

THE ROLE OF POLICE PROSECUTORS IN KENYA

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2. Kenyan constitution
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ABBREVIATIONS

C.P.C. Criminal Procedure Code

E. A East African Law Reports

Cr. App Criminal Appeals

A.C. Appeal Cases

L.T.R. Tanganyika Law Reports

The law of evidence is mainly made up of rules... in a criminal case... after a suspect is arrested... a charge sheet is drawn up... the charge sheet is made by an inspector or any other officer... it is often found... is charged with the crime provided in the... the offence he was charged with and... of a "guilty" person. The prosecutor has a duty to... which he thinks is true, but due to... it is not true.

The prosecution has a duty to be prepared with its case at the... It has to take care of the exhibits to be produced... of the witnesses of the prosecution side and... to the defence and it should know where and when the... The prosecution is responsible for... for the defence. The witness... with their witnesses. It is not unusual to see... because one or more of his witnesses... of a complainant or a defendant, not find that... the police have not even bothered to summon the witnesses to court... the witnesses had not even been informed of the date and hour of... are subject to... especially where he is in custody.

I N T R O D U C T I O N

I was inspired to write on this subject by my experience on this subject during my fourth-term programme. This system of our prosecution and its procedure has to be considered if the law is to be enforced in a human and sensible way. Little has been done to have a critical review of our prosecution system and how it is conducted especially in the lower courts.

In the lower courts prosecution is mainly undertaken by police officers except in special cases. Most such officers are either ignorant of the law or are not serious in their work or both. 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 falls in. The charge may be made by an inspector or any other officer above this rank. The way some of these charges are drawn is abhorrent. It often happens in court that an accused is charged with the wrong provision of the law which is contrary to the offence he has committed and end result of this is an acquittal of a "guilty" person. The prosecutor has a duty to amend or even change a charge which he thinks is wrong but due to inefficiency this is rarely done.

The prosecution has a duty to be prepared with its case at the date of the hearing. It has to take care of the exhibits to be produced in court, attendances of the witnesses of the prosecution side and even those useful to the defence and it should know where and when the proceedings will be taken place. The prosecution is inefficient here. It is rare that the prosecution calls the witnesses for the defence. The police do not also bother with their witnesses. It is not uncommon to see prosecutors asking for an adjournment because one or more of his witnesses to go to court on behalf of a complainant or a defendant, you find that in most cases the police have not even bothered to summon the witnesses to court or the witnesses had not even been informed of the date and hour of trial. Such adjustments are unjust to the accused especially where he is in custody.

Some magistrates commence the trial with a feeling of antipathy toward the accused. This makes it very easy for the prosecutor to influence the magistrate further against the accused. My observations is that the prosecutors regard their success with the number of convictions obtained in a day. There are innumerable ways in a magistrate's court in which prejudicial information can be conveyed to the magistrates in a manner unacceptable to a qualified bench. A prosecutor who uses this tactics succeeds to the contrary of the public opinion where he is labelled a persecutor. The ideal prosecutors is the one who finds or regards himself as part of the court assisting the bench to learn sufficient of the fact to enable it to arrive at a judicial decision whatever that decision may be. Rarely do the police prosecutors do this.

My dissertation will mainly deal with public prosecutions but despite this I will give a word here on private prosecutions. Private prosecution concerns those prosecutions which are not instituted by the state through its officials but are instituted by the citizens themselves. The right of a citizen to set criminal law in motion is guaranteed by the law (1). It has been argued that the right of private prosecution should be retained and safeguarded as a corrective measure in the hands of the private citizens to make up for the criteria or possibility of corruption of authorities (2). Unfortunately most citizens in Kenya are ignorant of this fundamental right and even if they were aware of it they would always like to have nothing to do with the courts. Again this right can be quashed by the Attorney General with the issue of Nolle Prosequi whose effect is to terminate the proceedings upon some considerations in Kenya is ailing and needs to be breathed life into in order to sprout.

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

To give a clear account of what I intend to write on, I have divided by dissertation into three chapters.

The first chapter will deal with the "prosecution process" where I will discuss how prosecution is carried out from the time of the arrest of the suspect to the time of judgement or acquittal whichever is the outcome.

The second chapter will deal with the "prosecution Discretion" where I will discuss how those vested with the power to exercise a discretion whether to prosecute or not exercise it. I will also discuss what crimes are prosecuted and which ones are not and what criteria the police follow it and when deciding to prosecute some cases and leave others.

Finally the third chapter will look at the effectiveness of our prosecution system, its shortcomings and then how it can be reformed if need be. The chapter will carry a critique of the Kenyan prosecution system.

CHAPTER ONE

THE PROCESS OF PROSECUTION

HISTORICAL DEVELOPMENT OF THE PROSECUTION SYSTEM

THE Kenya prosecution system follows that of England. To fully appreciate how this system came into Kenya I will give a brief account of its historical development in England and then in Kenya.

