

THE PLACE OF PRIVATE PROSECUTIONS IN KENYA'S
CRIMINAL LAW.

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of the requirements for the LL.B. degree,
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by

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DEDICATION

Dedicated to my parents for their love.

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ABBREVIATIONS

1. A.C. Appeal Cases
2. All E.R. All England Law Reports.
3. Ch. ^D Chancery Division.
4. C.L.R. Criminal Law Review.
5. E.A. East African Law Reports.
6. E.A.C.A. East Africa Court of Appeal.
7. K.B. Kings Bench Division.
8. K.L.R. Kenya Law Reports.
9. Q.B. Queen's Bench Division.

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14.	R. v. Paddington Valuation Officer Ex parte Peachy Property Corporation (1906) I.Q.B. 38	27
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17.	S.M. Maina & Richard Kimani v. Nathan Kahara (No. 7 of 1982 (unreported)	1, 40
18.	The Republic through Devji Kanji v. Davendra Valji Halai (1978) K.L.R. 178 (CA)	25
19.	Woolmington v. D.P.P. (1935) A.C. 642	23

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1. Constitution.
2. Criminal Procedure Code Cap. 75 Laws of Kenya.
3. Evidence Act Cap. 80 Laws of Kenya.

INTRODUCTION

When one talks about private prosecutions one is talking about those prosecutions which are not instituted by the state through its officials but of those prosecutions which are instituted by the citizens themselves. The right of citizens to set criminal law in motion is guaranteed by the law.¹ It is a constitutional safeguard in the hands of the citizens essential to help enforce the law. In the words of Lord Diplock²

"It is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of (police forces and the office of the Director of Public Prosecutions) to prosecute offenders against the criminal law."

This is also the view in Kenya. In The Nathan Kahara³ case, the High Court re-affirmed the private prosecution as a constitutional safeguard essential to counteract attempts by wealthy and influential people to stifle prosecutions when offences by them are alleged in reports to the police.

This dissertation is concerned with examining the role of private prosecutions in Kenya whether they actually play the part that they are supposed to play. It is undeniable that much of Kenyan law finds its source either directly or indirectly in English law. This is because Kenya was until 1963 a British colony and it was usual for the colonialists to apply their law. For this reason

the development or origins of private prosecutions in English law will be traced.

In Chapter One, an analysis of the citizens' right to initiate criminal prosecutions will be made. The history of the right will be discussed briefly. Private prosecution is the older form of prosecution, this is because the criminal law was not well established, the modern state was also not established to ensure maintenance of the law. The law developed with the society, the state and its machinery also developed and were able to maintain law and order.

Criminal law is that branch of the law which ensures that justice is done and wrongdoers are punished. In the medieval times, the mode of production was a feudal mode so private prosecutions were effective in maintaining law. When capitalism overthrew feudalism, the mode of production changed, industrialisation came, the social order changed. This had an effect on the law which had to conform with the prevailing situation, since law cannot exist in a vacuum. New institutions were introduced such as the Police Force, their duty was mainly to maintain law and order by apprehending criminals and taking them to courts which also grew and increased. The new machinery of prosecution proved quite effective and the right of private prosecution slowly lost its importance. There were moves to have the right taken away but it remained a right but with many infringements.

By the time Britain colonized Kenya this was the kind of jurisprudence she had, she imposed it onto Kenya. We shall study the kind of society existing before colonialism and their kind of law. This will try and see if the right of private prosecution existed as it is known today. The right was a new idea because it involved going to courts which were also new to the traditional society. The basis of the presence of the right in our law was founded by the imposition of English law and English ideas of justice. After Independence the right was maintained by the Criminal Procedure Code and the constitution as a safeguard for the citizens.

Chapter Two will discuss the procedural requirements of bringing a private prosecution to court. This will be done with the help of decided cases so that we may see how the courts have treated the right. From the cases one will also be able to draw a conclusion as to what kind of offences private prosecutions are instituted and who or what kind of persons use this right.

The state has the ultimate control over all criminal prosecutions⁴ through the principal law officer, the Attorney-General. The control is exercised e.g. by entering of a nolle prosequi, granting or refusing to give consent when it is required and through relator proceedings. These controls are also controls over private prosecutions and will be discussed in detail.

In Chapter Three, we will discuss a recent case of a private prosecution in Kenya, The Nathan Kahara case.⁵ The case will be dealt with at two levels, the lower court's decision and the revision of the High Court. The case is one of the most publicised decision of a private prosecution and it brought to the notice of a lot of people the right of a private prosecution.

In conclusion, we will be able to see whether this right is just a myth or a real safeguard and what role it has played in Kenya. Recommendations as to the usefulness of this right in Kenya and what can be done to make the right more useful will also be made. We hope to contribute in the administration of justice in Kenya and also educate the citizens on their rights.

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FOOTNOTES

1. The right can be inferred from S.26(3)(b) and(c) of the Constitution and S.88(1) and S.89 of the Criminal Procedure code.
2. Gouriet v. Union of Post Office Workers
(1978) A.C. 435 at 498.
3. This was said in the Revision of the Nathan Kahara Case.
4. S.(26)(c) of the Constitution.
5. This was case No. 7 of 1982 of the Chief Magistrates Court at Nairobi. The High Court decision as No. 11 of 1983 Nairobi (unreported).

CHAPTER ONE1: THE HISTORICAL DEVELOPMENT OF THE RIGHT
OF PRIVATE PROSECUTION.

The present criminal law in Kenya is inherited from the English law, this is because Kenya was colonized by Britain and she imposed her law on us. It will therefore be pertinent to give an account of the origins of private prosecutions in English law in order to understand its presence in our law.

Prosecution simply means formal accusation. It is the process by which criminal charges are made before a judicial officer or a tribunal.¹ Prosecution of crime is one arm of the machinery of criminal justice. It is wrong to suppose that the institution of prosecution is an automatic or mechanical process. Someone has to take charge of doing the prosecuting before a court of law can hear proceedings.

There are different methods of prosecuting crime, a state can allow the persons directly injured by the commission of the crime or his relatives in case of death to prosecute the wrongdoer, or it can designate a public official who will exercise the exclusive right to represent the state in bringing the wrongdoer to justice. The state can also designate a public official to represent the state in the prosecution of criminals but also allow

the victims of the crime or his survivors to join with the public official in the prosecution alone in the event of refusal to prosecute by the public official.² The choice of a particular method will be determined by the philosophy of the particular nation with respect to the fundamental purpose of criminal prosecution. If a nation should focus on the vindication of public rights through the prosecution and punishment of criminals it would be expected that a system of public prosecution would be established to implement this policy. If a nation believes that the rights of the victim is, if not the primary consideration, at least equally important with that of the state as a whole it is reasonable to suppose that a share of the prosecution will be delegated to the individual.

In Kenya we have a system of prosecution in which there are public officials, whose duty it is to carry out criminal prosecutions but the citizens also have a right to enforce the law. This right of private prosecution is a right of any citizen so long as he or she can show that he has an interest in the case. That is why it is private as opposed to public. The right of private prosecution has its origins in English law.

1:1. Private Prosecution Under English Law.

In England the right of private prosecution has always been recognised and upheld by the law. It is important in tracing the development of this right to

realise that it also developed with society, a study of the right will therefore be also a study of development of the society.

