

**An Analysis of the Prosecution of Hate Speech in Kenya: The Common Good  
Perspective**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

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January 2018

Word count (10,980)

**Declaration**

I, CHARLES LWANGA OPIYO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: *31<sup>st</sup> January 2018* .....

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This dissertation has been submitted for examination with my approval as University Supervisor.

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Dr. Antoinette Kankindi.

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## **Abstract**

*Hate speech is the new narrative in Kenya's political discourse. This rhetoric has been employed to galvanise one's supporters against an opposing group. The opposing group is often another ethnic community. This is validated by the sources of information considered in this study: journal articles, statute, and case law all seem to recognise that ethnicity is central in Kenya. Over and above being ethnic, hate speech presents a tangible danger to the fabric of society, the common good. A damning example of the realisation of this threat is the 2007 Post-Election Violence. The Director of Public Prosecutions has been charged with dealing with instances of hate speech via prosecuting them, with the aim of convictions. In this way, the law can act as a deterrent. The reality however, paints a different picture. Instances of acquittal of politicians based on procedural technicalities and the use of nolle prosequi orders without sufficient legal cause have become the norm. The inconsistency in the application of prosecutorial powers has rendered hate speech laws in Kenya nigh ineffective in dealing with hate speech perpetrated by persons of influence. This study seeks to elucidate the extent of these inconsistencies and attempt to establish a root cause. It will also show that there is in fact, a cause and effect relationship between hate speech and the occurrence of violence. In doing so, another approach to prosecuting hate speech will be suggested, based on instances of effective hate speech prosecution in case law and theories of legal scholars.*

## **Dedication**

*To Kenyans, may you one day be free of the fetters of corrupt governance.*

## **Acknowledgement**

To my supervisor, Dr. Antoinette Kankindi, for her guidance, corrections, and patience with my poor grammar!

To my parents; my father, for challenging my points of view and assisting me in refining them, and my mother for showing me invaluable techniques involved in editing Word Documents.

To my friends, who kept me on track by incessantly inquiring on my progress and provided much needed distraction during the harder moments.

To my siblings, for being there for me, from the beginning.

To God.

## Definition of terms

**Nolle prosequi**, A formal entry upon the record, by the plaintiff in a civil suit or the prosecuting officer in a criminal action, by which he declares that he "will no further prosecute" the case, either as to some of the counts, or some of the defendants, or altogether<sup>1</sup>.

**Hate speech**, the use of threatening, abusive or insulting words or behaviour, or displays any written material; the publishing of such material; the presentation or directing of such material in the form of a play; the distribution of shows or plays, and recordings of visual images with such material; or the provision, production, or direction of a programme<sup>2</sup>.

**Incite (to violence)** To arouse; stir up; instigate; set in motion; as, to "incite" a riot. Also, generally, in criminal law to instigate, persuade, or move another to commit a crime<sup>3</sup>.

**Common good** the social condition that allows everyone, as an individual and a group to achieve the good, this is the responsibility of the political class<sup>4</sup>.

**Prudence**, the ability to govern and discipline oneself using reason<sup>5</sup>.

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<sup>1</sup> —<<https://thelawdictionary.org/nolle-prosequi/>> on 29 January 2018.

<sup>2</sup> Section 13, National Cohesion and Integration (Act No. 12 of 2008).

<sup>3</sup> —<<https://thelawdictionary.org/incite/>> on 29 January 2018.

<sup>4</sup> Aristotle, *Politics*, Book I, 1252<sup>a</sup> 1-6.

<sup>5</sup> —<<https://www.merriam-webster.com/dictionary/prudence>> on 29 January 2018.

## **Table of Abbreviations**

Attorney General (AG)

Constitution of Kenya (CoK)

Director of Public Prosecution (DPP)

Election Offences Act (EO Act)

Kenya National Commission of Human Rights (KNCHR)

National Cohesion and Integration Commission (NCIC)

National Cohesion and Integration Act (NCI Act)

Office of the Director of Public Prosecutions (ODPP)

Truth Justice and Reconciliation Commission Report (TJRC)

## 1.0 Introduction

### 1.1 Background of the problem

The 2010 Constitution of Kenya (CoK) transferred the powers of prosecution from the Attorney General (AG) to the Office of the Director of Public Prosecutions (ODPP)<sup>6</sup>. Whereas in the previous constitution, the AG had full standing to be enjoined in any criminal matter<sup>7</sup>; this transfer was done to comply with the principle of separation of powers<sup>8</sup>. The overarching rationale for this separation posited by legal scholars is the role Kenya's centralized government played in hindering the AG's exercise of prosecutorial powers<sup>9</sup>. It is understood, that the executive at the time had vested within itself the powers to control the prosecution. This would open the AG to dismissal at will for decisions made against the executive, as a result, its security of tenure was always at stake<sup>10</sup>. This was not merely due to the political climate of the time. The power to dismiss the AG was enshrined in law as the 1986 constitutional amendment<sup>11</sup>, that effectively deleted the security of tenure of the AG<sup>12</sup>. This substantive change in the law limited prosecutorial powers by political influence, and had an adverse effect on the AG's impartiality, an essential norm in the practice of prosecution<sup>13</sup>.

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<sup>6</sup> Article 156, Constitution of Kenya (2010).

<sup>7</sup> Article 26(3), Constitution of Kenya (1964).

<sup>8</sup> Mbondenyei M and Ambani J, *The New Constitutional Law of Kenya*, Claripress Limited, Nairobi, 2012, 68.

<sup>9</sup> Wainyoike W, 'The Director of Public Prosecutions and The Constitution: Inspiration, Challenges and Opportunities' in Ghai YP and Ghai JC (eds), *The Legal Profession and the New Constitutional Order*, Strathmore University Press, 2014, 173.

<sup>10</sup> Waikwa, 'The Director of Public Prosecutions and The Constitution: Inspiration, Challenges and Opportunities', 174.

<sup>11</sup> Constitution of Kenya Amendment (Act No. 14 of 1986).

<sup>12</sup> Waikwa, 'The Director of Public Prosecutions and The Constitution: Inspiration, Challenges and Opportunities', 174.

<sup>13</sup> *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703.

The powers of the ODPP are defined clearly by the CoK and the ODPP Act<sup>14</sup>. Article 157 of the CoK establishes the office, elaborates on how the Director of Public Prosecutions will be appointed, and delineates the powers of prosecution<sup>15</sup>. The ODPP Act specifies the way the Director of Public Prosecutions (DPP) will conduct prosecutions or drop a prosecution through the exercise of the power of *nolle prosequi*<sup>16</sup>. Powers of conducting prosecution or dropping prosecution and their use have also been discussed in recent cases in the High Court of Kenya and the appellate Court<sup>17</sup>. Within the research, this jurisprudence will be analysed to clarify the Kenyan theory of prosecution.

This dissertation seeks to address the exercise of the discretionary powers of the ODPP, its *locus standi* in any criminal matter and the power of *nolle prosequi*; and the application of these powers to the jurisprudence on hate speech in Kenya. It is not the aim of this paper to discuss political undertones that affect the ODPP. A nexus will be established however, between any specific laws and judicial decisions made and the political effect that these laws were bound to produce. This discussion will be substantiated by institutional reports and existing literature.

Parliament made provisions to define hate-speech. These provisions act as a guide for courts of law in adjudication of such matters. Two Acts of Parliament define terms relevant to the research, these being *hate-speech* and *incitement-to-violence*: The Election Offences Act (EO

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<sup>14</sup> Office of The Director of Public Prosecutions (Act No. 2 of 2013).

<sup>15</sup> Article 157, Constitution of Kenya (2010).

<sup>16</sup> Section 5, Office of The Director of Public Prosecutions (Act No. 2 of 2013).

<sup>17</sup> GV Odunga J provides thorough analysis of Kenyan public prosecution theory in cases that he adjudicated upon: *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR; and *Republic v The Director of Public Prosecution ex-parte Victory Welding Works Limited and another* Nairobi High Court Misc. Civil Application No. 249 of 2012.

Act) of 2016<sup>18</sup> and the National Cohesion and Integration Act (NCI Act) of 2008<sup>19</sup>. The EO Act is a relatively young law enacted in 2016<sup>20</sup>. It empowers the DPP to prosecute hate speech and crimes of incitement within the context of an election<sup>21</sup>.

The NCI Act was passed by parliament two years prior to the promulgation of the CoK<sup>22</sup>, which makes it clear that the Commission is empowered to investigate and make recommendations to the AG (read: ODPP) and the Kenya National Commission of Human Rights (KNCHR) on matters regarding the abuse of rights due to ethnic incitement and hate speech<sup>23</sup>.