In England the crown is the fountain of justice and the origin of all 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 opportunities for perquisites in the form of fines. The justice of the King's bench were the chief servants whom the crown appointed for this purpose. The Governor 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, judges and coroners used the same instruments - the inquest and 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 a grand jury called the "indictment" and in the case of a coroner 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. As late as the seventeenth century the grand jury was presenting of its own knowledge. But by the end of it they had ceased to discharge the administrative task of providing material upon which

an accusation could be brought and had become a body which had to determine judiciary 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 the neighbourhood. 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 people. The Parish constable was a rudimentary form of policeman. The job was unpaid and members of the parish were selected by rotation to discharge it. The constable made the arrest when the accused was caught redhanded but did nothing much in investigation. This heavier duty was assumed by the justices ^{who} looked or enquired into local crimes, the offences of the state and in the privy council. The judge still retained a remnant of their former duties. This shows the common origin of all these forms of enquiry that the judges are still 'ex-officials' justices for the whole of England and 'ex-official' coroners.

The result of all these enquiries were 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 invited them to call it a true bill.

The justices like the grand jury, after the nineteenth century became a completely judicial body. They did not inquire into crime any more but listened to the evidence brought before them and decided whether or not to commit for trial. This transformation was possible because in the early part of the nineteenth century another organ of enquiry had come into existence. The metropolitan police Act 1829 maybe taken as marking the beginning of the creation of the police. It became their duty, not only to arrest and charge suspects 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 solicitors' department was created in 1935 at Scotland yard and it now conducts all police prosecutions. In the metropolitan area. Many 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 prosecution's 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 machinery. In ordinary cases they initiate the prosecution and gather the material for it but the case is prepared for trial by solicitors and counsel. The solicitors therefore prepare the case for trial and the barristers present it in court.

KENYA 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. 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 these systems the Attorney General is at the top of the prosecution department. In England the Office of the Attorney General is separate from that of the Director of public prosecutions while in Kenya the Attorney General holds both offices. In Kenya except in the major cases, the police investigate the case, prepare it and finally prosecute it. But in England the solicitor 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 for the case.

WHO CAN PROSECUTE

Prosecutors are mainly of two types: the private prosecutions and public prosecutions. All criminal cases that go for trial in the courts are initiated in the name of the state (hence R v Njoroge). All the same every citizen has a right to start a prosecution and set the criminal law in motion. In smaller cases the police may refused to prosecute and tell the complainants to go to the magistrate on their own and apply for summons. Hence private prosecutions under the provisions of criminal procedure code (2) any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person but no person other than the public prosecutor or other official generally or specially authorised by the Attorney General in this behalf shall be entitled to do so without permission(3).

[The result of private prosecutions, though it is only used to a limited extent, is considered to be valuable and worth retaining. For example in matters concerning the local authorities if the local authority in question has been negligent in executing its duties and thereby caused some damage to a citizen, such a case is hardly ever taken up by the police prosecutors. The injured person has to persue for compensation on his own. It is also important that the police do not involve themselves with minor issues or family matters. However private prosecutions only constitute a small portion of the total prosecutions initiated in the country.] Some of the Government departments like the income Tax departments and price control department may have their own prosecutors instead of using the public prosecutors who mainly are the policemen.

Public prosecutions are carried out by the public prosecutors, appointed by the Attorney General (4). Such prosecutors may include any advocate of the High Court, or person employed in the public service not being a public officer below the rank of sub-inspector of police. Every public prosecutor is under the express directions of the Attorney General (5). The public prosecutors 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 under his directions. (6) 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 code or any person acting under the directions of the Attorney General.

THE ROLES AND DUTIES OF THE PROSECUTOR

The prosecutor must state all the relevant facts of the case dispassionately and he should not attempt by advocacy to influence the court towards a more severe sentence. For example it is very common in our courts to hear the prosecution bring up an issue relating to the accused so as to influence the sentence. If the accused is a holder of a big public officer, there is reference to the accused's higher degree of responsibility and such other things.

The prosecutor should play an active role in the adjudication or in the criminal justice system. He is not constrained to accept passively every matter that is presented to him by police agencies which fail to meet his standards and priorities. He can give differential treatment to his cases, proportioning his time and resources among them based on his judgement of their relative importance.

The prosecutor has the task of placing before the court those features of the proved offence which suggest and draw attention to any relevant principles of sentencing. A mass of background information can be collected with comparative case, but irrelevant information is useless.

The proper role of the prosecution is to see that the prosecution case is properly presented and that all the weaknesses in the defence are identified and fairly exposed to the court. The object of the prosecutor therefore, is not to get a conviction unless justice requires it. In *Achieng VR* (7) it was said that it is the duty of the prosecutor to put the facts before the court and the court must decide on those facts.

The prosecutor serves as the guardian, protector and custodian of the community's scarce resources of adjudication. This he does by precluding 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. He achieves this by spending time on only the most important 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.

The duties of the prosecution includes the preparation of the case and presenting it to the court. The police are part and parcel of our prosecution system and especially in the magistrate's courts they prepare the cases and the evidence they so acquire is given to the prosecuting officer. This evidence is consequently used in the courts to argue out the case.

Criminal cases are either heard or disposed of by magistrates or dealt with by them on a preliminary inquiry (8) as to whether the prosecution evidence, taken on 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.

Various cases are dealt with summarily by magistrates and the more serious ones are commenced by the prosecutor making a complaint or applying for a summons which is served on the defendant telling him the charge he has to answer, when and where.

It is the duty of the prosecutor in charge to obtain statements from all the prosecution witnesses, to write them down, and even include his own testimony if it is relevant to the case, attach a summary of the facts on which the prosecution will rely, and set out clearly, concisely and in the correct order.