Criminal law comprises the norms of actions norma agendi, the rules of what is permitted and what is prohibited,³ it also includes the procedure by which criminals are brought to justice. There are many different definitions of what is criminal law, but for the purposes of this paper the above definition will be appropriate. The right of private prosecution is an old concept which can be traced with the development of the society and law.

Before the criminal law emerged as we know it today, man's conduct was governed by five fundamental ideas which were somehow overlapping; notion of private revenge, blood revenge, fancy of superstitious revenge, state revenge and mitigation of revenge in general.⁴ The order in which the ideas will be discussed is not necessarily the order in which criminal law was enforced.

Private Revenge.

This era was during the early days, the so called primitive stage of social development. To protect his personal security, and his property, and to deal with his crime problem⁵ man had to handle criminals alone, when he became a victim of an attacker he was forced to retaliate ruthlessly to make sure that he came to no harm or injury. Man administered his own private justice,

the law was individualistic since there was no common law to all; the law was as perceived by individuals. The community or tribe began to be interested in law and the responsibility of ensuring justice shifted from the individual to the society.

Era of Blood Revenge.

Crime during this time came to be regarded as affecting not only the victim of the crime, but also his family or tribe. An offence against a member of a family or tribe was seen as an offence against the whole family which acquired a right to seek justice. Crime during this time were crimes against the customs and religions in force. The punishment was inflicted collectively by the two opposing families. This led to the family feuds which sometimes became perpetual. At about this period religion was becoming powerful and very influential to the lives of the people. This led to the people believing that the spiritual authority did not encourage wrongdoers, he willed their punishment.

Era of Superstitious Revenge.

The church which was very powerful advocated the natural law, that was common to all mankind given by divine ruler. To discourage collective punishment, which had proved quite unsatisfactory because of the perpetual feuds the church encouraged the beliefs that God would punish wrongdoers. Crime was regarded as a sin against God.

The system of prosecution was thus being geared towards a public system. Parish constables were appointed but this did not do away with private prosecution. The church encouraged people to obey the King who was regarded as a peaceful ruler and the source of justice.

The Kings at this time had no professional servants. They relied on the natural rulers of the countryside and the great landowners. The vills were made liable for failure to arrest those who had committed homicide or failure to secure such persons if they had been arrested and escaped.⁶

The law was regarded as being given by the King who was the fountain of justice and it was his will that justice be done. This system emphasized on the moral obligations of vengeance incumbent on the kindred of the murdered man.⁶ Threat of vengeance was the only deterrent to crime and violence. During this time the duties of the ordinary citizens were not precisely defined. The Crown was concerned with repression of crime in order that the King's peace be maintained, officers were appointed to help maintain the peace.

State Revenue.

During this era the state became interested in crime and its repression. Officers were appointed to help maintain the King's peace. These included the Justices of Peace, Coroners and the Sherriffs. At first the powers of the citizens and the officers were the same

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the citizens could arrest if they suspected that a felony had been committed, when the hue and cry was raised the citizens had to act.⁷ The repression of crime was a source of revenue for the state through the fines imposed.⁸ By this time the idea of public and private rights was emerging. It was during feudalism. The Lords helped in maintaining law and order. The King represented every member of the society. The victim of crime was compensated but the era came to an end with the emergence of the more fully developed state dominant criminal law. The compensation was an attempt to replace personal and family vengeance with settlement of the wrongs by reparations of money or goods.

The amount of the compensation varied with the nature of the crime, age and sex and the injured party. As the state power increased the state began to intervene in the process, it also claimed a share in the compensation. The rights of the injured party became under civil law.⁹

The criminal law was vague, the offences were not clearly defined and the procedure was arbitrary often with strong political overtone, the punishments were barbaric. There was a crisis of law and order, crime was on the increase and this encouraged new procedure to be developed. Before the citizens had been dependent on the King's prosecution but now they mistrusted the system. They maintained law and order through initiating private accusations. This system was also common in other parts of Europe like

Spain and France. The right to initiate private prosecution was regarded as an extension of justice founded on the idea of the King's peace, in cases of riotous injury the interests of the King and the injured party were equally balanced. It was therefore expedient for the public authority to bring wrongdoing to light.¹⁰ The private citizen was expected to appear and prosecute the case on behalf of the King as well as himself (pro domino rege quam pro seipso.)

+ Any private person could prosecute for an alleged crime with a bill of indictment and witnesses to prove its case.¹¹ The right of any person to come forward and sue on behalf of the King was recognised by the courts who expressed their readiness to hear the humblest in the realm. There was no official specifically charged with the duty of investigating crime or possessing special power for that purpose. There was no organised police force in the middle ages. Private accusations increased and cases were badly prepared and poorly presented some prosecutions were bought off, others were threatened with some form of blackmail. Many innocent people were maliciously indicted and imprisoned. The law was being used as a weapon in local struggles for powerful men literally took the law into their own hands. Most of the cases by the aristocracy were on alleged trespass.

There was need for reform and this was done gradually. By the sixteenth century reliance was placed on official action,

Officials were given more power than the ordinary citizens. In England the police force was emerging and statutory enactments for its establishment were made.¹² The major responsibilities of the police was law enforcement and managing prosecutions.¹³ There were changes in attitude towards private prosecution which were no longer very popular because of the abuses.

There was a general move to change the system. Scholars argued that the system of prosecution should be changed to a public prosecution system or a mixed model.¹⁴ The allegations were that private prosecution was prone to strike deals with criminals which leads to failure of the prosecution. [The private prosecutor had to bear the costs of bringing a criminal to justice. This weakened the citizens' sense of public duty.¹⁵] Even before the new measures to improve prosecutions were taken there had been private organisations set up for the purpose of initiating prosecutions. In the 1700's the Society for the Reformation of Manner's acted as prosecutors to encourage the observance of the laws of sabbath. The crisis were reflecting the changes which were occurring in the society which was moving from feudalism to capitalism which is a system which needs a more organised form of administration. The old institutions which were only a bar to the growth of capitalism had to be done away with. The state has to protect itself and the supremacy of the law was emphasized. It was important to sieve prosecutions to ensure that only right or justifiable ones came to the courts.

In a bid to control prosecutions many people even judges advocated for a public prosecution system. Lord Denman speaking in 1824 had this to say:-

"But that the administration of justice should be left in almost every instance be set in motion by individual feelings of resentment, and placed under the guidance of ordinary magistrates or perhaps even inferior persons is a strange abandonment of public interests to chance In cases of misdemeanour, we have heard it asserted that indictments are almost preferred in the court of King's Bench, for the sole purpose of extorting money, and that in every stage of the proceedings if a private prosecutor can obtain a certain sum they are instantly dropped and are never mentioned again. This is said to be the case with perjury again more frequently than any other offence. . . ." 16

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In 1859 parliament enacted a bill which stated that no bill of indictment could be presented to the Grand Jury unless the prosecutor was bound to prosecute or give evidence, or the suspect was in custody or the indictment was preferred by the director or the consent of a judge or a law officer had been obtained. Even with the move to take away the right of private prosecution, it remained a very important right and was statutorily recognised. S.7 of the Prosecution of Offences Act of 1879 preserved this right. The aggrieved party could apply for an order of court directions to a judge of the High Court if the deputy director of prosecutions abandoned or neglected to continue a criminal prosecution.