The CoK establishes a balance between utterances of hate speech and the right to freedom of expression<sup>24</sup>. While every person has the right to seek and express ideas through scientific research or artistic expression<sup>25</sup>, the right does not fall within the spheres of “propaganda for war, incitement to violence, hate speech and advocacy for hatred”<sup>26</sup>.

The legislature formulated the NCI Act since hate speech had become a prevalent phenomenon in the country due to the pervasive effects of tribalism in general<sup>27</sup>. One of the root causes of violence according to the Truth Justice and Reconciliation Commission Report (TJRC) was the use of incitement in the public sphere by politicians or media personalities<sup>28</sup>.

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<sup>18</sup> Election Offences (Act No. 37 of 2016).

<sup>19</sup> National Cohesion and Integration (Act No. 12 of 2008).

<sup>20</sup> Senate Hansard Report, 7 September 2016, 6.

<sup>21</sup> Section 21, Election Offences (Act No. 37 of 2016).

<sup>22</sup> The NCIC Act had contemplated that the prerogative to prosecute still belonged to the AG. Section 1, National Cohesion and Integration (Act No. 12 of 2008).

<sup>23</sup> Section 25(2)(h), National Cohesion and Integration (Act No. 12 of 2008).

<sup>24</sup> Article 33(1), Constitution of Kenya (2010).

<sup>25</sup> Article 33(1), Constitution of Kenya (2010).

<sup>26</sup> Article 33(2), Constitution of Kenya (2010).

<sup>27</sup> Parliament Hansard Report, 12 March 2008, 1.

<sup>28</sup> Truth Justice and Reconciliation Commission, TJRC Final Report-Volume 11B, 2013, 308.

In addition, this paper will probe local and international case law, to compare the application of norms of prosecution. The case of *Nahimana et al. v. The Prosecutor*<sup>29</sup> will be used to elucidate the norms of prosecuting hate speech, and its link with violence. The norms established in international courts will then be compared to actual practice in Kenyan courts, four cases will be probed in depth, *Alan Wadi Okengo v Republic*<sup>30</sup>, *Chirau Alimwakwere v Robert M. Mabera & 4 others*<sup>31</sup>, *Johnstone Muthama & 8 others v Inspector General of Police & 2 others*<sup>32</sup>, and *Republic v Moses Kuria*<sup>33</sup>. This analysis will seek to outline inconsistencies in the exercise of the discretionary powers of the ODPP. Most of these cases ended in acquittal or via *nolle prosequi* orders entered at the Magistracy. Their purpose is to illustrate the discrepancies that exist in the application of prosecution theory. As such, the cases are not being used to examine precedence, since the Magistrate Courts do not have this power. This study seeks to probe why the cases ended in an acquittal despite the existence of compelling evidence that the accused persons made statements that fall within the legally defined domain of hate speech. These cases deal with similar legal phenomena, yet their outcomes were vastly different. The research will endeavour to study the reasons behind the difference in outcomes. It is a requirement in law for the ODPP to provide reasons why it intends to undertake or drop a suit<sup>34</sup>, such reasons given (or not given) will be probed based on their legal implications.

Subsequently, the secondary aim of investigation will be the impact that these decisions would have on the notion of the rule of law and the common good of the people in Kenya. This section of the research will take a deductive reasoning approach. General principles will be tested

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<sup>29</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR Appeal Judgement of 28 November 2007.

<sup>30</sup> [2015] eKLR.

<sup>31</sup> [2012] eKLR.

<sup>32</sup> [2016] eKLR.

<sup>33</sup> [2016] eKLR.

<sup>34</sup> Article 157(8), Constitution of Kenya (2010).

against the legal phenomena to draw logical conclusions. The methodology will facilitate the analysis of the effect of what others may perceive as the ODPP's apparent laxity in prosecuting hate speech on the public. Moreover, due to the impact on the people of Kenya, there is need to interpret the situation from the perspective of the principle of the common good. Within this perspective, the nexus can be established between hate speech and the destruction of the social order.

The principles of prudence and the common good in this part will be inspired by Aristotelian notions on the role of leaders. Negative rhetoric disrupts the social order; therefore, it is essential that the ODPP finds more efficient mechanisms to prevent the impact of incendiary rhetoric.

### **1.2 Statement of the problem**

The problem that the paper seeks to investigate is two pronged: the inconsistency in the application of the ODPP's discretionary powers specifically *nolle prosequi*, and the impact this inconsistency has on the rule of law and consequently the common good of society.

### **1.3 Purpose and importance of the study**

The purpose of the study was to investigate the use of the ODPP's *nolle prosequi* power regarding the prosecution of hate speech perpetrated by leaders. As a corollary, the study will explore the pervasive effects of hate speech on the Kenyan public.

This research may prove to be timely. Due to the socio-political environment that builds towards the elections. Hate speech is a tool oft used in this socio-political environment, resulting in the amplification of tension and sometimes, violence. The public's descent into violent conduct can be stopped by the independent exercise of the ODPP's *nolle prosequi* power. If used effectively, the prosecutor's discretion can be an effective deterrent, it can dissuade leaders from making inciting comments out of fear of prosecution and potential conviction.

#### **1.4 Hypothesis**

Would the swift and conclusive prosecution of hate speech by the ODPP lead to unity in Kenya and the achievement of the common good?

#### **1.5 Methodology**

This research was limited to desk research. Sources of information included books, institutional reports from the KNCHR and TJRC, local and international case law, Kenyan legislation and international instruments, conference papers, and journal articles. Online newspaper articles were also used to furnish the context of some of the events outlined in this study.

#### **1.6 Specific objectives and Chapter Summary**

The specific objectives of this study were met within the chapters of this dissertation. The Kenyan public prosecution theory, common good as a central norm of society's order, and prudence as a guiding principle for leadership are contemplated in chapter three.

Chapter four covered the description of case law. The cases are exclusively Kenyan hate speech cases. To supplement the discussion in this chapter, the Parliament Hansard report with discussions vis-à-vis the creation of the NCIC was also utilised. The Hansard elucidates the legislative intent behind the NCI Act.

The main theme investigated in chapter five was whether the general principles in chapter three applied to the cases described in chapter four. Issues probed include, whether the theory of prosecution discussed in chapter three translated into actual practice in Kenyan courts. Thus, from the general principles in chapter three, deductions will be made. In line with the principle of the purpose of rhetoric, outlined in the theoretical framework, a causal link will be made between reckless utterances such as hate speech and incitement to violence made by leaders. A comparison was also drawn between prosecution of hate speech in the ICTR and Kenyan

prosecution. Finally, the chapter suggests an approach to prosecution of hate speech that the ODPP can apply within a reworked legal framework.

Chapter six elaborates conclusions drawn from the foregoing chapters and recommendations.

### **1.7 Scope and limitations of the study**

The online portal for Kenya law reports does not provide judgments made in the magistracy. This may be attributed to these judgements not forming precedent<sup>35</sup>. Therefore, the only other means of accessing these judgements related to hate speech, such as the Moses Kuria<sup>36</sup>, Ferdinand Waititu<sup>37</sup>, and Chirau Ali Makwere<sup>38</sup> cases would be getting access to the files from the criminal registry of the trial courts.

This also proved problematic, due to the political implications of these cases, registrars are not willing to open the case files to persons who are not enjoined in the suit in any manner. This introduces the second limitation of the study, the political implications surrounding some of the cases. While it would be informative to properly decipher if there are in fact any political factors that may lead to the acquittal of politicians, this information would be difficult to verify and consequently, should be confined to the realm of conjecture.

Therefore, the scope of the paper was informed by these limitations. One of the assumptions the research has made is that the prosecution has not been encumbered in carrying out its duties

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<sup>35</sup> -<<http://kenyalaw.org/kl/index.php?id=124>> on 29 January 2018.

<sup>36</sup> *R v Ferdinand Waititu & Another* Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.

<sup>37</sup> The Ferdinand Waititu case that was concluded in the magistracy should not be confused with the High Court case *Benson Riitho Mureithi v J. W. Wakhungu & 2 others* [2014] eKLR where the plaintiff challenged Ferdinand Waititu's appointment to the Athi Water Services Board. One of the issues to be determined by the High Court was whether the arrest and subsequent charging of Ferdinand Waititu with hate speech on 27<sup>th</sup> September 2012 was enough to render his appointment illegal. The High Court rejected this argument stating that another court was still handling the matter and the High Court would be infringing on the lower court's mandate leading to a violation of the *sub-judice* rule. The magistracy case is, *R v Ferdinand Waititu & Another* Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.

<sup>38</sup> *Republic v. Chirau Ali Makwere*, Nairobi Chief Magistrates' Court, Cr. Case No. 1215 of 2012.

by these political undertones. Legal and philosophical principles, case law and reports are thus relied upon to support the arguments made by the research.