The prosecutor should try to anticipate the line of defence that the accused might use, and should be ready for any attempt by the accused to support his case with false evidence. He should also obtain information

of the past conduct of the accused. He can acquire the information from the accused and verify it if necessary from other sources.

The prosecutor has to ensure that all witnesses are warned to attend the court and all the exhibits which have to be produced are brought to court. The prosecutor should also ensure that the defence witnesses are aware of the case, time and place and especially so if the accused is in prison.

The prosecutor giving the evidence in court should be absolutely fair and impartial and include any material that is favourable to the accused. The statements of the accused's record should be made available to his solicitor.

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 obviously able to throw light on relevant events. Such witnesses should be called whether they support the prosecution or not. Absence of such obvious witness may draw doubt on the prosecution's case. In R V Edwards and others (9), justice Eric said "My own impression is clear and I believe a majority of Judges have distinctly decided that the counsel for the prosecution is not bound to call all the witnesses. Public justice, ~~HC~~ is called upon to lay such facts before the court or jury as he thinks the interest of justice demands" Thus it is upon the discretion of the prosecution to call the witnesses they feel are relevant and truthful to the cause.

There is then the most obvious duty of the prosecutor - To open the case against the accused person, and he shall call witnesses to adduce evidence in support of the prosecution witnesses in their giving of evidence, and guides them when they make vague statements. He does this by asking the questions which are intended to guide the witnesses to bring out the true picture of the incident on trial. The prosecutor is not allowed to ask leading questions.

Under section 311 of the criminal procedure code, after the prosecutor has called all prosecution witnesses, and the accused person says that he does not mean to give evidence or make an unsworn statement, or to adduce evidence, the prosecutor has to sum up and close the prosecution's case.

If a prosecutor comes across a crime being committed and therefore has knowledge of it he can initiate a prosecution like any other citizen with an aim of combating crimes and as a police officer he ought to arrest such people as he thinks are committing the crimes. However, practically, 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 looked at the prosecution process from the time a suspect is arrested to the determination of the case. The next question to be considered is whether the prosecutor is presumed to well know their work effectively or as expected. The next chapter will deal with this.

CHAPTER II

THE DISCRETION TO PROSECUTE

It is natural that those responsible for enforcing criminal law should disclose how widely they use their discretion. When some offences are ignored and some offenders are not brought before the court, there must always be suspicion of unfairness. Administrative officials making such decisions in private are liable to be attacked for showing partiality or condemning wrongdoing. Yet the law cannot be enforced indiscriminately. It would be intolerable if every breach of law, regardless of the circumstances, were always prosecuted in court.

Ill-formed criticism is likely to rise from lack of information due to lack of disclosure of the considerations prosecution authorities take into account before they take up a case. Many questions present themselves for discussion. Why are some offenders brought before the court while others are excused! Why are some crimes prosecuted and others overlooked? What safeguards exist to ensure that decisions are not taken arbitrarily or influenced by improper pressures or dictated by administrative convenience.

In this chapter I will try to answer the questions above. The discretion to prosecute has been judicially, morally and socially recognized. Although there are no authorities in point in Kenyan case, there are several authorities from English law 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 same thing happens in Kenya. Police officers are not bound by any duty to prosecute all cases 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 1963 (2) when Miss Pat Arrowsmith was prosecuted for obstructing the highway during her campaign for nuclear disarmament and protested that she had been singled out unfairly the Lord Chief Justice remarked "the police cannot prosecute every obstructor

of the highway ~~but must exercise a wise discretion~~ when they prosecuted".

The latest authority can be found in the judgements of the court of Appeal in R U Metropolitan Commissioner Ex parte Blackburn (3). Mr. Blackburn the member of parliament of stalybridge had been dissatisfied because the police had decided not to prosecute gaming clubs in London. He applied for a writ of Mandamus to compel the commissioner to enforce the law. The Judges clearly accepted the right of the police to exercise "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". The case confirmed that the police have a wide discretion as whether to prosecute or not.

After an arrest is made by police officers it is upon the court prosecutor or officer in charge to decide whether to institute a prosecution or not. If he accepts the charge he authorised the writing of a charge sheet specifying the offence which should be read to the accused. The accused should be cautioned before he makes a statement that everything he says would be used as evidence during the trial.

In deciding whether or not to prosecute, the officer in charge acts in an independent capacity. 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, the officer will probably seek to protect himself by requiring the witnesses to sign the charge sheet as the person making the charge. If the 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 failure to report will render the accused liable for arrest. All these powers are vested with the prosecutor and he is expected to exercise them independently. This shows that he has the discretion whether to prosecute or not.

I have so far discussed the police powers to the question whether or not to prosecute. One can go on and ask 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 exercising of the discretion whether to prosecute or not does not end up with the police but with 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 in the Department of prosecution in that station. It is not necessary that the officer in charge of the prosecution department in a particular police station will prosecute personally in court. If the case is a complex one or it is a sensitive case, it may be prosecuted by the state counsel, or the Deputy Public Prosecutor, or the Attorney General himself (4). At this stage the prosecutor has no alternative but to appear in court on the mention date of the case. After the case has been mentioned under the criminal procedure code (5), the prosecutor can withdraw the case before judgement is pronounced. This can only be done in the subordinate courts. The withdrawal has to be done with the consent of the court or on the Attorney General's instructions. Thus the prosecutor can either decide to go on and prosecute or not or after the prosecution has been taken up he can withdraw the case.