Many inroads were made into the right of

private prosecutions but the basic right was retained. The arguments were that the crown was the overall control over all criminal prosecutions, which were made in its name. The attorney general as an agent and officer of the Crown was vested with power over all criminal prosecutions, he could enter a nolle prosequi or refuse to give his consent when it was required. This power was recognised by the courts in R. v. Allen.¹⁷

"In this country where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be a Tribunal having authority to say whether it is proper to proceed further with a prosecution. That power is vested in the attorney general not in the courts."

By the entry of a nolle prosequi the prosecution is put to an end without any possible objection from the parties. This right was supposed to dispose off any technically imperfect proceedings by the private citizens who sometimes may not be well versed in proceedings and the law. This discretion could not be questioned.¹⁸

The right, private citizens was retained as a corrective measure in the hands of the private citizens to make up for the inertia or possibility of corruption of authorities.¹⁹ The private persons had to show that they had a locus standi an interest in the case. It was not just anybody who could prosecute if the rights which were being interfered with injured the public then the citizens could use relator actions.

On the other hand therefore there were those moves to restrict the rights of private prosecutions, while on the other there were strong advocates for retention of the right. It argued that even in a system of public prosecution, those officials are only acting in their private capacity, they are paid locally out of the funds from the locality.²⁰

This is a system of democracy of ensuring that the citizens have a duty and not only a right to maintain law order as Lord Shaw Cross put it when speaking to the House of Commons in 1951:

"We have to secure and preserve our individual liberty and security by evolving a system under which these birthrights depend ultimately not upon an executive however benevolent, nor upon a judiciary however wise but upon the active support and the final judgement of our fellow citizens". 21

It is with such kind of jurisprudence that the colonialist came to Kenya. Before the colonial period there were many traditional societies in Kenya and they had their own system of justice.

The Pre-Colonial Era

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

and order. Most functions of the society were done communally or collectively.²² There was no individualism as among the English, the whole community was bound by the realisation that each belonged there and each had a role to play. The societies were governed by a system of customs and traditions or beliefs. If a person broke any of these he would be punished. The aim was to maintain the equilibrium, penalties were directed not against specific infractions but to the restoration of this equilibrium.²³ Among the Kikuyus in case of murder the family group of the murdered man took up arms and invaded the murderer's homestead with the object of killing the murderer or one of his close relatives and letting them realise that the murdered man had a family group capable of inflicting retribution on behalf of one of its members.²⁴ Compensation was paid to the family of the deceased because they had lost a member who contributed to the activities of the clan. These communal sentiments led to the consideration of offences being not only in terms of their effect on individuals but their effect on the entire community.

There was no distinction between civil and criminal law as was known in European concepts. All these features had their consequences on the administration of justice. Every member of the community had a duty to report any breach of the public law but for breach of private rights the victim had a right to seek justice. All these ideas of justice and law were gradually eroded away with colonialism.

The Imposition of the Right of Private
Prosecution onto Kenya.

The Colonial Era:

Britain colonized Kenya in the nineteenth century, this was part of her imperialistic moves. One of the aims of Britain as a fulfilment of the Berlin Treaty was to introduce and establish law and order to the territory. The English people were different from the Africans and they had their own conceptions of law and justice, they also had their own very different philosophies of life. Imperialism had a racialistic approach, the Africans were considered backward and uncivilized. They were referred to as natives or 'savage'. The English therefore set about to civilize the Africans and this they did through many ways - law, institutions and economic forces.

The English legal system was introduced to Kenya in 1897 by the East African Order-in-Council; this was the foundation of English law in Kenya. The Order-in-Council introduced a wholesale importation of English law and principles of justice. Indian Acts and Codes like the Penal Code and the Criminal Code were extended to the protectorate. These codes were mere codifications of English criminal law in force in England then. The law was to facilitate the application of English law among the British subjects. The Indian Criminal code was based on the Queensland model of 1899.²⁵

Customary law was replaced by a system of courts with officials to work in the courts. The 1897 Native Courts Ordinance established a system of courts whereby the natives were to apply their laws. The colonialists realized that the Africans could only apply law which they were familiar with, they therefore could not apply the English law, but this was only in civil matters in criminal law statutory laws were enacted and had to be enforced. A dual system of courts was established, courts for the English and the natives. The courts gradually changed in constitution and procedure they were increasingly accepting principles of English law and procedure. The Africans did not trust the system of courts because they saw them as weapons or instruments of the colonialists, they preferred to settle their disputes out of court.

The Indian Criminal Code and the Penal Code were replaced in 1930 by the present codes. These presented for the application of private prosecution by the citizens. However, the right of private prosecution was not used by many citizens. This was because of the expenses involved, not many people had the finances to take proceedings to court. The Africans did not use the courts very much, the right was mainly used by the white settlers.²⁶ The courts recognized this right which was granted by the Criminal Procedure Code S. 83(2). A magistrate could authorise a private prosecution. This was the law until independence.

The Independence Era.

Kenya attained independence in 1963. She acquired an independent constitution as the supreme law of the land. The constitution retained the right of private citizens to conduct proceedings under S. 26(3)(b), right to private prosecution can be inferred from the Attorney general's power to take over and continue any such proceedings that have been instituted or undertaken by himself or any other person or authority. The Criminal Procedure Code section 89 also gives the citizen's the right, the private citizen's can present complaint to a magistrate. The private citizens have to apply for permission to conduct proceedings to a magistrate trying the case. Private prosecutions are mainly used by government departments, corporations and local authorities who have their own legal departments to conduct their legal affairs.

In practice most of the prosecutions are conducted by the police. This is because of various factors and requirements which will be discussed in the next chapter.

FOOTNOTES

1. Halsbury's Laws of England 3rd Ed. Vol. 25 pg. 349.
2. Sullivan F.C. The Administration of Criminal Justice Cases and Materials.
2nd Ed. The Foundation Press Inc.
(1969) p 385.
3. Schafer Introduction to Criminology. Reston
Publishing Co. Inc. (1976) pg. 6.
4. Supra at p. 27.
5. Ibid at 29.
6. Alan Harding The Law Courts of Medieval England
George Allen & Unwin Ltd. (1973) p. 15.
7. Sir William Holdsworth, A History of English Law
5th Ed. Vol. 3, p. 599.
8. Plucknett Theodore F.T. A Concise History of the
Common Law, 5th Ed. Butterworths
London (1956) pg. 424.
9. Supra note 3 at p. 31.
10. Supra note 6 at p. 89.
11. H.E.L. Vol. 3 p. 600.
12. Metropolitan Police Act 1829. Dublin Police Act
1786.
13. Edwards : The Law Officers of the Crown
Sweet and Maxwell (1964) p. 338.
14. Scholars like Bentham, Voltaire and Romilly.
15. Supra note 13 at p. 339.

16. Lord Denman Future C.J. of Kings Bench as quoted in Edwards p. 341.
17. (1862) I B & S 850.
18. R. v. Dunn (1843) I C & K 730.
19. Lord Wilberforce in Gouriet v. Union of Post Office Workers (1978) A.C. 435 at 477.
20. Patrick Devlin The Criminal Prosecution in England Yale University Press New Haven (1958) p. 13.
21. Supra note 13 at p. 400.
22. Jomo Kenyatta, Facing Mt. Kenya, Heineman Educational Books p. 195.
23. J.H. Driberg 'The African Conception of Law' Jo. of Comp. Legislation and International Law Series III Vol. 16 p. 231.
24. Note 22 at p. 227.
25. Alan Milner, Africa Penal Systems, Routledge & Keagan Paul London (1969) p. 94.