## 2.0 Literature Review

Scholarly works used in this research covered three broad topics: the interaction between freedom of speech and hate speech; philosophical notions on human conduct; and an illustration of hate speech and its prosecution in Kenyan context.

Articles that considered hate speech from a rights and duties perspective juxtaposed the legal response to hate speech with the right to free speech<sup>39</sup>. Two contrary responses are evident in these articles: the freedom of speech approach, and the consequentialist approach. Libertarian notions justify the free speech approach, which posits that hate speech should be treated as protected speech<sup>40</sup>. The proponents of the free speech approach affirm that applying the law in this manner would bring about the common good<sup>41</sup>. This position is illustrated by the evolution of the decisions of the Supreme Court of the United States (SCOTUS) regarding hate speech<sup>42</sup>.

The libertarian position was instrumental in providing this research with a potential solution to the problem contemplated by the paper, politically instigated hate speech. It falls short however, in certain respects. Authors such as Susan Benesch address these shortcomings whilst critiquing the free speech approach to hate speech. Positing that it is not only unsuitable when

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<sup>39</sup> Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', *American Society of International Law Proceedings of the Annual Meeting*, 2011, 389—<http://www.jstor.org/stable/10.5305/procanmmeetasil.105.0389> on 7 Oct 2017; and Simpson R, 'Dignity, Harm, and Hate Speech' 32(6) *Law and Philosophy*, 2013.

<sup>40</sup> Heyman S, *Free Speech and Human Dignity*, Yale University Press, New Haven & London, 2008, Chapter 8; and Brink D, 'Millian Principles, Freedom of Expression and Hate Speech' 7(2) *Legal Theory*, 2001.

<sup>41</sup> Brink D, 'Millian Principles, Freedom of Expression and Hate Speech' 7(2) *Legal Theory*, 2001.

<sup>42</sup> Heyman in chapter 8 charts the gradual evolution of the treatment of hate speech in the United States Supreme Court from the initial outlaw of fighting words in *Brandenburg v Ohio* 395 U.S. 444 (1969), to the eventual declaration that insults form part of protected speech per the first amendment in *Gooding v Wilson* 405 U.S. 518 (1972). See generally, Heyman S, *Free Speech and Human Dignity*, Chapter 8.

dealing with politically instigated hate speech, but it is also potentially harmful to society<sup>43</sup>. Benesch's puts forth the consequentialist approach, which recommends that hate speech should be prohibited not because it is offensive or insulting but rather because of its potential to lead to violence<sup>44</sup>.

This is not to say that consequentialism is not the ultimate solution. It is largely a legal response to a socio-political problem that exists outside the scope of courts of law, due to this, it is also insufficient<sup>45</sup>. While consequentialism gives a practical means to prosecuting hate speech, it does not address secondary issues such as: the empowerment of the DPP to actually prosecute politicians; and incendiary rhetoric, with its adverse effects on the common good. This necessitated the study of philosophical schools of thought that considered the societal aspect of the problem.

The solution it would seem, lay in classic philosophy. Despite most works of classic philosophy falling outside the ten-year timeline of the sources used in the literature review, they were instrumental in providing much needed context to a human conundrum. The postulates of Aristotle were included to propose an objective for the law; can the law alone achieve the common good for all persons? Or rather, is it via the cultivation of a positive ethical standard that hate speech can be prosecuted by the DPP and subsequently avoided by politicians? These queries also justified the inclusion of modern works dealing with the effects of human conduct, *Virtuous Leadership* by Alexandre Havard sought to answer these questions<sup>46</sup>.

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<sup>43</sup> Benesch, 'Inciting Genocide, Pleading Free Speech' 21(2) *World Policy Journal*, 2004.

<sup>44</sup> Benesch, Election-Related Violence: The Role of Dangerous Speech, 390.

<sup>45</sup> Benesch, Election-Related Violence: The Role of Dangerous Speech, 390.

<sup>46</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, Scepter Publishers, United States of America, 2007, 57.

To provide background to the problem, documents on the history of the acts and omissions of the ODPP regarding hate speech prosecution, and the ODPP's public struggle for independence have been used<sup>47</sup>. Furthermore, these articles and textbooks provide an insight into the legislative intent of separating the ODPP's functions from the AG's office<sup>48</sup>, this being the provision of assurances to the public that the days of executive's intimidation of independent offices were over<sup>49</sup>.

Kenyan legal scholars have focussed primarily on the political ramifications of hate speech, and not necessarily on its legal and societal consequences<sup>50</sup>. Peter Onyango Onyoyo in *Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges*<sup>51</sup>, explains the criminal implications of hate speech, how the political class have used hate speech to intimidate and antagonise their opponents and why there are seldom any cases in Kenyan courts<sup>52</sup>. Onyoyo's focus is centred on the political themes informing the ODPP's response to hate speech. This precluded the analysis of this paper due to the limitations set in the research.

Reports by the judiciary provided institutional objectives of the ODPP, which serve as examples of policy-based considerations made considering the ODPP's legal obligations<sup>53</sup>. The ODPP intends to enhance its capacity to prosecute more crimes by increasing its staff to tackle

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<sup>47</sup> Waikwa, 'The Director of Public Prosecutions and The Constitution: Inspiration, Challenges and Opportunities'; and Mbondenyei M and Ambani J, *The New Constitutional Law of Kenya*.

<sup>48</sup> Article 156, Constitution of Kenya (2010).

<sup>49</sup> Waikwa, 'The Director of Public Prosecutions and The Constitution: Inspiration, Challenges and Opportunities'; and *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR.

<sup>50</sup> Onyoyo P, 'Criminality in Hate Speech Provisions in the Laws of Kenya-Jurisprudential Challenges', University of Nairobi, 2014.

<sup>51</sup> Onyoyo, 'Criminality in Hate Speech Provisions in the Laws of Kenya-Jurisprudential Challenges'.

<sup>52</sup> Onyoyo, 'Criminality in Hate Speech Provisions in the Laws of Kenya-Jurisprudential Challenges'.

<sup>53</sup> The Kenya Judiciary, State of the Judiciary and Administration of Justice-Annual Report, 2015, 93.

the demands of the criminal justice system<sup>54</sup>. Despite being in line with the DPP's power of delegation<sup>55</sup>, this measure still does not entirely solve the issue of how the DPP handles cases that affect the public interest (as anticipated by Article 157 of the COK). This is because the ODPP's staff are ultimately guided by the exercise of the DPP's discretionary powers<sup>56</sup>.

The KNCHR in its report, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* affirm that there is a causal link that exists between incitement via hate speech and wanton violence<sup>57</sup>. While the reports do not purport that incitement is the only cause of the violence they do state that it was one of the main causes<sup>58</sup>. This report shows that due to the violence caused by incitement there is sufficient cause to demand the immediate and conclusive prosecution of hate speech by the ODPP<sup>59</sup>. It is also noted that due to the lack of the independence of the judiciary, the effective prosecution of these cases is hampered<sup>60</sup>.

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<sup>54</sup> The Kenya Judiciary, *State of the Judiciary and Administration of Justice-Annual Report, 2015*, 93.

<sup>55</sup> Section 22, *Office of The Director of Public Prosecutions (Act No. 2 of 2013)*.

<sup>56</sup> Article 157, *Constitution of Kenya (2010)*.

<sup>57</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, 2008*.

<sup>58</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, 2008*, para.391.

<sup>59</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, 2008*, para.735.

<sup>60</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, 2008*, para.695.

### **3.0 Theoretical Framework**

The theoretical framework will be informed by two principles: prosecution theory, specifically the legal principle of prerogative powers of the prosecutor; prudence as a principle of governance and leadership; and the concept of the common good as the organising principle of society.

Hate speech is a phenomenon that leads to the abrogation of the common good, therefore prudence will not be limited to the leadership and governance, it will also be applied to the exercise of the prerogative powers of the prosecutor and as part of the prosecutor's responsibility to achieve the common good. This implies that the ODPP should practice prudence as an underpinning norm as well.

#### **3.1 The prosecutor's prerogative powers**

The powers of the DPP are enshrined in the 2010 CoK and are elaborated further in the ODPP Act. Among the different powers of the ODPP; this paper will focus on the specific statutes that empower the DPP to prosecute hate speech and incitement to violence. These statutes include section 21 of the EO Act and section 25 of the NCI Act. Article 157 of the CoK makes it clear that, the ODPP is empowered to institute criminal proceedings in any matter that affects the public interest and hence disrupts social order. This is in accordance with the principles of administrative justice and prevents the abuse of rights.

The prosecutor's powers have been extensively discussed in Kenyan jurisprudence and more so in the cases used in this research. The theory of prosecution in this study, will refer to these cases. Thereafter, the extent that the cases deviate or conform to the theory will also be elaborated upon. Jurisprudence will also be used while considering the overarching topic of the research, that is the prosecution of hate speech.