Under constitutional provisions, the Attorney General has power in any case he considers desirable to institute criminal proceedings against any person before any court (6) in respect of any offence alleged to have been committed by the person (7). Similarly he has power to discontinue any proceedings in court by entering a Nolle prosequi (8). The power to take over proceedings instituted by any other individual (9) and to discontinue them, is vested in the Attorney General only. In practice the Attorney General can delegate these powers to other officials in his chambers. This power of the Attorney General to issue Nolle Prosequi gives him and his law officers a wide discretion to exercise their powers over whether to prosecute or not. We can therefore say 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.

DECISION TO PROSECUTE EXERCISE PRINCIPLES

The exercising of the discretion depends on the facts of the individual case and personal views of the one who is exercising the discretion. However there are some general principles which are to be considered when one is exercising discretion. The way it is exercised is very important in the administration of the criminal law.

The first question to be considered is whether there is sufficient evidence to warrant a conviction. It is also important to consider whether the prosecution is likely to succeed because it is bad for the administration of justice if many prosecutions are undertaken when there is no hope of obtaining a conviction. Again there is also the question of public interest and moral issues even in a weak case if they are arguable.

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

OBSOLETE LAW

Some purists have taken the line that if a law is on the statute book it should be enforced. However, there are some laws that remain in the statute book through Governmental inertia which could not be enforced without offence to public opinion. Here one would expect the legislature to repeal the law but instead it is so busy passing new laws Wilcox A.F. says "In such circumstances the police in England do not consider themselves to have any obligations to rake about in the dust to find archaic offences - blasphemy, apostacy, profane swearing or ~~de~~secration of the sabbath which

which they can prosecute"(10).

Occasionally an Act long forgotten is revived. In R U Brittain (11) 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 sentence of nine months imprisonment was dismissed.

ABORTION

This is a controversial law and the decision to prosecute is usually tricky. However when cases are brought to the police it is seldom difficult to decide whether a prosecution should be taken up or not where the abortion is performed by an inexperienced person with the result that the woman ends up in hospital, then it is necessary to prosecute in order to ensure that other people don't fall victims to the same treatment. When a professional abortionist is charged it is seldom considered necessary to prosecute the woman on whom the operation has been performed.

INDECENCY

The idea of bringing a prosecution when an adolescent boy commits an act of indecency with a girl under sixteen is repugnant to most parents. Police normally consider whether the girl needs care and control. Most charges are brought against mature men who take advantage of young girls but occasionally it is necessary to prosecute a gang of youths who indecently assault a girl of their own age.

Even when 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.

OBSCENITY

Sometimes the police decide against prosecuting obscene literature or libels due to public interest. It is true that once there is a prosecution of an obscene book, play etc, the public especially those people who had had no opportunity to have seen the book before the prosecution get 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 a big way.

BIGAMY

Where nobody has been deceived and the man and the second partner are living together happily nothing but harm would be achieved by taking proceedings against them. Moreover the legal wife may rejoice in the arrangement so as to use it as a ground for divorce. However it is a different matter where a man has deceived a lady who would not but for the deception have married the man. Rarely is the bigamy offence ever taken up in court due to polygamous marriages existence in Kenya.

DRUNKENNESS

The enforcement^{of} the law here is quite hard. The harsher the rules on drunkenness the more the offence increases. The public at large usually does not see anything wrong with drinking and they therefore rarely inform the police of the drinking spots. The presidential directive of 1979 declaring total illicit brews as illegal only encouraged illegal brewing. The police, however, do exercise their discretion whether or not to arrest and prosecute by considering the circumstances of the drunkenness and the victim. Rarely do police officers take an old drunkard to court for prosecution.

ATTEMPTED SUICIDE

Sometimes the police base their discretion on public opinion. Most people have sympathy for the distraught souls who have been driven into moments of despair to end their lives. In such cases the police usually does not make an arrest except in cases where it is clear that unless restrained the person would immediately renew the attempt.

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.

UNPOPULAR LAWS

If the law is so unpopular it is held in general contempt and it cannot be effectively enforced by the police who are dependent on the goodwill and support of the public. If the police determine not to prosecute on a particular case, they are open to the charge of assuming the function of the parliament. Perhaps this assumption of a parliamentary function is necessary if parliament does, not do its work of nullifying unpopular laws. The Royal commission on police powers and procedure in England (12) of 1929 talking on the subject of law against lotteries and street betting said that "the present state of the law is altogether anem^{LO}ous, and so out of harmony with public opinion, that the attempts to enforce it are bound to react on the morale of the police".

TRIVIAL AND TECHNICAL OFFENCES

Many trivial and technical laws are not enforced by the police (13). Minor motoring offences are often dealt with by a warning. Similarly minor assault cases are usually dropped at the station after a word by the police to complainants and the defendants. Parking offences ^{are dealt with} reasonable and tolerant way.

MARYDOM

Normally the police will not prosecute if in doing so they will give a platform to someone who wishes to pose as a Martyr and gain publicity for his own cause.

