by the greater efficiency of a well-organised and specialised department. Even if this is an increase in cost I think that the importance and value of the suggested change more than justifies it.

FOOTNOTES TO CHAPTER I

1. Late in the 17th and early 18th centuries.

1(a) See History of English Law Vol. 4 p. 137.

2. Laws of Kenya (cap) 75.

3. Criminal Procedure Code S. 88(1)

4. S.26(3) (b) of the Kenyan Constitution

5. Private Prosecutions Criminal Case No. 115 of 1976.

6. S. 87(a) of Criminal Procedure Code (C.P.C.)

7. S.85 (1) of Criminal Procedure Code (C.P.C.)

8. This power can be delegated to his officers.

9. Mostly Public Prosecutors are got from the police force, only in the higher courts where State Counsels do appear as Public Prosecutors.

10. S. 85(3) of the Criminal Procedure Code.

11. S. 86 of the Criminal Procedure Code.

12. S. 2 of the Criminal Procedure Code

13. See Waruru Kanja's case, Daily Nation of October 1981.

14. (1972) E.A. 557

15. Ibid Page 558

16. (1972) E.A. 37 at p. 40

17. S. 231 Criminal Procedure Code

18. S. 101 Criminal Procedure Code

19. Such information can't be used as evidence against the accused unless he (accused) raises the character of prosecutor or one of the prosecution witness at issue.

20. (1936) E.A.C.A. Vol. III 51 at p. 53

21. S. cox 82.

22. 2 car and kiv 520

23. Rv. Bryant (1946), 31 Cr. App. R. 146

24. Rv. Collister (1955) 39. Cr. App R. 100

25. Rv. Casey (1947) 32 Cr. App. R 91

25(a) This is just but a rule of practice. However, rarely do the prosecution side disclose any information useful to the defence - my 4th term experience.

26. S. 300 Criminal Procedure Code.

27. S. 206 (3) and S. 311 Criminal Procedure Code

FOOT NOTES TO CHAPTER II

1. See the Judicature Act 1967 S. 3(1)

1(a) S.7 of Police Act. Cap 84

1(b) A.F. Wilcox "Decision to prosecute" page 11.

2. Arrowsmith V. Jenkins (1963) 2 QB 561

2(a) Jackson R.M. "Enforcing the law - London 1967.

3. See the Royal Commission Report on the Police of 1962 (England)

4. (1968) 1 ALL E.R. 763

5. See papers read on the Fourth National Conference on Research and Teaching in Criminology held in Cambridge in July 1970.

6. Rarely does the Attorney General appear in court in his capacity as the Director of Public Prosecutions.

7. Section 87 of the Criminal Procedure Code.

8. Under S. 83 of the Criminal Procedure Code the Attorney General may delegate his powers to the Senior State Counsels or Deputy Director of Prosecutions.

9. Except in a court martial

10. S. 26 (3) (a)

11. S. 26(3) (c), see also S. 82(1) of Criminal Procedure Code.

12. S. 26(3) (b)

13. He is mostly involved in Political affairs rather than his civil service duties.

13(a) Of late there has been a lot of reports from our local dailys of scandals where prominent politicians and civic servants have been mentioned. None of them has gone near a court of law.

13(b) The Daily Nation 25th January 1980

14.0 These people were called the "change the constitution group"

14(a) In England the Prime Minister Mr. Atlee had to face a storm of criticism in parliament after the conviction of Klaus Fuchs for passing secret information on

q atomic weapons to the Russians while he was head of the Theoretical Physics Division in Harwell in 1949.

14)(b) In April, 1970 Mr. Will Owen, the member of Parliament for Morpeth (England) was tried and acquitted at the Old Bailey of charges under official Secrets Act of Commucating information useful to an enemy

14(c) See Weekly Review of May 22nd 1981

14(d) Daily Nation 1st May 1981.

15. See Weekly Review May 1981

15(a) See Daily Nation 25th January 1980 where the Attorney General claimed to dismiss James Mungai's case and Ngoroko affair for public interests.