For instance, the power of *nolle prosequi* was discussed expansively in the case *Republic v Michael Rotich & 2 others*<sup>61</sup>. The matter in contention was whether the DPP should be allowed to discontinue a criminal suit against a person accused of murder effectively acquitting the accused, and if by the court not allowing this discontinuance, a breach of the rights of the accused would occur. The court stressed that the DPP may only discontinue a suit after justifying the exercise of *nolle prosequi* to the satisfaction of the trial court. The court emphasized: “*The Director for Public Prosecutions may not discontinue a prosecution without the permission of the court (...)*”<sup>62</sup>.

The DPP’s power to discontinue a suit is subject to checks and balances: while his powers are unfettered, they are still subject to review by the trial court. The court is thus bound to respect the prosecution’s activities and only intervenes when it deems substantial bad faith, oppression or misuse of the court process may ensue. The prosecution is charged with providing a reasonable and probable cause for instituting a suit, otherwise it opens itself to an unfavourable review by the court<sup>63</sup>.

The *dicta* of *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others*<sup>64</sup> explained the relationship between the court and the prosecution’s power to institute or stop a suit. The court relied on the speech of Lord Salmon in the case *D.P.P v Humphrey’s*<sup>65</sup>, where he stated that:

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<sup>61</sup> [2016] eKLR.

<sup>62</sup> *Republic v Michael Rotich & 2 others* [2016] eKLR.

<sup>63</sup> *Republic v Director of Public Prosecutions & 3 others Ex-Parte Meridian Medical Center Ltd & 7 others* [2015] eKLR.

<sup>64</sup> [2015] eKLR.

<sup>65</sup> (1976) 2 All ER 497.

*“A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere.”*<sup>66</sup>

*Chamanlal* is relevant here because it dealt with the prosecutor’s prerogative in highly sensitive public interest matters. Matters of public interest refer to the common good of the people. The matter of interest, in this case, was the prosecution of persons accused of involvement in the *Anglo Leasing* Corruption scandal; an issue that had gripped the Kenyan public’s attention<sup>67</sup>. In terms of the common good, hate speech and incitement to violence are as important as the corruption scandal due to the disruption they cause within the social order.

In the case of *Senoi Ene Parsimei Esho Sisina & 8 others v Attorney General*<sup>68</sup>, Odunga J elaborates upon the situations within which the court may intervene to ensure the *bona fide* exercise of the powers of prosecution. Stating:

*“In my view, the decision whether or not to enter a nolle prosequi is an exercise of discretion and ought to be exercised on bona fide based reasons. (...) The court can only intervene in the following situations: where there is an abuse of discretion; where the decision-maker exercises discretion for an improper purpose; where the decision-maker is in breach of the duty to act fairly; where the decision-maker has failed to exercise statutory discretion reasonably; where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*

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<sup>66</sup> *D.P.P v Humphrey’s* (1976) 2 All ER 497.

<sup>67</sup> ‘Kenyans demand more graft scalps’ BBC News, 17 February 2006-  
<<http://news.bbc.co.uk/2/hi/africa/4723480.stm>> on 29 January 2018.

<sup>68</sup> [2013] eKLR.

*where the decision-maker fetters the discretion given; where the decision-maker fails to exercise discretion; where the decision-maker is irrational and unreasonable.*”<sup>69</sup>

The *obiter dicta* of Odunga J imply a remedy available to persons when the ODPP abuses its discretionary powers. This remedy is the judicial review of the ODPP’s decisions. Judicial review is conducted by the court and can be sought by citizens. While it is trite law that the ODPP is an independent office, it is not precluded from review. There are some limits placed upon the review of the prosecutor’s discretionary powers. These include, the legality of the decision-making process is the sole parameter subject to review, and the grounds of review are restricted to illegal acts, irrational acts, and procedural impropriety<sup>70</sup>.

It just so happened that Odunga J also adjudicated upon a case where the ODPP’s use of the *nolle prosequi* power was challenged. The suit was based on the perceived inaction of the public prosecutor in the case *Republic v The Director of Public Prosecution & 7 Others*<sup>71</sup>. The applicants sought to compel the ODPP to amend a charge sheet and institute criminal proceedings against another party. The court averred that the ODPP power to institute and drop a prosecution is “purely discretionary”. Furthermore, the court declared that ordering the ODPP to prosecute or not outside the scope of the grounds of review would be “outside the ambit of the judicial review relief of *mandamus*”<sup>72</sup>.

Regarding the power to institute prosecutions, there also exists a test in law that the ODPP uses to determine whether it will prosecute or not. This test was discussed in the case *Republic v Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya*<sup>73</sup>.

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<sup>69</sup> *Seenoi Ene Parsimej Esho Sisina & 8 others v Attorney General* [2013] eKLR.

<sup>70</sup> *Meixner & Another vs. Attorney General* [2005] 2 KLR 189.

<sup>71</sup> [2013] eKLR.

<sup>72</sup> *Republic v The Director of Public Prosecution & 7 Others* [2013] eKLR.

<sup>73</sup> [2014] eKLR.

In this situation, it is evident that the Kenyan judge agreed with the obiter at the Queen’s Bench in the case *R v DPP Exp. Manning*<sup>74</sup>, which stated that two criteria are to be relied upon before instituting a public prosecution: whether there is a reasonable prospect of landing a conviction as a judgement; and, whether the evidence adduced during the investigations is reliable<sup>75</sup>. In addition, these investigations should not be used to seek redress in an individual’s civil matter<sup>76</sup>. Rather, they should be done with the public interest as the central concern<sup>77</sup>.

The environment within which the ODPP operates is also expounded in Kenyan jurisprudence. The seminal case on the interaction between the ODPP and the expectations of the public played out in the case *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others*<sup>78</sup>. One of the issues to be determined in the case was the circumstances which would spur the ODPP to institute a suit. The fact in issue was the theft of millions of Kenyan shillings through the sale of fake government contracts<sup>79</sup>.

The court held that the prosecutor in such instances should be mindful of the public opinion and act in the best interests of the Kenyan people. The trial judge stated that the ODPP has the misfortune of being in a “politically intolerant environment where the executive wants to micromanage independent constitutional bodies”<sup>80</sup>.

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<sup>74</sup> [2001] QB 330

<sup>75</sup> *R v DPP Exp. Manning* [2001] QB 330

<sup>76</sup> *Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703.

<sup>77</sup> Section 5 (2) (b), Office of The Director of Public Prosecutions (Act No. 2 of 2013).

<sup>78</sup> [2015] eKLR.

<sup>79</sup> Ongiri I, ‘DPP orders 13 arrested over Anglo Leasing’ Daily Nation, 2 March 2015-  
<<http://www.nation.co.ke/news/DPP-orders-13-arrested-over-Anglo-Leasing/1056-2640656-11vplh7/index.html>> accessed on 29 August 2017.

<sup>80</sup> *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR.

Odunga J goes on to lament that because of these circumstances, the prosecution inexorably finds itself fettered when it shouldn't be. As such, it is essential for the court to be mindful of this and act as a check and balance to the ODPP to allow it to exercise its powers solely for the benefit of the common good of the people.

This check applies both ways. The ODPP must be *estopped* by the trial court from “stage managing” criminal proceedings to achieve an acquittal that should appease the public<sup>81</sup>. The office must also be encouraged to freely prosecute prominent persons that may enjoy the protection of the executive.

The court is cognisant that it is difficult for public prosecutions to be conducted under the thrall of an intolerant executive. A situation aptly described by Odunga J:

*“This is what this country finds itself in. A pathetic situation where independent constitutional commissions and office are browbeaten and bullied into total submission and forced in the process to become an appendage of an executive that is intolerant of dissenting opinion and allergic to objective and independent institutions that exercise their powers according to the dictates of the law.”*<sup>82</sup>

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<sup>81</sup> *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR.

<sup>82</sup> Political machinations have been excluded from this study. This does not preclude this paper from expressing opinions of the court on the political atmosphere (read: circumstances) within which the ODPP operates. *Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR.

### 3.2 Prudence and the common good

The cases illustrated above indicate that issues of the public interest such as corruption, hate speech and incitement to violence put social order and the common good at high risk. This public interest and common good must be informed by the same classic theories, Aristotelian principles, and prudence<sup>83</sup>.

Aristotle elaborates the notion of order in society and the body politic. For there to be a good society there needs to be good citizens and prudent leaders. The end of the interaction of both is the common good. He states that there exists a higher good that is pursued by the society and the political class. This good is understood as the common good; the social condition that allows everyone, as an individual and a group to achieve the good, this is the responsibility of the political class<sup>84</sup>.