On Christmas Day in 1950 Ian Hamilton stole from the Chapel of Edward the Confessor in Westminster Abbey the historic "stone of scone". He considered it's rightful place to be in Scotland. The stone was recovered and returned to Westminster Abbey but Hamilton was denied the opportunity of Scottish Nationalism.

USE OF UNFAIR METHODS

In cases where unfair methods are used in catching criminals it is better to drop the prosecutions rather than try to secure a conviction. Example of this is 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.

POLITICAL CONSIDERATION

Government has to accept that from time to time, prosecution will cause it embarrassment. Instead of this embarrassment, the Government decides to drop the prosecution even where there is not doubt the culprit will be found guilty by a court of law if prosecuted. This mostly happens when the prosecution will involve top Government officials or politicians whose prosecution may bring the Government into ridicule by the public. There have been several reports of scandals in our daily newspapers in which some of our top government officials or politicians have been involved for example in Mungai's case" or the "Ngoroko Affair". Mungai was accused of having trained a squad meant to assassinate some top politicians and Government officials. He run away and later came back and was arrested but later was released when the Attorney General decided not to prosecuted him claiming that the case was not in the public interest.

Another example of the Attorney General discretion is where a spy has been caught for betraying secret information to hostile powers. Such a prosecution might reveal the weaknesses of the Government security means and therefore careful discretion has to be exercised here, whether to prosecute or not. In most cases, though, spies have to be prosecuted (14). Treason and its allied offences of sedation, mutiny and others are only prosecuted at the consent of the Attorney General. This is in order to allow careful scrutiny of the case before it is brought to court. The treason (15) case of Muthemba is a good example here. In the judgement of this case Justice Simpson of the High Court of Kenya criticized what he called "Inadequate Investigations" by the authorities before the case was brought to 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 a nation as the threat to war. A sensitive political instincts is needed

to judge whether criminal proceedings against strikers are likely to bring about a settlement or provoke more trouble. An example of this is the doctor's strike of 1981 which brought chaos all over the country. When the doctors' refused to go back on duty following an ultimatum issued by the minister of Health, the Government authorised the police to arrest all doctors who refused to go and work and charge them as contravening section 34(1)B of the trade Disputes Act. Despite the arrests hundreds of doctors still defied Government directive to go back to work. Finally the Government had to give in by convening a meeting with Kenya Medical Association at which it was decided that the doctors should return to work and government will give consideration to the doctor's demands.

The arrests prompted a demonstration by the university of Nairobi students who sympathised with their fellow medical students who had been sent away in connection with the doctor's demands. The members of public started sympathising with the doctors and infact blamed the Government for the increased number of people dying everyday. The Government was embarassed as it had finally to acquiesce with the doctor's demands while initially it had shown that it could curb the strike by arrests. It would have been better had the Government just resolved the issue initially peacefully.

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 public order is preserved. This should be done with ^{the} motive to get things under control.

MISUSE OF DISCRETION

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

It has been mentioned earlier that police officers do misuse their discretion of whether or not to prosecute by using it to obtain bribes. Most

vehicle owners especially matatus have to give a bribe of about shs. 10 or Shs. 20 everyday in order to have their vehicle moving on the road the whole day whatever its condition. Thus they can overload, drive unworthy vehicles etc. and consequently many accidents result. Police also misuse their discretion in order to obtain bribes in illegal brewing of chang'aa and traditional liquour, prostitution and other social offences.

The Attorney General and his immediate officers have the discretion to prosecute or not. The Attorney General can discontinue any proceedings against any person before judgement by issuing a Nolle Prosequi. If the discretion of the Attorney General is misused very adverse results 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 (16).

There have been cases where nolle prosequi has been used to exonerate political colleagues. The press has since 1965 been reporting entries of nolle prosequi which involved prominent people. On the 24th April 1969 for example a report appeared in the local daily (17) "councillor who Acquitted". In the case a Nairobi Councillor who was charged with the offence of theft by servant was acquitted in the magistrates court after the prosecution withdrew the case. The entrance of the nolle prosequi had been directed by the Attorney General and no explanation for its issue was given. Thus the powers of the Attorney General are sometimes used to let criminals off.

CONTROL OF DISCRETION

Misuse of discretion is a fact and if the law is to be enforced effectively and sensibly some measure of discretion is essential. In the case of Sharpe V Wakefield (18) . Lord Halsbury declared: Discretion means when it is said that something is to be done within the rules of the authorities that something is to be done within the authorities that

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 has been able to formulate rules fettering discretion.

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:-

1. PARLIAMENTARY CONTROL

Members of parliament are able to raise questions with the Attorney General about decisions to prosecute which come within ~~their~~ limited sphere of responsibility. Ministers too are accountable to parliament for their enforcement of the 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 criticism made by the public complaints of injustice especially when wrongdoers seem to have escaped prosecution through negligence or ineptness are taken up with avility in newspapers and radio programmes. Delegation of authority police coordination, training, supervision do check the exercise of discretion.

II. 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 discharge (19). Due to this, prosecution will soon become discouraged if their efforts are achieving no significant effect.

Judges ought not hesitate in expressing their disapproval if they feel that a prosecution was ill-advised. Public reactions to headlines must be taken seriously and this is beneficial as it goes along way to ensure that the law is not being enforced with undue harshness.