CHAPTER TWOTHE PROCEDURAL REQUIREMENTS OF A PRIVATE PROSECUTION.

In this Chapter we shall be concerned with the procedure in which a private prosecution is brought to court. In discussing this procedure it will be necessary to deal with prosecutions in general because there are certain principles which have to be complied with. The criminal procedure lays down the method in which a prosecution is to be conducted. Criminal law is concerned with ascertaining whether or not the accused committed the alleged crime and thus dispense justice accordingly.

The proper role of the prosecution in a criminal trial is to see that the prosecution case is fairly presented and all weaknesses in the defence case are identified and fairly exposed to the court. The prosecution thus has the burden of proving the alleged crime, it must prove it to the court that accused committed the crime beyond any reasonable doubts. This rule of law was laid down in an English case Woolmington v. D.P.P.¹ The accused person is presumed innocent until proved guilty. Lord Sankey explained this principle:-

"Throughout the web of English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt"

The Constitution of Kenya also places the burden of proof on the prosecution.² That burden of proof, sometimes called the legal burden is dispensed off in many ways.

The prosecution calls witnesses who testify to the court on the alleged act. There are also other modes of adducing evidence in court; but these are outside the scope of this paper. The prosecution should not press for a conviction, they are ministers of justice assisting in its administration rather than its advocate. There are certain instances where the burden of proof shifts from the prosecution, these include where an accused party pleads insanity or intoxication³ which are defences in law and they diminish liability. In civil cases it is the duty of the party who wishes to have judgements in his favour to establish all facts which he relies upon. This is similar to the role of the prosecution which must prove that there is a prima facie case against the accused. The degree of proof required is much higher than in civil cases. Once the prosecution has made out its case the accused person then defends himself. This he may do so personally or with the help of an advocate. If the court finds him guilty it convicts and sentences him accordingly.

Prosecution is therefore part of criminal justice. It can, in Kenya, be brought either by a private person or a public official, the police or attorney-general in this case. In practice the bulk of the prosecutions are made

by the police, but there are a few private prosecutions.

Statutory Requirements of S:88(1) C.P.C.

Before a private prosecutor, citizen can initiate a prosecution he has to get permission to initiate the prosecution, from a magistrate trying the case.⁴ The private citizen then becomes responsible for conducting the trial, he may do so personally or by an advocate. In Nunes v. R⁵ the appellant appealed against his conviction on two charges of perjury alleged to have been committed in the trial case. The issue was whether the private prosecutor was entitled to appear on appeal, ~~The~~ Attorney-general having intimated that he didnot propose to take part in it. In this case permission to prosecute was never asked for but the court held that by the magistrate allowing the trial to proceed he gave his permission.

In Kyagonga v. Uganda⁶ the High Court of Uganda held that even though no formal leave of court for the prosecution was recorded, by allowing the complainant to lead evidence must mean that such leave was given to him. The courts have decided that permission to institute a proceeding may be drawn from parties conduct, if no objection is raised to the absence of formal permission, until after the close of the prosecution case such permission may be inferred from the face ~~of~~ that the trial has been allowed to proceed so far.⁷

The private citizen conducting a proceeding will be liable to pay costs to the accused person.

Ches
IV

In R Ex parte C.H. Brain v. Confait⁸ the appellant was private prosecutor in a perjury case in which the respondent (accused) who was legally aided was acquitted. The alleged perjury was said to have been committed by the accused while giving evidence in his own defence on a serious criminal charge, the evidence was to the effect that the appellant has instigated and abetted his offence. The Attorney-general declined to prosecute the accused, so the appellant applied and obtained leave to prosecute. The appellant was unable to appear for the hearing because of a delay of his ship due to bad weather. The court acquitted the accused and made an order for costs from which the appellant appealed.

It was held that the court had no power to order a private prosecutor to pay the Crown, the costs would only be made to the accused and in this case accused had incurred no expenses since he was legally aided, so the award was set aside.

Locus Standi

The private citizen wishing to conduct a prosecution has to establish that he has a locus standi, that is he has capacity to conduct or prosecute the accused. The private citizen has to be the victim of a crime or he must show some direct interest in the proceedings.⁹ In Ex parte Siddebotham James L.J. explained that the complainant must be

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

The position of the aggrieved party is that he has to have some personal interest, he must not be a stranger in the matter. The courts will not listen to "a mere busy body who was interfering in things which do not concern him".¹¹ The question of locus standi is answered in the same way as when the court is granting prerogative orders. The courts in England have not been insistent as they were in insisting that the person suing must have an interest in the matter. It is now settled that all that the complainant has to show is a sufficient interest. In R. v. Metropolitan Police Commissioner, Ex p. Blackburn¹² the commissioner issued a policy decision that proceedings were not to be brought against clubs for breach of the gaming laws unless there were complaints of cheating. Mr. Blackburn did a survey on what went on in the gaming clubs of London and discovered that they were openly breaking the law but could not be prosecuted due to the policy decision issued by the Commissioner. Blackburn therefore applied for a mandamus to compel the Commissioner of Police to do his duty that is reverse that decision. During the course of the hearing the Commissioner undertook to do so. The Court of Appeal held that while the decision whether or not to prosecute in any particular case should not be interfered with, it would interfere in a policy decision amounting to a failure

to enforce the law. The court heard Blackburn against the arguments that he had no locus standi. A few years later Blackburn brought proceedings against the Commissioner for failing, as he asserted, to enforce the law against obscene publications.¹³ Mr. Blackburn was concerned for his children. The Court of Appeal said that the courts would interfere with the discretion to prosecute only in the extreme cases. In these cases the discretion was not extreme.

The interest of the party seeking to enforce the law must be above the interests of the community as a whole. But there are certain instances where the courts will allow an interest to be enforced by a party other than the victim. This was the case in Pickering v. Willoughby¹⁴ where the person assaulted was so old and so much under the control of the assailant as to be unable to institute proceedings. His relative was allowed to lay an information on his behalf. This would also be the case where the party has got no capacity at law, i.e. a minor, a person of unsound mind. In countries like Germany or France a stranger cannot institute proceedings without first getting the victim's consent.¹⁵ The test whether the complainant has a locus standi is a means of making sure that vexatious or frivolous proceedings are not brought to court. In Kenya before one can institute a private prosecution, he has to establish a locus standi. This means that it will be difficult for citizens to enforce

the criminal law effectively since he has to be personally affected. The test is more of a control of the right of private prosecution, a citizen who is a ratepayer or a taxpayer has been taken to have an interest under English law. It is not really known how far the courts will go in interpreting whether a citizen has an interest in a case, because there is no laid down rule as such.

Controls by the Attorney-General over
Private Prosecutions.

In general the Attorney-General is vested with the power to control all criminal prosecutions. This is because he is the state's chief or principal law officer and an agent in law enforcement. The controls are exercised in various ways which are also powers of the Attorney-General (fiat). They include relator actions, granting consent, and nolle prosequi.