The next step therefore would be to ask, how does the political class contribute to the realisation of the common good? This query leads to the practical application of the principle of prudence in leadership in relation to the achievement of the common good, as the purpose of the actions of the political class. The principle of prudence also extends to the prosecutor and the court. The research will therefore examine the prosecution of hate speech, as incited within political activity. Hate speech within the context of political activity leads to the curtailing of the common good, necessitating the action of the prosecutor to restore the common good.

Elaborating on the politician's speech on his treatise in rhetoric, Aristotle recognised the danger of reckless speech and its disruption of the social order. The main critique is that the framers of dangerous speech paid more attention to the powers of persuasion of the speaker in a

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<sup>83</sup> Aristotle, *Politics*, Book I, 1252<sup>a</sup> 1-6.

<sup>84</sup> Aristotle, *Politics*, Book I, 1252<sup>a</sup> 1-6

deceitful manner that meant to incite emotion<sup>85</sup>. They give the politician room to persuade their public by fair means or foul<sup>86</sup>. It is explicitly mentioned that politicians, if left to their own devices, may inspire prejudice, pity, or anger among their public to ensure they retain power<sup>87</sup>.

What is a realistic standard that can be placed upon politicians when addressing the public? Their speech and acts must be prudent and directed to truth and justice, to achieve the common good. Truth is essential so that the public may know that which is good and be convinced that the good that their leadership is pursuing is worthwhile. Justice implies that in the political context that their rights and freedoms should be upheld<sup>88</sup>. The common good is not a privilege but a right essential to the good of all<sup>89</sup>.

There is a danger to be avoided, because politicians are called upon to use their powers of persuasion for the good. Failure to do so can lead to violence and unrest. In *Rhetoric*, it is posited that when rhetoric conveys injustice or deceit then it has the potential to cause great harm<sup>90</sup>. Due to its nature as an art form concerned with the welfare of a large group of persons, a large group of persons may suffer as a result<sup>91</sup>.

To lead and serve the people, it is essential for the leader to cultivate prudence. Prudence is defined as the art of effective decision making<sup>92</sup>. It goes without saying that good decision making is paramount to the achievement of the common good<sup>93</sup>. Prudence in this instance is

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<sup>85</sup> Aristotle, *Rhetoric*, Book I, 1354<sup>a</sup> 12-18.

<sup>86</sup> Aristotle, *Rhetoric*, Book I, 1354<sup>a</sup> 12-18.

<sup>87</sup> Aristotle, *Rhetoric*, Book I, 1354<sup>a</sup> 12-18.

<sup>88</sup> Aristotle, *Rhetoric*, Book I, 1355<sup>a</sup> 22.

<sup>89</sup> Aristotle, *Rhetoric*, Book I, 1355<sup>a</sup> 30-34.

<sup>90</sup> Aristotle, *Rhetoric*, Book I, 1355<sup>b</sup> 3-7.

<sup>91</sup> Aristotle, *Rhetoric*, Book I, 1355<sup>b</sup> 3-7.

<sup>92</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 57.

<sup>93</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 57.

not limited to the actions of politicians. It is the virtue of leadership in every instance, consequently the ODPP is also directly concerned with the public interest<sup>94</sup>. In fact, the three steps to prudent decision making posited by Alexandre Havard in *Virtuous Leadership*<sup>95</sup>, resemble the two-step prosecutor's test discussed in the case *Republic v Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya*<sup>96</sup>. The three steps are as follows: deliberation, which entails the accumulation of information to establish a relevant set of facts to inform the decision; judgement, evaluation of this information; and finally, the actual decision making<sup>97</sup>. The two-step prosecutor's test was formulated to determine the instances where a prosecutor may decide to initiate proceedings. It provides two criteria: first, that evidence adduced is reliable (much in line with the deliberation phase of prudent decision making); and second, there is a reasonable chance to land a conviction as per the evaluation of the prosecutor this refers to the two steps of judgement and deciding to prosecute the case.

Politicians should make informed decisions about what they communicate to the public. What does this information pertain to? The politician should understand that they are leading people, and consequently are charged with the betterment of their livelihoods. To understand what is essential for human flourishing, they must understand the human person. Therefore, politicians must be students of human nature so that they may be able to make decisions that truly benefit people<sup>98</sup>. A modicum of philosophical and moral knowledge of persons is necessary. It is impossible for politicians to make sound statements that would eventually be to the benefit of citizens without this principle in mind.

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<sup>94</sup> Section 4 (f), Office of The Director of Public Prosecutions (Act No. 2 of 2013).

<sup>95</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 57.

<sup>96</sup> [2014] eKLR.

<sup>97</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 57.

<sup>98</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 58.

The consequences of hate speech, such as violence and ostracism between communities are in direct conflict with the common good especially when the hate speech is perpetrated by leaders. Hate speech's consequences deprive citizens of an essential good that is due to them: a peaceful existence where one can flourish<sup>99</sup>.

Hate speech also engenders injustice. Additionally, the laxity in prosecution of hate speech by political leaders further perpetuates injustice. The pursuit of justice is a norm of that informs the conduct of the ODPP. It is provided for in statute, the ODPP is charged with being cognisant of the principles of natural justice and act in the service of the cause of justice<sup>100</sup>. Havard affirms that the achievement of justice in a community is dependent on whether leaders within that community fulfil their duties to the public, doing so, they render an essential service for their citizens<sup>101</sup>.

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<sup>99</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 65.

<sup>100</sup> Section 4, Office of The Director of Public Prosecutions (Act No. 2 of 2013).

<sup>101</sup> Havard A, *Virtuous Leadership: An Agenda for Personal Excellence*, 101.

## 4.0 The Prosecution of Hate Speech in Kenya

### 4.1 Introduction

The case law on hate speech will be scrutinised to define hate speech within the context of the NCI Act (“the Act”), the context leading to the Act, the claims politicians have made in relation to the Act, and the interpretation of the court apropos these claims.

#### *a. Alan Wadi Okengo v Republic<sup>102</sup>: Defining Hate Speech*

This case was an appeal that arose from a conviction and sentence in the Nairobi Magistracy, Case No. 1 of 2015. Alan Wadi was charged with hate speech in the first trial court contrary to section 13(1)(a)(b) and (2) of the NCI Act. Section 13 broadly defines the crime and subsequently, its punishment.

The court upheld that the *mens rea* of hate speech is the intent to “stir up ethnic hatred, or having regard to the circumstances, ethnic hatred is likely to be stirred up”<sup>103</sup>. According to the Act, intent is expressed via the use of threatening or abusive words or behaviour, or written material with the same content; the publishing of this material; the presentation of this material in the form of a play<sup>104</sup>; the distribution of said play via a recording or images of the same; or the provision or production of a programme<sup>105</sup>.

The *actus reus* was the publication of a message on the appellant’s Facebook page. The magistrate ascertained that the content of the message, amounted to the incitement of hate between members of various ethnic groups in Kenya (the *mens rea*). The act also expands the definition of “ethnic hatred”:

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<sup>102</sup> [2015] eKLR

<sup>103</sup> Section 13 (1) (e), National Cohesion and Integration (Act No. 12 of 2008).

<sup>104</sup> Section 13 (1) (e), National Cohesion and Integration (Act No. 12 of 2008).

<sup>105</sup> Section 13 (1) (e), National Cohesion and Integration (Act No. 12 of 2008).

*(...) hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins*<sup>106</sup>.

There was the secondary charge of undermining the authority of a public officer<sup>107</sup>. Alan Wadi pled guilty on both counts and was sentenced to serve a one-year term in prison per count.

Upon appeal, the appellant did not challenge the judgement of hate speech. He relied on procedural errors made by the prosecution. For the sake of a legal argument however, the research will exclude the faulty nature of the charge sheet presented by the prosecution at this point.

When analysing of this case, one may determine that jurisprudence surrounding hate speech has grown rather than attenuated. The appellate court faulted the magistracy and prosecution for their failure to fully investigate the mental status of the accused, and the particulars of the secondary charge on the charge sheet. These issues did not affect the accuracy of the event that led to the occurrence of hate speech. As stated above, the definition of the *actus reus* and *mens rea* of hate speech was a valid one that can be relied upon by other courts based on the Act and this case.

***b. Chirau Ali Makwere v Robert M. Mabera & 4 others*<sup>108</sup>: *The Constitutionality and Enforcement of the NCI Act***

The case originated from a request made to the Chirau Ali Makwere (the petitioner) a Cabinet Minister and Member of Parliament (MP) Matuga Constituency, to record a statement regarding statements he made during a political rally. The petition challenged the

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<sup>106</sup> Section 13 (3), National Cohesion and Integration (Act No. 12 of 2008).

<sup>107</sup> Section 132, Penal Code (Act No. 81 of 1948).