CHAPTER III

CRITICAL ANALYSIS OF PROSECUTION SYSTEM IN KENYA

INTRODUCTION

I have discussed in detail, in the last two chapters how the prosecution exercise is carried out, and how the decisions to prosecute are made. In both chapters it has come out clearly that 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 other wise. I will carry the analysis systematically starting from the time of ^{arrest until} judgement.

My criticism is aimed at pointing out where the system has failed and what should be done to rectify the situation. Our present system can be commended for the good work it has done in our courts in ensuring that justice is done. In fact some police prosecutors in their work are very good and effective and carry their work better than many state counsels, who are qualified lawyers.

However, there is no system which is totally faultless. It is these faults which call for criticism.

DEFECTS OF THE KENYAN PROSECUTION SYSTEM

As indicated above, most of the prosecutions in our courts are done by police prosecutors. It would certainly appear to the public 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 (1) especially in the subordinate courts. This impression created to the public can lead to them thinking 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 - THEIR TRAINING AND ITS DISADVANTAGES

I learnt from a police officer that once a police officer is appointed to take the duties of a prosecutor, he is taken for a course where he is trained of the court procedure, and how to conduct prosecutions. There is no teaching of the general principles of law at this course and so far as points of law are concerned, our police prosecutors are not conversant. Many people have (2) expressed the feeling 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 officer knows quite enough to enable him to argue points of law with an average advocate and again in their training the police prosecutors sit for examination papers to that effect, and in any case if the point of law is beyond the scope of a competent prosecutor then the case probably ought to have been presented by a state counsel from the beginning. All the same there is no doubt that lawyers, by reason of their training and experience are much better qualified than 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 prosecutor (3). A professional prosecutor 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 magistrate courts where the accused does not have the benefit of the service of witnesses' statements with him as he does where he is tried on indictment is normally complained (4) about. Equally important is the presentation of relevant information (5) and proper effective (6) cross-examination.

Most lawyers are trained to have an independence of mind and an appreciation of the true role of an advocate. The police prosecutor is subject to a number of disadvantages. Frequently, he himself, authorised the prosecution. In addition, the officer conducting the prosecution

may feel to blame if he fails to shield the officer giving evidence from criticism and errors (7).

The honest, zealous and conscientious police officer, who has satisfied himself that the suspect is guilty, becomes psychologically committed to prosecution and thus successful prosecution. When the police officers mix themselves in the conduct of a prosecution they become biased. Consequently they might decide not to prosecute in order not to damage police morale whereas an independent prosecutor would not be influenced by such consideration. However the ideal prosecutor who disassociated himself from the organisation causing the prosecution, and regards 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 might be.

POLICE PROSECUTORS AND THE DISCRETION IN PROSECUTION

The decision to prosecute does not and should not solely depend on the likelihood of a conviction. Individual circumstances and public policy may dictate at times whether a case will be prosecuted or not. Perhaps the defendant is too ill to attend trial without great risk to his health or even his life, All these factors are considered. The police are ill-equipped by the outlook, training and functions to weight these factors objectively nor should they be expected to do so.

The decision on whether to prosecute partakes of a judicial decision since the bringing of a charge on insufficient evidence can have disastrous consequences on a man's domestic life and career, particularly if he is held in custody pending trial (8). It is difficult for investigation to achieve necessary detachment and unfair to expect them to do so.

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The dominance of the police in the prosecution system exposes them to temptation. They may seek or bargain with a suspect promising to refrain from prosecution, 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. This is the order of the day in the police force. Most of the cases brought to court are those a negotiation for a bribe between the officer and the suspect has failed. The risk of abuse, however well-intentioned the motives, is manifest in such a situation.

POLICE PROSECUTORS AND THE MAKING OF CHARGES

The way the police officers prepare charges is abhorrent. It is common to see criminals being acquitted by the court, not because they are not guilty, but because they have been charged with the wrong, offence. When the case comes for hearing the evidence given becomes irrelevant as to what is in the charge sheet (9). An example is a case (10) in the Kiambu Resident Magistrates 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 ambiguous way and was unintelligible. The magistrate advised that, police officers who draft charge sheets, should seek professional advice. Thus the way police officers prepare charge sheets is not the best.

Of course the task, of charging someone is not so easy. An inspector who is drawing a charge, receives a mass of information and has to discover an appropriate offence in order to charge.

This task of making charges ^e can only be carried out better by qualified lawyers who will be able to make the correct charge without any difficulties. If this is not possible where the prosecutor is a qualified lawyer, and the police make a defective charge, he will be able to detect a mistake and thus change or amend the charge before he brings it to court.

FURTHER DEFECTS OF THE PROSECUTION SYSTEM

The Kenyan prosecution system is accusatorial and not inquisitorial. It has developed into a context between the two sides with the court acting as a sort of an umpire (11). This method obscures or distorts the very different role which the prosecution should play, as compared to that of a 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 feelings or involvement. These cannot be entirely ^{eliminated}, 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.

The procedure of prosecution offends against the principle that, the prosecutor 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.

As I have indicated above our prosecution system has several defects which call for rectification. I make the recommendations below as a way of trying to rectify the systems though the recommendations are not exhaustive.