Relator Actions: The Attorney-General is regarded as the guardian of the public interest in seeing that the law is obeyed. If the private citizen cannot bring himself action the class of having a special interest (locus standi) he can go to Attorney-General and ask him to intervene, either by taking the proceedings himself or by giving him permission to use his name in the suit. The granting of permission is known as a relator action.

It is founded on the common law principle that the Attorney-General represented the King as parens-patriae, he would proceed by way of information to enforce the rights of a charitable nature for the benefit of those interested persons who have decided or were unable to enforce their claims.

In A-G v. Harris¹⁶ the court explained that a relator action was a suit brought by the Attorney-General at the relation or instance of some other person. The suit is brought by the complainant although the Attorney-General is the plaintiff in the action. In this case the Court of Appeal in England in a relator action for an injunction to restrain the defendant from selling flowers from two stalls which projected on a footway near the entrance of a public cemetery held that the actions injured the public. The Attorney-General is therefore the representative of the whole community to see that the laws are obeyed and to put a stop to continuing and deliberative flouting of the will of parliament.

The idea of relator actions is founded on the belief that the citizens are responsible for ensuring that the law is enforced and that even the public officials can only act in their private capacity but they are conferred with special powers which enable them to enforce what the citizens cannot enforce.

In Gouriet v. Union of Post Office Workers 17

the plaintiff had applied to the Attorney-General for his consent to act as a plaintiff in a relator action for an injunction against the Union of Post Office Workers, on the grounds that the actions of the Union's members in interfering with postal communications, and the action of the Union in soliciting or endeavouring to procure such interference would constitute criminal offences under the Post Office Act.

The Attorney-General refused to give his consent and the plaintiff thereupon issued a writ in his own name, claiming an injunction restricting the Union from the planned boycott. The application for an interim injunction was dismissed by the High Court, the judge holding that since the Attorney-General had refused his consent to a relator action the plaintiff himself had no locus standi. The plaintiff appealed and the Court of Appeal granted him the interim injunction and gave him leave to add the Attorney-General as a defendant in the suit. The Union complied with the injunction and the boycott did not take place. At the time of the hearing the Attorney-General appeared and contended that the court had no jurisdiction to question his decision to refuse his consent to a relator action and that since the plaintiff had no particular interest as a member of the public, he was not entitled to bring the action in his own name

after the Attorney-General had refused his consent.

It was held that despite the refusal of the Attorney-General to give his consent to relator proceedings, the court had jurisdiction to grant the interim injunction to the plaintiff. The court also said that the Attorney-General's discretion was not absolute, the court could in a proper case allow the plaintiff to apply for a declaration or an injunction joining the Attorney-General as a defendant. In particular where the Attorney-General refused his consent to an action seeking to enforce the communal law, the citizen could come to court and ask the law to be enforced.

This brings us to the conclusion that under English law any member of the public can institute criminal proceedings even without establishing a personal interest, this is contrasted with the common law position where proceedings could only be made by persons who could establish an interest. The courts in Kenya will not question a decision of the Attorney-General if he refuses to grant his consent. The courts are also part of the government machinery¹⁸ even though the doctrine of separation of powers is advocated. Before some proceedings can be brought before a court they require consent of the Attorney-General.

Consent to Initiation of Proceedings: There are

instances where the sanction of the Attorney-General is needed before proceedings can be instituted are statutory requirements. They include crimes or charges under which the state has the final authority, all prosecutions are conducted at the mercy of the Crown. These include crimes such as Sedition which S.58(2) of the Penal Code says no person shall be prosecuted for the offence without the written consent of the Attorney-General. The Prevention of Corruption Act¹⁹ also says that written consent of the Attorney-General is required before the proceedings are commenced. In the case of Abubakar Kakyama Manyaja v. R²⁰ the appellant was arrested and charged with contravening S.19 of the Legislative Council Powers and Privileges Ordinance of 1955. He was charged before a jury and pleaded not guilty. The provisions of this Ordinance required that no prosecutions could be instituted without sanction of the Attorney-General. It was alleged that the written consent of the Attorney-General was given before the commencement of the trial. The court held that the consent was valid.

The sanction to prosecute constitutes a condition precedent to the institution of a prosecution. The magistrate trying the case should satisfy himself that such consent has been granted before hearing the case.²¹ It is in the absolute discretion of the Attorney-General to grant or refuse to give his consent.

The reasons for this requirement of the sanction is that the Attorney-General or his deputies will be able to scrutinize the charge and ensure that only good and not defective charges appear in court. This would also ensure that some uniformity in the administration of criminal law is reached. This sanction was originally aimed at controlling private prosecutions. The private prosecutor might be influenced by other motives, rather than to vindicate or assist in the criminal law.

In granting or refusing to give his consent the Attorney-General does not have to give reasons, this can operate negatively because the Attorney-General can usurp the powers of the individuals. It is also not laid down under what circumstances consent will be refused. From experience we find that the granting of consent takes an unnecessarily long period of time. This will mean that it is expensive for a private prosecutor who does not have the same facilities ^{which ones} as the police. When a private citizen decides to initiate criminal proceedings it is because the police have failed to act, so it becomes meaningless where he has to wait for consent which he is not sure will be granted to him. Certain policies are adopted in granting consent, the prosecution should not be prejudicial to the accused or the accused person has already suffered enough. The Attorney-General is also vested with the power to stay proceedings by the use of the nolle prosequi.

Nolle Prosequi: The Attorney-General can control all criminal prosecutions through the entry of a nolle prosequi. This is an exclusive right given by the constitution.²² The origin of this right is that it was natural for the Crown in whose name criminal proceedings were instituted to reserve the right to terminate the same proceedings at will.

The Attorney-General can enter a nolle prosequi, which simply means not willing to prosecute, at any time before the judgement. This is not the same as withdrawing a case under S.87 of the Criminal Procedure Code. The nolle prosequi operates as a stay sine die of the proceedings. This was explained in R. v. Dunn²³ by Holt C.J.:

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

The nolle prosequi is entered by the Attorney-General by stating in court in writing that the Republic does not intend to continue with the proceedings as per S.82(1) of the Criminal Code. Once the nolle prosequi is entered the accused person is discharged in respect of the charge, but this does not bar subsequent proceedings on the same offence. This was explained in the case of Poole v. R.²⁴ where a nolle prosequi had been entered but new information on the same terms as the first charge was laid. The appellant contended

inter alia that the trial was a nullity because the Attorney-General had entered a nolle prosequi in respect of the first information. The Privy Council held that the entry of nolle prosequi did not discharge the proceedings so as to preclude the filing of another charge based on facts disclosed during the first hearing. Nolle prosequi is not a pardon for the accused who may still be charged for the same offence. The courts have accepted the view that this power of the Attorney-General is not subject to review by the courts. In R. v. Allen Cockburn C.J. expressed his view saying:

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

The Attorney-General will or can enter a nolle prosequi without first hearing the parties concerned, in a civil case as the plaintiff he can also enter a nolle prosequi. The nolle prosequi is a way of disposing off any technically imperfect proceedings. This was a way of eroding the citizens' right to initiate criminal proceedings, it was also based on the fact that many imperfect proceedings for extortion of money were being brought to the courts. A prosecution should not be

oppressive to the accused person. This nolle prosequi is a dark cloud hanging over every criminal trial. The Attorney-General penetrates in criminal prosecutions as a matter of public policy. Unfortunately we feel that this right has been misused even in areas where the prosecutions are public. One cannot clearly say what kind of proceedings will be stayed, the nolle prosequi has been entered in very different cases.²⁶

The private citizen conducting a prosecution is still at a disadvantage because he has to satisfy the court with all these extra requirements which are not required in an ordinary police prosecution. This makes the citizens constitutional right impracticable and for these reasons very few private prosecutions are made.