<sup>108</sup> The Commissioner of Police, NCIC, Attorney General and Director of Public Prosecutions were enjoined in the case. [2012] eKLR.

constitutionality of provisions of the Act, the basis of the request to record the statement. The specific provisions included section 13, 14 and 62. Section 13, defines hate speech and outlines its punishment. Section 14 provides the exceptions to the preceding section, and finally, section 62 defines the offence of ethnic or racial contempt as well as its punishment.

The petition sought to not only render the said provisions unconstitutional, it also sought to justify words he uttered during a rally in Kombani area at Matuga as being protected speech.

The statement made was allegedly as follows:

*“Waswahili na Waarabu tuna uchungu sanasana, walitugandamiza, wakatufanya watumwa, hatutakubali, hatutakubali, sisi, sisi, kamawaliyofanya mababuzetu, walisema wale Wadigo, Wakamba na Waduruma tukawa nunua kama makaa (...) Nawaonya watu wa bara waliona ukabila wataona cha mtemakuni (...)”<sup>109</sup>.*

The essence of the above statement is that the Swahili and Arabic peoples are responsible for the historical injustices that native people suffered. The MP ends the statement with a threat, the people from the hinterland i.e. mainland Kenya, should stand warned, due to the injustices they meted out on indigenous coastal peoples<sup>110</sup>.

Chirau denied making these statements and suggested that as a leader he was entitled to agitate on the inequalities that exist in society, more specifically those that adversely affect his people. The legal implications that accompanied this argument were based on: the speech was protected under Article 33 of the CoK, as free speech; and the sections on which his petition was based were unconstitutional. Chirau asserted that his statements would not constitute one of the exceptions provided in Article 33. These being, propaganda for war, incitement to violence,

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<sup>109</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 2.

<sup>110</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 3.

hate speech and advocacy of hatred. The provisions' unconstitutionality lay in their lack of legislative intent. Limiting the right of free speech, constituted, according to him, a violation of Article 24(2)(a) and (b) of the CoK, the limitation of rights clause. This lack of constitutionality extended to the actions of the respondents as well, for they intended to charge the petitioner with the alleged offence of ethnic or racial contempt within the provisions section 62(1) of the NCI Act as read with sections 13 and 14 of the same act.

There arguments of the respondents provided insight into the procedure of prosecuting hate speech and the aims that the NCIC and the ODPP have when prosecuting the crime. In support of these aims, are the principles set out in Articles 24 and 33 of the CoK. The respondents were the NCIC, the Chief Inspector of Police, and the Attorney General.

The NCIC, opposed the petition stating that there was a complaint made by the Executive Director of Muslims for Human Rights (MUHURI) that claimed that the petitioner made statements amounting to hate speech. Complaints are one of the triggers of investigation into a claim of hate speech<sup>111</sup>. Upon investigation of the complaint, the NCIC forwarded the findings of the investigation to the Criminal Investigation Department (CID) for further inquiry. The aim of the investigation was to determine whether an offence had been committed under the provisions of the Act. No decision to prosecute had been taken at that time.

The first respondent was the police officer investigating the complaint lodged against the petitioner. The inspector had received the complaint from the NCIC and initiated investigations into the allegations of the commission of ethnic and racial contempt via statements made by the petitioner. After the investigation, the inspector forwarded the resulting report to the ODPP.

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<sup>111</sup> Section 43, National Cohesion and Integration (Act No. 12 of 2008).

The AG asserted that the sections in contention within the NCI Act were not in contradiction with the CoK. Rather, they complimented Article 33 of the CoK and were in line with the limitations the article places on the exercise of freedom of speech. Furthermore, the AG stated that the suit lodged by the MP was premature; criminal proceedings had not been instituted against the petitioner. The claims made by the petitioner could only be discussed at a criminal trial court.

The court analysed hate speech in this case drawing from the Constitution of Kenya, and the experience of international law provisions ratified by Kenya that inspired Article 33. The significance of this analysis was to show the interaction of two operating principles, free expression of the right and the extent to which the right functions. It was stated by the court that the right to freedom of speech included the right to:

*“(...) seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.”*<sup>112</sup>

The court noted that the practice in international law was to not only permit the banning of certain speech, but to demand the active criminalisation of speech that undermines the rights and freedoms of others. The court cited the case *Mark Gova Chavunduka and Another v The Minister of Home Affairs*<sup>113</sup> which held that the freedom of expression was essential in a democracy due to the four special objectives that it ought to serve:

*“(...) (i) it helps an individual attain self-fulfilment; (ii) it assists in the discovery of truth and in promoting political and social participation; (iii) it strengthens the capacity of an individual*

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<sup>112</sup> Article 19 (2), International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

<sup>113</sup> Supreme Court Civil Appeal No. 156 of 1999 (unreported).

*to participate in decision making; and it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change ....*”<sup>114</sup>

Furthermore, the court stressed that the freedom of expression is,

*“(...) neither absolute nor boundless; most democratic societies impose limitations on freedom of expressions (sic) which attempt to balance the freedom of expression and the societal or public interest and the rights of others.”*<sup>115</sup>

These goals are also shared by the ODPP<sup>116</sup>. The court then delineated the reasons behind the prohibition of hate speech. Apart from maintaining public order, limitations placed on speech are also protective in nature. They seek to prevent,

*“psychological harm to targeted groups that would effectively impair their ability to (...) contribute to society. Prohibition of hate speech prevents visible exclusion of minority groups that would deny them equal opportunities (...) hate speech is a direct invasion of the dignity of individuals and communities.”*<sup>117</sup>

The court upheld the constitutionality of the provisions of the Act on hate speech. The court referred to the long title of the act and the history of its creation. The act was made in response to the 2008 post-election violence, its formulation was based on the National Dialogue and Reconciliation Agreement<sup>118</sup>. Parliament discussed the progress of the Bill in light of the

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<sup>114</sup> *Mark Gova Chavunduka and Another v The Minister of Home Affairs* Supreme Court Civil Appeal No. 156 of 1999 (unreported).

<sup>115</sup> *Charles Onyango Obbo and Another v Attorney General of Uganda* Constitutional Appeal No. 2 of 2002 (Unreported).

<sup>116</sup> Article 157, Constitution of Kenya (2010).

<sup>117</sup> *Afri-Forum and TAU SA v Julius Sello Malema and Others*, [2011] 4 All SA 293 (EqC)

<sup>118</sup> —<<https://www.cohesion.or.ke/index.php/about-us?id=63#full>> on 10 January 2018.

division caused by the violence<sup>119</sup>, from the discussions, it intended to prevent new “flare-ups” of violence<sup>120</sup>. There was a general consensus in parliament that the fast tracking of the Bill was necessitated by the importance of reasserting public order<sup>121</sup>. The long title averred that the purpose of the act was to encourage,

*“(...) national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission (...)”*<sup>122</sup>.

The airing of grievances of his constituents by the petitioner can be said to be free speech, as long as it does not constitute hate speech. What these provisions aim to criminalise is the incitement to hatred and violence among various groups<sup>123</sup>. Therefore, the court declared the statute constitutional.

The High Court agreed with the respondents use of procedure as well, stating that the NCIC acted within its constitutional and statutory mandate by conducting investigations into the occurrence of hate speech, noting that section 59 of the NCI Act empowered the NCIC to do so. The complaint received was also made within the parameters of enforcement of the objectives of the Act<sup>124</sup>. The court also noted that the lodging of a complaint was not tantamount to the institution of prosecution proceedings; thus, avoiding the petition made for orders of *certiorari* lodged by the plaintiff<sup>125</sup>.

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<sup>119</sup> Parliament Hansard Report, 12 March 2008, 1.

<sup>120</sup> –<[http://info.mzalendo.com/hansard/sitting/national\\_assembly/2008-03-12-09-05-00](http://info.mzalendo.com/hansard/sitting/national_assembly/2008-03-12-09-05-00)> on 10 January 2018.

<sup>121</sup> The late Mutula Kilonzo and Omingo Magara, the then MP’s of Mbooni and South Mugirango echoed these views. Parliament Hansard Report, 12 March 2008, 1.

<sup>122</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 40.

<sup>123</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 48.

<sup>124</sup> Sections 43 and 44, National Cohesion and Integration (Act No. 12 of 2008).

<sup>125</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 53.

Finally, the court reaffirmed the independence of the NCIC and the ODPP as bodies charged with the investigation of hate speech in as much as it threatens the public order. By virtue of their independence, the courts cannot interfere in their ordinary exercise of their discretion. The only instance that interference would be warranted is if the abuse of rights is occasioned. Due to the court's role as a custodian of the Bill of Rights<sup>126</sup>. The court found that there was no need to interfere in this case, for it saw no breach of the petitioner's rights<sup>127</sup>.