RECOMMENDATIONS

Accordingly my recommendations are as follows:-

A. There should be established a Department of public prosecutions to be responsible for the decision 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 offence 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 appreciated 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 the staffing or the prevalence of a certain kind of offence. The line would be drawn by the Director in the term of regulations 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 the Departments' responsibilities. The police would have a right to hand over cases to the Department ^{and} would have the power to call in cases where it felt it to be desirable.

(ii) By leaving the prosecution at the present dealt with by the Government Departments and the public bodies in their hands. Ideally these two should come under the Department of public prosecution, but it is appreciated that this may not be a practical proposition for some considerable

time is required. I regard it as important that the actual conduct of prosecutions by those bodies should be in the hands of advocates and not ordinary employees.

C. The right of private persons to initiate a prosecution should be preserved with the reservations that the Department should have the power to take over the conduct of such a prosecution as it thought fit. It is also desirable that where the Department of Public Prosecutions is satisfied that the prosecutions should be initiated 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 answerable to parliament for its functions. This would also be seen as a step to release the Attorney General from the duties of Director of Prosecutions, a duty which he does not carry effectively (15) due to his political involvement which carries almost all his time. The Department should be financed by the Attorney General's Department.

E. The Department has a ready-made basis and could conveniently be organized and developed out of the existing staff of the Attorney General Chambers. In addition to having a strong central organization it would have regional and local officers 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 attention.

F. The Department would be staffed by lawyers assisted by a clerical staff of qualified law clerks and legal assistants. It should be possible to provide status, remuneration and a career structure which would attract men and women of the right calibre.

H. In addition to receiving information from the police, they would be entitled to pursue inquiries either by obtaining declarations or statements

from witnesses if necessary or oath or by suggesting additional lines of enquiry.

A grave criticism of the present system is the fact that the present system of procedure in our courts is such that justice is done. In fact, the work of the prosecutors is such that they are very good and effective and their work better than any other work which is done by any other person.

However, there is no system which is totally faultless. There are call for a change in some of the things which are done and what should be done in order to remedy the situation. Chapter II of the Bill deals with the discretion to be exercised by the courts. This is a very important matter with the public. The exercise of discretion is a very important matter from the point of view of the public as there is no doubt that the discretionary powers are exercised. Such questions arise - why some cases are brought to court and others are dismissed, why some cases are heard and others are dismissed, and what is the reason for this? These questions are not asked directly or indirectly by the public, but they are asked by administrative authorities. These questions will be asked from the point of view of the public or it is to be expected that the discretion will be exercised in a way which will be to the benefit of the public and which will be to the benefit of the public.

Discretion is exercised in important cases and in all cases where the prosecution is concerned. The present law relating to the discretion to be exercised by the courts is such that the right to be tried is infringed, if such offences are to be prosecuted as a matter of course they should, and this could be done. The discretion should be used in cases where the public interest is involved. It is a matter of public interest to know whether a person is guilty of a crime and whether he is to be tried. It is a matter of public interest to know whether a person is to be tried and whether he is to be tried. It is a matter of public interest to know whether a person is to be tried and whether he is to be tried. It is a matter of public interest to know whether a person is to be tried and whether he is to be tried.

CHAPTER FOURCONCLUSION

There has not been many complaints by aggrieved citizens, nor has a grave crisis of confidence in the prosecution system arisen. Our present system therefore can be commended for the good work it has done in our courts in ensuring that justice is done. Infacts some police prosecutors in their work are very good and effective and carry their work better than many state counsels, who are qualified lawyers.

However there is no system which is totally faultless. These faults call for criticism to point out where the system has failed and what should be done to rectify the situation. Chapter II which dealt with the discretion is misused at times. This results in some dissatisfaction with the public. The exercise of discretion process raises many questions from the uninformed public as there is no understanding on how discretionary powers are exercised. Such questions include - why some offenders are brought to court and others are excused, why some crimes are prosecuted and others overlooked, and what safeguards exist to ensure that decisions are not taken arbitrarily or influenced by improper pressures or dictated by administration convenience. These questions call for an explanation from the prosecutors to the public so as to enlighten the public on discretion and consequently they will know why some offences are ignored and others prosecuted so fast.

Discretion in prosecution is important as not all offences call for prosecution. For example some trivial offences where someone has suffered no loss though his right is infringed, if such offences are to be prosecuted on every time they occur, much time would be wasted. Such time should be used on bigger offences such as murder, treason and the like. At times public opinion in a certain issue is against prosecution. In chapter II I tried to give various factors which are considered in deciding whether to bring offenders before the courts or take alternative action. In spite of this individual cases seldom fall neatly into one

category. Subsequently discretion cannot be fettered by rules. Therefore I would urge institutions concerned to apply effective measures or not to prosecute and try to explain if need be why each offence or several in a group are prosecuted or just ignored.