From the cases that we have seen that private prosecutions made by the private citizens are usually for offences which are really more personal than public. This is probably caused by the fact that the citizen has to have a locus standi but it brings one to the conclusion that private prosecutions are really not playing a very important role in the criminal law.

FOOTNOTES

1. (1935) A.C. 642.
2. S.77(2)(a).
3. S.III(2) Evidence Act Cap. 80 Laws of Kenya
and S. 13. P.C.
4. S.88(1) C.P.C.
5. (1935) 16 K.L.R. 126.
6. (1973) E.A. 486.
7. The Republic through Devji Kanji v. Davendra
Valji Halai (1978) K.L.R. 178 CA.
8. (1957) E.A. 296.
9. Foulkes D. Introduction to Administrative Law
pg. 187 4th Ed. Butterworths
London (1978).
10. (1880) 14 Ch. 459 at 465.
11. L. Denning in R. v. Pandington Valuation Officer
Ex parte Peachey Property Corp.
(1966) 1 Q.B. 380.
12. (1968) 2 Q.B. 118.
13. R. v. Metropolitan Police Commissioner Ex parte
Blackburn (No.3) (1973)
1 All E.R. 324.
14. (1907) 2 K.B. 296.
15. Glanville Williams "The Power to Prosecute"
C.L.R. (1955) pg. ~~543~~ 222.

16. (1960= 3 All E.R. 207.
17. (1978) A.C. 435.
18. S.B.O. Gutto "Notes on the Rule of Law and Justice and the Constitutional Development in the Kenya Government" I.D.S. University of Nairobi, Working Paper No. 348 of 1979.
19. Chapter 65 Laws of Kenya S.12 says there must be written consent before prosecutions of offences under the Act are made. Other instances are in incest S.167 P.C. requires the sanction of the Attorney-General.
20. (1960) E.A. 23.
21. Abulla Suleiman El Harthi and Others v. R.
(1955) 22 E.A.C.A. 404.
22. S.26(3)(c) and S.82(1) of the C.P.C.
23. (1843) I.C.& K. 730.
24. (1960) E.A. 644.
25. (1862) B & S. 850 at 854.
26. i.e. in Makecha's Case. Daily Nation Nov. 17th, 1983.

CONCLUSION:

The main concern of this dissertation has been to find out whether private prosecutions have played an important role in enforcing the criminal law in Kenya. We established the existence of the citizen's right to set criminal law in motion but the use of this right has been limited by various factors.

The private citizen who wishes to initiate a criminal prosecution has to meet the costs of the proceedings. The citizen will also involve himself in expenses of hiring legal aid. This makes private prosecutions so expensive that very few people are able to afford them, since in Kenya the majority are the poor people. The attitude of the people towards the prosecution and enforcement of law has also played an important role in limiting the use of the right.

Many people regard the enforcement of criminal law as part of the duties of the police and the department of public prosecution. The private citizens do not see it as part of their duties to initiate criminal prosecution. Such an attitude has its origins in the colonial era when the law was imposed and the machinery for its enforcement was also created. The law was seen as an instrument of oppression, the police were the major department used in prosecution and this attitude has not been changed.

The requirements of initiating a private prosecution require that a citizen should have a locus standi, an interest in the matter. This has led to the right being used for minor cases such as assault and not very serious offences which really affect the well being or security of the public generally. This is because it is not spelled out or written down as to what constitutes a sufficient interest in a case.

Before a private citizen can initiate a prosecution he has to have informed the police and the Attorney-General who have refused to act. The right is regarded as a corrective measure in the hands of private persons to make up for the neglect, inertia or possibly the corruption of authorities. This means that the right is a weapon against wealthy individuals but it fails to be because of the expenses involved. The right does not serve its purpose because, it can only be used by the people with financial abilities and they are the people whom it is assumed to be corrupting the police. The private citizen has to ask for permission to conduct the case from a magistrate trying the case. Once the permission is granted the citizen takes charge of the case but he is under a constant threat of the Attorney-General taking over the case and entering a nolle prosequi.

The police department feel that by the citizen deciding to initiate proceedings they are undermining their position. They are therefore not very helpful and do not give much assistance. The state has found it necessary to restrict

the use of this right of private prosecution because, once a citizen conducts a case he becomes entitled to costs and this will mean that the state will be losing a source of revenue i.e. the fines imposed.

We therefore come to the inevitable conclusion that private prosecutions have not played an important role in our criminal law, they have not been a corrective measure in the hands of the citizens, but they have been the privilege of a few citizens who can afford to institute proceedings. We would therefore recommend that a few changes be made in the process of instituting a private prosecution.

There should be a system whereby the government will provide funds for citizens who wishes to commence a private prosecution. We do not think that there can be any danger of a frivolous and malicious prosecution because of the various safeguards we discussed earlier.

A system of prosecution by the citizens is not enough in ensuring that justice is done because of the kind of society which we have to-day. So the dual system which we have in Kenya is good but the police should not be the prosecutors, there should be trained personnel solely involved with this role. This would minimize the possibility of corruption of the police. The department should be required to give reasons for its decisions on whether or not to prosecute and indeed this will make the citizens have more faith in their work.

If we are to maintain the right of private citizens to prosecute then the right should be more available to the citizens.

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL (REVISION) CASE NO. 11 OF 1983

EXTRACT
THE JUDGEMENT

(From Original Dismissal in Private Prosecution No. 7 of 1982 of the Chief Magistrate's Court at Nairobi: A. Ruf, Esq.)

RICHARD KIMANI & S. M. MAINAAPPLICANTS

VERSUS

NATHAN KAHARARESPONDENT

ORDER OF COURT ON REVISION

Sometime in November, 1982, a complaint sworn by two councillors of Nairobi City Council was made to a Senior Resident Magistrate in support of a support to charge Nathan Kahara (who was then the Mayor of Nairobi) with conspiracy to defraud the public contrary to section 317 of the Penal Code alternatively conspiracy to commit a misdemeanour namely to defraud the public contrary to section 394 of the Penal Code. A charge sheet containing 39 counts was attached. Both the complaint and the magistrate's signature to the charge sheet are undated.

On 30th November, 1982, the two complainants through their advocate Mr. Muite applied under s. 88 of the Criminal procedure Code for permission to prosecute Mr. Kahara. Mr. Kahara was neither present nor represented. Permission was granted by Mr. Aswani, a Senior Resident Magistrate.

On 14th December, 1982, the accused appeared before the Chief Magistrate, pleaded not guilty to all the charges and, his advocates having asked for an adjournment to raise a lengthy preliminary point, was released on his own bond for Shs.1,000,000 with 2 sureties in the same amount. Submissions on the preliminary were eventually made to the Chief Magistrate on 21st and 25th January, 1983 by Mr. Georgiadis for the accused, Mr. Muite for the complainants and Mr. Chunga, Principal State Counsel, in the capacity of amicus curiae.