16. See Turning a blind eye 1954 Crim. L.R. 271

17. A.F. Wilcox "The Decision to Prosecute"

18. R.V. Brittain

19. Cmd 3297 of 1929 Page 80.

20. In England when it was discovered that a few years ago that about thirty thousand of owners of radio controlled toy boats needed a radio licence, the postmaster-general told the House of Commons that the post office had turned a blind eye, but, later it had to be admitted that there had been at least one prosecution as a result of the activities of detector Vaus.

20(a) See case of Sewa Sing Mandia V.R. (1966) E.A. 315

21. In my interview tih a police inspector, he told me that cautioning parties involved in a scuffle at a drinking bout perform wonders as opposed to prosecuting them.

22. Supra.

23. The Attorney General being a politician holds a position equivalent to Ministerial post and therefore sees it as his duty to defend the government by all means even where partiality will occur or result.

24. The then East African Standard

25. The then East African Standard of 10th May 1965.

26. 12th May 1965

27. Daily Nation Friday January 20th 1978 P.32.

28. Daily Nation Friday February 3rd 1978..

30. (1891) A.C. 173.

31. In England & U.S.A.where trial by jury is common, juries may dismiss a case altogether, inspite of plain evidence of guilt, if they think a charge should never have been brought.

32. See Muthemba's case, judgement where Justice Simpsion said that prosecution was ill-advised

FOOTNOES TO CHAPTER III

1. I received this information at the course of my research. Even my supervisor Mr. P. Nowrogee who is a prominent lawyer has expressed the same opinion.

2(a) Prosecutors after the investigation are the ones who lays the complaint in court as if they were the complainant themselves.

2. Even Magistrate Court has its permanent prosecutor who under the Criminal Procedure Code (S.85) should be of the rank of sub-inspector and above; he prosecutes or conducts the prosecution in all criminal cases which come into that court with an exception of the few carried bout by Government Bodies.

4. See Criminal Law Review (1961) p.199.

5. Police prosecutors do not find it as their duty to reveal to the defence information which would be useful to it; this is due to the attitude they have that the case is there to be won.

6. Discussed in chapter one.

7. In my fourth term practicals I came to discover that most of the cases were dismissed by the court. In such cases Magistrate used to say that there was no enough evidence and the prosecution has failed to prove its case.

8. This is my fourth term experience.

9. In my fourth term practicals, I noticed that, the prosecutor was not very happy when his fellow officers giving evidence were strongly cross-examined, especially in represented cases.

10. An English Attorney General, one Alexander Corkburns when giving evidence to the select committee on Public prosecutions in 1856 expressed these thoughts.

11. From my careful observation of the charges brought to court by the police, I am of the conclusion that they don't consider anything else in their decision whether to prosecute or not except that, they are likely to get a conviction.

12. See Chapter 2 of the dissertation.

13. This is a common phenomenon in our courts where one can be held in custody for a months or even years only to end up being acquitted due to lack of evidence against

14. See the Daily Nation of 11th May 1982 p.8 where a District Magistrate at Siaya District Magistrate court said that prosecuting officers lost cases because police officers were ignorant of changing laws and did not bother to check their facts,

15. R.V Mary Wangaru Criminal Case No. 1237 of 1981.

16. See Daily Nation of 3rd March 1981

16(a) No officer for example would have problems in charging a drunk since it is a prevalent offence in almost all the Magistrate courts.

16(b) See Magendo v. Nguvani (1970) L.T.R. P. 60.

17. See Criminal Procedure in Scotland and France Chapter 4 pp. 15-19.

18. 3rd Edition at page 14.

19. See Police Commission Report: crund 535 1969 chap. 6 page 34 para. 142 of England.

20. Supra

21. Infact the first Attorney General to appear in the Capacity of Director of Public Prosecutions was Mr. Karuga in the spying case where one was accused of passing Military secrets to Tanzania army.

22. These may not be enough but training of more staff can be done through the University and the School of Law.

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