Hate speech charges were eventually confirmed but, the ODPP dropped charges instituted against the petitioner<sup>128</sup>. The decision was made after Chirau Ali Makwere apologised for his statements, thereafter MUHURI and the NCIC sought to withdraw the complaint and suit respectively<sup>129</sup>. The decision of the DPP to enter a *nolle prosequi* seemed to have been influenced by these withdrawals. *Prima facie*, these withdrawals were in line with the objective of conciliation; one of the aims of the NCIC<sup>130</sup>, the same cannot be said however, of the decision of the *nolle prosequi* order<sup>131</sup>. While the order was not made in bad faith, the prosecution in this instance should have recognised that the offence in issue was not merely affecting the complainants, it affected the Arabic and Swahili communities as a whole<sup>132</sup>. Hate speech, by definition, is speech directed to a whole community and not institutions affiliated to the protection of the rights of said community i.e. MUHURI. Therefore, the ODPP's

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<sup>126</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 55.

<sup>127</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 56, *D.P.P v Humphrey's* (1976) 2 All ER 497

<sup>128</sup> *Republic v. Chirau Ali Makwere*, Nairobi Chief Magistrates' Court, Cr. Case No. 1215 of 2012.

<sup>129</sup> *Khalef Khalifa v Republic & 3 others* [2014] eKLR, para. 11.

<sup>130</sup> Section 25 (2) (g), National Cohesion and Integration (Act No. 12 of 2008).

<sup>131</sup> *Khalef Khalifa v Republic & 3 others* [2014] eKLR.

<sup>132</sup> *Chirau Alimwakwere v Robert M. Mabera & 4 others* [2012] eKLR, para. 2.

objective of prosecuting a case on behalf of groups that have suffered an abuse of rights and ensure that criminal justice is served for the *whole* community<sup>133</sup>.

A similar issue arose in *Mohamed Abdow Mohamed v R*<sup>134</sup>, the applicant was accused of murder. Later, the family of the deceased was approached by the family of the accused and a traditional method of dispute resolution was used to settle the case<sup>135</sup>. As such, the family of the deceased wrote to the DPP requesting the discontinuance of the case.

The main issue to be determined was whether a murder charge can be withdrawn on account of the settlement between the families. Referring to Article 157 of the CoK, the court found that the ODPP utilised its powers in a manner consistent with the ends of justice by discontinuing the suit. The court allowed the appeal, and the accused was discharged.

*Mohamed Abdow* represents the emergence of criminal jurisprudence that prevents the state from being the proper plaintiff in criminal suits. This is not in line with public interest litigation. *R v DPP & another Ex parte Chamanlal*<sup>136</sup> makes this distinction clear, matters of public interest supersede individual interests. More so if these issues threaten the public order.

***c. Johnstone Muthama & 8 others v Inspector General of Police & 2 others*<sup>137</sup>: *The Gravity of Hate Speech Perpetrated by Politicians***

The DPP had not brought charges against the six at the time this appeal was launched. Therefore, the object of the appeal was to reverse the rejection of a bail application by the Chief Magistrate. The rejection of the bail application was instigated by an application made by the

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<sup>133</sup> Section 4, Office of The Director of Public Prosecutions (Act No. 2 of 2013).

<sup>134</sup> [2013] eKLR.

<sup>135</sup> The family of the deceased was given livestock based on Islamic law and customs. *Mohamed Abdow Mohamed v R* [2013] eKLR.

<sup>136</sup> [2015] eKLR.

<sup>137</sup> [2016] eKLR.

DPP in the trial court, where he requested the court to detain the petitioners during the conduct of investigations into the allegations of hate speech.

The trial magistrate agreed with the application based on two arguments proffered by the ODPP. These being, first, the persons accused of hate speech were likely going to interfere with witnesses; and second, the prosecution needed a period of four days to finalize the investigations. The trial court confirmed the reason.

The appeal before the High Court was based on a claim by the petitioners which asserted that the rejection of their bail application was a denial of their constitutional rights. They argued that, while the right to bail was a limited one, the circumstances where bail can be limited are solely exceptional ones. There must be compelling reasons provided by the court in taking the decision to limit the right.

Additional arguments that were also presented sought to denounce the reasons given to deny bail by the Magistrate's Court. The Magistrate's Court held that because of the position and influence of the accused persons, it was very likely that there would be interference with witnesses. The petitioners rebutted this position stating that this reason was unfounded and baseless, they argued that witness interference is a crime *per se* and cannot form one of the reasons to deny bail.

The ODPP subsequently sought to clarify the rationale behind the decision of the trial court to deny bail. Relying chiefly on the argument that witness interference would occur, they stated that the crime in issue threatened national security; thus, the prudent course of action would be to prevent the continued interaction between the accused persons and their supporters. The respondents concluded their arguments with an exposition on the rationale of bail applications. The determination of bail is based on a case by case analysis of the circumstances of the case;

based on the nature of the crime and the position the petitioners hold in society, the decision to reject the bail application was a valid one.

The High Court agreed with the decision of the trial court<sup>138</sup>. Stating that, bail is a limitable right and the exceptional circumstances that warrant the denial of bail cannot be fully indexed to form a comprehensive test. A case by case approach would yield the best results<sup>139</sup>. The onus lies on the prosecutor to show that these compelling reasons exist and warrant the denial of bail. The ODPP gave two reasons, stating that the accused persons would very likely interfere with the investigations, and there was a need to finalize investigations.

The rationale underlying the High Court's decision elucidated the stance the court had on the pervasive nature of hate speech:

*“The circumstances are exceptional. The Petitioners face relatively serious crimes. They may not be a flight risk but certainly their influence in society is not to be ignored or gainsaid. A threat to witnesses and witness interference as well as intimidation is anything but new (...) it is pretty clear that the Petitioners are accused of conduct which threatens the national fabric. The Petitioners, in their own way, have access to thousands of Kenyans. They are politicians (...) When they speak or walk, the thousands admire or follow them perhaps for all the wrong reasons. It would be more appropriate to have them confined as the DPP wraps up the process of formally charging them in court.”<sup>140</sup>*

The High Court insisted that there is a balance to be struck between the rights of the individual and the interests of the public at large. This case provided an instance where the public good needed to supersede the individual interest. The objective to be attained by relegating the

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<sup>138</sup> *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 27.

<sup>139</sup> *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 18.

<sup>140</sup> *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 28.

individual interest is the achievement of state-wide cohesion and the preservation of the national fabric. Therefore, the denial of bail was a small price to pay to achieve this.

***d. Republic v Moses Kuria<sup>141</sup>: Justice versus procedure in hate speech prosecution***

In this case the DPP appealed to the High Court due to being aggrieved by the ruling of the trial court to grant the respondent bail pending the trial. Its main contention was that the trial court should have taken cognisance of the fact that the accused was a repeat offender. Therefore, it was in the best interest of the public to keep the accused in custody until the hearing.

According to the prosecution the respondent's utterances were a threat to national security, especially in an election year. The prosecution was making its case based on violence in the past due to similar utterances. The prudent course of action would be the application of prohibitive measure to protect the public order.

The appellate court in response to the prosecutor's claim, stated that bail is denied to accused persons only when there are compelling reasons to do so. According to case law, to protect the public an accused is denied bail if they are prone to repeating the offence. In this instance, the court observed that a public figure has added responsibility to speak prudently to avoid sowing discord between communities. This decision is in line with article 33 of the CoK.

The court decided to set Moses Kuria free on more punitive bond and bail terms, instead of limiting his freedom. The *obiter dicta* of the court dissents with this final decision. A similar *obiter* was utilised in, *Johnstone Muthama*<sup>142</sup>, concluding that, the ability of prominent leaders

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<sup>141</sup> [2016] eKLR.

<sup>142</sup> [2016] eKLR.

to influence large groups necessitated their incarceration, aiming to preserve the integrity of the case, and protect social order<sup>143</sup>.

The eventual acquittal is attributed to the rejection of the type of evidence presented; the Magistrate ruled that the video evidence incriminating Moses Kuria and Ferdinand Waititu of hate speech was incorrectly adduced questioning the authenticity of the record<sup>144</sup>.

It appears that procedure took precedence to justice. The CoK seeks to prevent this, stating that justice shall be administered without undue regard to procedural technicalities<sup>145</sup>. Meaning that if procedure is seen to be encumbering the administration of justice, it should be ignored. The meaning of “justice” in article 159 is expanded in article 22 (3) (d) of the same document, which states that the court will observe the rules of natural justice in avoiding these procedural burdens.

## **4.2 Conclusion**

From the described case law, it appears that the ODPP’s response to hate speech could be inconsistent, due to the difference between the outcomes suits against politicians and those against the common citizen.