Prosecutors at times do not take their duties seriously. Whereas they are supposed to be dispassionate in the cases they handle and consequently not influence the courts towards a certain judgement they do the opposite. For example it is very common in our courts to hear the prosecution bring up an issue relating to the accused so as to influence the sentence. If the accused is a holder of a big public office there is reference to the accused's higher degree of responsibility and such other things. This ought not be the case if the case is properly presented and in time. More often than not the prosecutors charge the accused's wrongly. The facts in issue may not fit the charge or they even quote the wrong section under which the offence falls or they may ask for some reinstatement which cannot be granted under the charge they present. They may not have their witnesses in court in time or they may have obtained their evidence unlawfully. Consequently it is common especially in the subordinate courts for a guilty person to be acquitted due to the improper carrying out of the prosecutor's duties. For example there was a case (1) in the Kiambu Resident Magistrate's 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 ambiguous way and was unintelligible. The magistrate advised that, police officers' preparation of charge sheets is not the best.

Most of the defects pointed out above would be lessened if the police prosecutors' training was taken more seriously and diversified in its subjects. I learnt from a police prosecutor, he is taken for a course where he is trained of court procedure and how to conduct prosecutions. This is not taught the general principles of law and so he remains ignorant of the same. This position places a police prosecutor in an inferior situation when he has to

arue points of law with a qualified lawyer. Most criminal cases in the magistrates courts involve complicated points of law on which the police advocate is unable to adequately assist the bench. Thus the training should be more seriously aimed at being able to help the prosecutor assist the Bench properly. Points of law, independence of mind and an appreciation of the true roles the prosecutors have to play dispassionately are important. The training should take care of those needs.

More qualified lawyers should be absorbed in the prosecution department to ensure that justice is maintained in the prosecution system. This would be possible because qualified lawyers are more enlightened in law work as compared to the police prosecutors. Consequently the guilty people can be convicted. Technical issues which the police prosecutors are not acquainted with and consequently call for a court would be easily dealt with by the lawyers. They would therefore maybe categorize the factors of discretion in an understandable logical manner which would make the public be more well-acquainted with the situation. It would be possible to provide status, remuneration and a career structure which would attract men and women of the right calibre. Infact it is the dominance of the police in the prosecution system which corrupt the whole system. The police bargain with the suspect promising them to "put a good word with the magistrates" or to grant them bail or not to oppose it. The faster the dominance is crashed the better for justice.

My suggestions are subject to any necessary inclusions or or suggestions and corrections by others. Fortunately it will not be necessary to start from scratch as the existing set-up is capable of being developed. It is unwise to wait until a situation has reached crisis dimensions before one starts to think of reform. Even after the prosecution system has been reformed, change in the administration of criminal justice will still need to be brought about. The state should be concerned to have satisfied servants in the prosecution system. Satisfaction brings forth efficiency and good citizens. The weaknesses in the prosecution system call for reform. Where the traditional institutions are found to be wanting like in Kenya, a break with the tradition is advisable.

INTRODUCTION

FOOTNOTES

1. S Zb (3) (b) and (c) of the constitution of Kenya ans Ss 88 (1) and 89 of C.P.C
2. Lord Wilberforce in *couriet V Union of Post Office Workers* (1978) A.C 435 at F 477.

CHAPTER ONEFOOTNOTES

1. Late in the 17th and early 18th centuries.
2. Laws of Kenya (cap) 75
3. Criminal procedure code S. 88 (1) (Kenya)
4. S 85 (1) of criminal procedure code
5. S 85 (3) of the criminal procedure code (Kenya)
6. S 86 of the criminal procedure code
7. (1972) E. A. 37 at page 40
8. Section 231 criminal procedure code

FOOTNOTES

1. See section 3(1) of the Judicature Act, 1967
2. Arrowsmith V Jenkins (1963) ZQB 561
3. (1968) 1 ALL E.R. 763
4. Rarely does the Attorney General appear in court in his capacity as the Director of public prosecutions
5. Section 87 of the Criminal Procedure Code
6. Except in a court martial
7. Section 26 (3) (a) of criminal Procedure Code
8. S Z6 (3) (c), see also s 82 (1) of criminal procedure code
9. S Z6 (3) (b) of criminal procedure code
10. A.F. Wilcox "the Decision to Prosecute"
11. R U Brittain
12. Cmd 3297 of 1929 at page 80
13. See case of Sewa sing Mandia UR (1966) E.A 315
14. In April, 1970 Mr. Nill Owen, the member of Parliament for Morpeth (England) was tried and acquitted at the old Bailey of charges under official secrets Act of communicating useful information to an enemy.
15. See weekly Review, Nairobi, May 22nd 1981
16. 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
17. The then East African standard
18. (1891) A.C. 173
19. In England and u.S.A where tried by Jury is common, juries may dismiss a case altogether, inspite of plain evidence of guilt, if they think a charge should have been brought

1. Every 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 out by Government bodies.
2. See (1961) Criminal Review Page 199
3. 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.
4. Discussed in Chapter one.
5. In my fourth term practicals I came to discover that most of the cases were dismissed by the court. In such cases magistrates used to say that there was not enough evidence and the prosecution had failed to prove its case
6. This is my fourth term experience
7. 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 cases represented by lawyers.
8. This is a common phenomenon in our courts where one can be held in custody for months or years only to end up being acquitted due to lack of evidence against them.
9. See the Daily Nation, Nairobi, 11th may 1982 at page 8 where a District Magistrate at Siaya District magistrate court said that prosecuting officer lost cases because police officers were ignorant of the changing law and did not bother to check their facts.
10. R U Mary Wangari Criminal Case No. 1237 of 1981
11. See Magandu V Ngurani (1970) L.T.R. Page 60