The Chief Magistrate gave his ruling on 9th February, 1983, dismissing all the charges against the accused and discharging him.

Under s. 348A of the Criminal Procedure Code only the Attorney-General may appeal from an order dismissing a charge. Mr. Muite

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accordingly requested the High Court to exercise its powers of revision to revise and/or quash the ruling of the Chief Magistrate and refer the case to the Resident Magistrate's Court with orders for it to commence the trial and hear the case. Since a number of important points of law arose the Attorney-General was invited to appear as amicus curiae. Mr. Chunga represented him. Mr. Muite with Mr. Mohamed for the complainants and Mr. Georgiadis with Mr. Mwaura for Mr. Kahara who by this time had ceased to exercise the functions of Mayor. The complainants likewise were no longer councillors. Mr. Muite filed a document which he called a Memorandum of Revision for which there is no statutory provision. Since the complainants were not parties who could have appealed we were not debarred by s. 364(5) from entertaining the proceedings and we allowed Mr. Muite to make submissions on the lines indicated in the Memorandum.

In his ruling the learned Chief Magistrate held that permission having been granted by the Senior Resident Magistrate he had no power to exercise an appellate jurisdiction to reverse it. That is, he had no jurisdiction to consider Mr. Georgiadis' submissions that before granting permission Mr. Aswani should have considered the locus standi of the complainants in the matter and should have heard the accused.

He accepted Mr. Chunga's submissions that the discretion of the court in granting permission for a private prosecution must be exercised judicially, sparingly and only on extremely good grounds and that the court must find out if the police or the Attorney-General had been informed and with what result particularly in a case such as this of considerable public interest. He agreed with Mr. Chunga that the recent deletion of the words "inquiry into or" from section 88(1) of the Criminal Procedure Code had the effect of enabling a private person to conduct a prosecution to apply for permission only during

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us and which we shall consider shortly. Mr. Chunga asked the court to dismiss the charges. He said "The private prosecutor will not be allowed to assume the responsibility conferred on the Attorney-General," and "The Attorney-General will give his consent to any private prosecutor when it is necessary".

The learned Chief Magistrate concluded by holding that the Attorney-General had ultimate and undisputed control over all prosecutions. Accepting Mr. Chunga's submissions he dismissed all the charges against the accused and discharged him.

Before hearing the submissions of counsel for the complainants and the former accused to whom we shall refer respectively as the applicants and the respondent we invited Mr. Chunga to state the position of the Attorney-General in the matter. He raised two points. In the first place he said the permission was null and void because the magistrate was not trying the case at the time he granted it.

S. 88(1) of the Criminal Procedure Code formerly read as follows:

"88.(1) Any magistrate inquiring 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 authorized by the Attorney-General in this behalf shall be entitled to do so without permission."

We shall revert later to the interpretation of the words "trying any case" but it would be convenient at this stage to consider the effect of the deletion of the words "inquiry into or" by the Criminal Procedure (Amendment) Act 1982, (No. 13 of 1982). Mr. Chunga submitted and the learned Chief Magistrate held in his ruling that the effect of this amendment was to remove the power of a magistrate to grant permission before the commencement of a trial. This is not so. He never had that power. The main object of the Criminal (Amendment) Act, 1982, was to replace preliminary inquiries with shorter and more expeditious committal proceedings. The words "inquiry into" referred to preliminary inquiries and their removal does not otherwise affect the meaning of the section.

Mr. Chunga's second point was that the section confers a discretion which has to be exercised judicially and he requested the court to indicate the principles applicable. He submitted that consideration should have been given to the lôcus standi of the applicants who were seeking to prosecute the respondent for offences in which they had suffered no injury. In the absence of personal damages or injury a prosecutor had no locus standi. We shall consider this point along with the submissions in respect thereof of Mr. Muite and Mr. Georgiadis.

Mr. Muite invited us to take the opportunity to lay down guidelines on the role of the Attorney-General when he appears in person or by State Counsel as amicus curiae. We are confident that the Attorney-General knows his role when invited by the Court to appear as amicus curiae and that there is no need for us to provide guidelines nor would it be proper for us to do so except at his request. We would however add with respect that Mr. Chunga appearing as amicus curiae exceeded his functions of advising and assisting the lower court on a matter of public importance when he asked the court to dismiss the charges against the accused.

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

The Chief Magistrate's decision to dismiss all the charges and discharge the accused was apparently based on his conclusion that the Attorney-General had ultimate and undisputed control over all prosecutions.

As a general proposition this is undoubtedly correct but it is necessary to look at the statutory provisions. The powers of the

Attorney-General are to be found in section 26 of the Constitution which reads as follows:

- "26. (1) There shall be an Attorney-General whose office shall be an office in the public service.
- (2) The Attorney-General shall be the principal legal adviser to the Government of Kenya.
- (3) The Attorney-General shall have power in any case in which he considers it desirable so to do -
- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
- (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
- (4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence, or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.
- (5) The powers of the Attorney-General under subsections (3) and (4) of this section may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.
- (6) The powers conferred to the Attorney-General by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority;

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

- (7) For the purposes of this section, any appeal from any judgment in any criminal proceedings before any court, or any questions of law reserved for the purpose of any such proceedings, to any other court, shall be deemed to

be part of those proceedings:

Provided that the power conferred on the Attorney-General by subsection (3)(c) of this section shall not be exercised in relation to any criminal proceedings or to any question of law reserved at the instance of such a person.

- (8) In exercise of the functions vested in him by subsections (3) and (4) of this section and by sections 44 and 55 of this Constitution, the Attorney-General shall not be subjected to the direction or control of any other person or authority."

Under sub-section (3)(b) the Attorney-General can take over and continue criminal proceedings (other than courts-martial) instituted or undertaken by any other person or authority and under para (c) he can discontinue any such proceedings at any stage before judgment. A right by any other person to institute or undertake criminal proceedings can be inferred from these provisions. Section 89 of the Criminal Procedure Code expressly confers the right to institute criminal proceedings on any person by means of complaint to a magistrate and section 88 confers the right to any person to conduct the prosecution subject to the permission of "any magistrate trying the case."

Thus before the Attorney-General can control a private prosecution he must take it over. Having taken it over he may either continue it or discontinue it by entering a nolle prosequi as provided by section 82 of the Criminal Procedure Code. Nowhere can it be inferred from the foregoing provisions that the consent of the Attorney-General is required before a private prosecution can be instituted or conducted.

Mr. Chunga referred us to para 626 of Vol. 10 of Halsbury's Laws of England (3rd Edition) which reads as follows:-

"626. Crimes against the state. It is the duty of the Attorney-General to institute prosecutions for crimes which have a tendency to disturb the peace of the state or to endanger the government; and no information at the suit of any one but the Attorney-General will be granted by the Queen's Bench Division of the High Court of Justice for such an offence."

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The offences with which the accused was charged however allege fraud against the public, not crimes against the state. It may be noted that no provision is made in the Criminal Procedure Code for a private prosecution in the High Court or for an appeal by a private prosecutor. It may be useful to compare our legislative provisions with respect to private prosecutions with the English Common Law.

In *Gouriet v Union of Post Office Workers* 1978 AC 435 Lord Wilberforce (at p.477) briefly considered the right of private prosecution in England.

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

With respect to section 88 of the Criminal Procedure Code Forbes J. P said in *Riddleschager v Robson* (1959) EA 841 at p. 845

"On the basis of those cases the Crown is the prosecutor in law; but the Crown must, of course, act through someone. Normally the Crown acts through a "public prosecutor" as defined in s. 2 of the code - see s. 86 of the Code. But special provision is made in s. 88 to enable the Crown to act through a complainant in cases in which a public prosecutor does not wish to act. In such case the consent of the magistrate must be obtained before the complainant can "conduct" the prosecution."

It is of course necessary now to substitute "Republic" for "Crown" when reading that passage.

In Kenya also the right of private prosecution is essential to counteract attempts by wealthy and influential people to stifle prosecutions when offences by them are alleged in reports to the police. The most frequent offences which become the subject of private prosecutions are assault and trespass. There are in addition offences of a minor nature in which the police quite properly

take the view that it is not in the public interest to prosecute.

The right of private prosecution is a constitutional safeguard.

In the words of Lord Diplock in the Gouriet case (supra) at p. 498:

"It is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of [Police forces and the office of Director of Public Prosecutions] to prosecute offenders against the criminal law."

Quote

The learned Chief Magistrate in our view erred in complying with the request of Mr. Chunga to dismiss the charges and discharge the applicant on the ground that the Attorney-General has ultimate and undisputed control over all prosecutions without considering how much such control is exercised.

Three questions now fall to be considered.

1. How should the words "trying the case" be interpreted? When does a magistrate start trying a case?
2. In considering whether or not to grant permission has he a discretion which should be exercised judicially?
3. If he has such a discretion on what principles should it be exercised?

1. "Trying the case"

Mr. Chunga said that a trial presupposes a full hearing. In the context of section 88, however, "trying" we think must include taking a plea. It is we think clear that the trial of a case cannot start before the accused person is before the court. As soon as an accused person is before him in court for the purpose of pleading to a formal, duly signed charge a magistrate can properly be described as "trying the case." It is at this stage that an application may be made for permission to prosecute. If in the absence of the accused person permission is purportedly granted to a private prosecutor to conduct a prosecution

the power to grant permission cannot be taken to have been exercised by a magistrate trying the case. Such permission is premature and as both Mr. Chunga and Mr. Georgiadis submitted, it is null and void. Hence the magistrate before whom the trial commences is at liberty to disregard it and make his own decision to grant or refuse permission.

The application in the present case appears to have been made at the time when the complaint was before the magistrate. Whether or not this is so the record shows that on 30th November, 1982, Mr. Muite applied for permission to prosecute and asked for mention on 6th December. Permission was granted and it was not until 14th December that the accused appeared before the court and the charges were read and explained to him. Thus when permission was given to Mr. Muite to conduct the prosecution the accused was not before the court, Mr. Aswani was not therefore trying the case and he had no jurisdiction to grant or refuse permission. The Chief Magistrate before whom the trial started was therefore free to make his own decision to grant or refuse permission. He was not being asked to exercise an appellate jurisdiction to reverse a decision of a senior resident magistrate. Having held as he did that he had no jurisdiction to interfere with the decision of Mr. Aswani to grant permission there was no basis for his decision to dismiss all the charges and discharge the accused.

2. Discretion

It was not disputed and we agree that in deciding whether or not to grant permission to conduct a private prosecution the magistrate trying the case has a discretion which should be exercised judicially. Although he

had before him the sworn complaint of the two councillors and the charge sheet there is nothing in the record of the present case to indicate either that the learned senior resident magistrate appreciated that he had this discretion or that he made the decision in the proper exercise of his discretion.

3. Principles to be applied

When an application is made under s. 88 to conduct a prosecution we think that the magistrate should question the applicant to ascertain whether a report has been made to the Attorney-General or to the police and with what result. If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the police of that fact.

An example of the exercise of discretion is to be found in the case of Riddleschager v Robson (supra) in which the resident magistrate granted permission to a private individual to conduct a prosecution in default of the Attorney-General doing so. Forbes Ag. P said (at p. 843) -

"The learned resident magistrate in a written ruling noted that the attorney-General had previously declined to institute the proceedings, but expressed the hope that the attorney-general would see fit to undertake the conduct of them. In default of the attorney-general doing so the learned magistrate ruled that the appellant should have the conduct of the prosecution, and the appellant did, in fact, through his counsel, conduct the prosecution."

The magistrate should also ask himself. How is the complainant involved? What is his locus standi? Has he personally suffered injury or damage or is he motivated by malice, or political considerations? In the present case it is alleged that the public has been

defrauded. No case either in England or Kenya was brought to our notice in which a private prosecutor has prosecuted on behalf of the public interest. To prosecute on behalf of the public is to usurp the functions of the Attorney-General. Mr. Georgiadis drew an analogy between private prosecutions and prerogative orders. An applicant for a prerogative order such as certiorari or mandamus must show a sufficient interest in making the application. As Mr. Georgiadis submitted a fortiori is this necessary in a private prosecution where the liberty of the subject is involved. Lord Denning tried to stretch the meaning of "sufficient interest":

"Every responsible citizen "he writes in his book 'The Discipline of Law' at p. 122 "has an interest in seeing the law is enforced; and that is a sufficient interest in itself to warrant his applying for certiorari or mandamus to see that it is enforced"

The House of Lords thought Lord Denning went too far. In the Gouriet case (supra) at p. 477 Lord Wilberforce said

"It can properly be said to be a fundamental principle of English Law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public!"

Prerogative remedies such as certiorari, mandamus and prohibition are of course not available against private individuals but only against government departments or any person or body set up by statutory authority affecting the rights of individuals.

Even if it be true that every citizen has sufficient interest in seeing that the law is enforced it does not follow that every citizen has a sufficient interest in conducting the prosecution of another citizen for an offence which has caused him no damage or injury.

The complainants were at the material time councillors of the City of Nairobi. The land belonged to the City Council of Nairobi. Being councillors did they have a sufficient interest? Have they personally suffered some damage or injury? These are matters which should be considered in the present case.

We have found that the permission which Mr. Aswani purported to grant was null and void and that the Chief Magistrate erred in dismissing the charges and discharging the accused at the request of Mr. Chunga on the ground that the Attorney-General has ultimate and undisputed control over all prosecutions. His order must be set aside.

There remains the complaint by which the proceedings were instituted and the formal charges signed by the Senior Resident Magistrate to which the respondent has pleaded not guilty. It is not for this court to grant or refuse permission. The applicants are at liberty if they think fit to apply now to the magistrate trying the case for permission to conduct the prosecution. The accused should be present. In considering whether or not to grant permission the magistrate should bear in mind our views on the exercise of his discretion. It is understood that since the charges were dismissed by the Chief Magistrate investigations into the matter alleged in the charges have been instigated by the Attorney-General but we are not aware of the result of these investigations. In the event of permission being granted the Attorney-General of course has the power to take over the prosecution and either continue it or enter a nolle prosequi.

Dated at Nairobi this 12th day of July, 1983.

A. H. SIMPSON
JUDGE

S. K. SACHDEVA
JUDGE

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