It may be observed that the court recognized that hate speech is a threat to social order, however, political leaders are not being convicted for such crimes. The tendency is to acquit them, due to an overemphasis on procedure, or the entering of *nolle prosequi*. While *Nolle prosequi* is within the powers of the prosecutor, it should promote the ends of justice for the whole society, instead of providing room for offenders to repeat such offences<sup>146</sup>.

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<sup>143</sup> Witness intimidation was a danger recognised by the court. *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 28.

<sup>144</sup> *R v Ferdinand Waititu & Another* Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.

<sup>145</sup> Art. 159 CoK

<sup>146</sup> Section 4, Office of The Director of Public Prosecutions (Act No. 2 of 2013).

The rationale of the Act is to prevent disunity and combat violence<sup>147</sup>. It appears that the reality in courts has defeated the legislative intent of the NCI Act and Article 33 of the CoK.

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<sup>147</sup> Parliament Hansard Report, 12 March 2008, 1.

## **5.0 Approaches to Prosecuting Hate Speech**

### **5.1 Introduction**

The deductive method will be used to analyse approaches to prosecution of hate speech in line with the general principles in the theoretical framework. The terms of the debate are focussed on whether hate speech is a wrong to be prosecuted or whether hate speech is a crucial part of free speech. To dispel ambiguities on these issues, the consequentialist approach, and free speech theories by legal scholars on hate speech prosecution within the context of hate speech perpetrated by politicians will be used to supplement the suggested approach. The theories considered will largely contribute to the debate on whether hate speech is a wrong to be prosecuted or whether it is a crucial part of free speech. To provide a more practical basis of the arguments herein, hate speech cases from the International Criminal Tribunal for Rwanda (ICTR) will be utilised.

### **5.2 The Consequentialist approach**

Consequentialism is based on prosecuting hate speech due to its effects, mainly violence and discord in society<sup>148</sup>. Prosecuting hate speech in anticipation of its consequences entails the adoption of a clear definition for the offence, to prevent restriction of legitimate speech<sup>149</sup>. Similarly, the NCI Act provides such a definition, which has been used to garner a conviction in the past<sup>150</sup>. In this regard, Kenyan law has already achieved this objective. The problem arises in instances where the law should be applied to politicians, in these cases the ODPP's response appears to have been inconsistent.

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<sup>148</sup> Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', 389-390.

<sup>149</sup> Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', 389-390.

<sup>150</sup> *Alan Wadi Okengo v Republic* [2015] eKLR.

Consequentialism identifies two challenges that arise when dealing with hate speech: identifying which speech is unlawful; and formulating a means of limiting its effects in a legitimate way without breaching the freedom of expression<sup>151</sup>.

A balance must be found between free expression and hate speech. Thus, a distinction needs to be made between speech that can cause harm due to its potential to incite violence; and offensive speech that is insulting but not harmful<sup>152</sup>. The court is better placed to determine rights in relation to this distinction, it should determine whether speech has potential to broach harmful consequences or constitutes mere insults.

The role of the ODPP is to promote and protect public order, and it is the duty of the court to ascertain rights and their infringement. The ODPP initiates suits based on the two step criteria: whether the evidence adduced is reliable, and whether there is a reasonable chance to land a conviction<sup>153</sup>. The court also assesses the exercise of the ODPP's power in relation to rights<sup>154</sup>. This check and balance formula is applied by the court to ensure that public order is respected, and free expression is protected.

The burden of evidence placed on the prosecution may vary depending on the facts of the case. If there is a likelihood to incite violence through hateful language, the prosecutor need only prove that the influential person not only used hateful language, but also used their position to incite violence against another group of people, for instance, another ethnic group<sup>155</sup>.

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<sup>151</sup> Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', 390.

<sup>152</sup> Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', 390.

<sup>153</sup> *Republic v Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya* [2014] eKLR

<sup>154</sup> *D.P.P v Humphrey's* (1976) 2 All ER 497.

<sup>155</sup> Section 13, National Cohesion and Integration (Act No. 12 of 2008).

Kenyan statute has separate offences for incitement to violence and hate speech<sup>156</sup>. The salient difference between the two is the intent of the perpetrator. The NCI Act states that the intent of hate speech is to stir up ethnic hatred between groups<sup>157</sup>. Incitement to violence has neither the ethnic qualification, nor the intent to stir hatred. The perpetrator simply intends to make other persons engage in violence<sup>158</sup>. It is therefore difficult in practice to link intent with the effects.

The reality is that hate speech in Kenyan cases, more so perpetrated by politicians, have violence as an end, or as an after effect<sup>159</sup>. This reality is reflected in Kenyan prosecutorial procedure. Hate speech cases often have charge sheets with the primary charge of hate speech, and the secondary charge of incitement to violence<sup>160</sup>.

The ODPP's endeavour represents a form of the consequentialist approach. This argument intends to suggest the direct linkage of incidences of hate speech with the threat of violence in the legal framework, calling for a harmonisation between the NCI Act and the Penal Code. This may be reflected in the *mens rea* of the offence. For instance, a perpetrator of hate speech may not only intend to engender hate between communities, he may also wish to incite violence resulting from that hate<sup>161</sup>. Such an approach would consider the effects.

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<sup>156</sup> Section 96, Penal Code (Act No. 81 of 1948), Section 13, National Cohesion and Integration (Act No. 12 of 2008).

<sup>157</sup> Section 13, National Cohesion and Integration (Act No. 12 of 2008).

<sup>158</sup> Section 96, Penal Code (Act No. 81 of 1948).

<sup>159</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008, para.391.

<sup>160</sup> *R v Ferdinand Waititu & Another* Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.

<sup>161</sup> *R v Ferdinand Waititu & Another* Nairobi Chief Magistrate Court Criminal Case No.470 of 2012.

This dichotomy necessitating the harmonisation of the legal framework was exemplified in the ICTR case of *Nahimana et al. v. The Prosecutor*<sup>162</sup>, where the prosecution had to show that there was a causal link between broadcasts and articles of hate speech and the violence.

The persons had influence and used it to instigate violence: via the use of disparaging statements made against the Tutsi. Ferdinand Nahimana set up the company *Radiotélévision libre des mille collines* (RTLM), while he was also a member of the party *Mouvement révolutionnaire national pour le développement* (MRND)<sup>163</sup>. He used his position to incite acts of genocide and provide information to aid the same<sup>164</sup>. The conviction of direct and public incitement to commit genocide was subsequently reaffirmed in this appeal<sup>165</sup>.

### 5.3 The Freedom of Speech approach

*Nahimana*<sup>166</sup> represents an illustration where violence occurs due to utterances made. This however, may not always be the case. Sometimes hateful statements may be uttered, and the violence anticipated due to them does not occur. To claim however, that hateful statements without the violent effects cannot be harmful, let alone criminal, would constitute too narrow a view of the danger hate speech presents. This claim also ignores reports made within the Kenyan context proving that hate speech not only caused harm, but also has the potential to do so *ab initio*<sup>167</sup>. Therefore, the law needs to prevent hate speech in itself, as *Alan Wadi*<sup>168</sup> and

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<sup>162</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR Appeal Judgement of 28 November 2007.

<sup>163</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR, 1.

<sup>164</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR, para.601.

<sup>165</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR, 346.

<sup>166</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR.

<sup>167</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008.

<sup>168</sup> *Alan Wadi Okengo v Republic* [2015] eKLR.

*Nahimana*<sup>169</sup> have shown. Prosecuting occurrences of violence without tackling hate speech would exclude the actual cause of that violence.

The postulate elaborating that restrictions on hate speech should be determined based on a harm-prevention paradigm, which holds that, outside the nexus with violence, there is no convincing rationale for legally restricting hate speech<sup>170</sup>. This claim contends that there is no general restriction on free speech, contrary to this claim, the NCI Act establishes grounds to restrict free speech, if it constitutes hate speech. The threat toward a targeted group is the key point to consider<sup>171</sup>.

#### **4.4 Conclusion**

Would the prosecution of hate speech solely based on consequences be effective in Kenya? The answer to this query must consider that there is in fact, a causal link between occurrences of violence and hate speech perpetrated by persons of influence<sup>172</sup>, which is true in the Kenyan context as well<sup>173</sup>. The perpetrators of hate speech should be prosecuted, instead of waiting to see if statements would bring about discord in society.

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<sup>169</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR.

<sup>170</sup> Simpson R, 'Dignity, Harm, and Hate Speech', 705.

<sup>171</sup> Simpson R, 'Dignity, Harm, and Hate Speech', 706.

<sup>172</sup> Benesch S, 'Election-Related Violence: The Role of Dangerous Speech', 390.

<sup>173</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, 2008, para.391.

## 6.0 Recommendations and Conclusions

The recommendations are based on two considerations: the inconsistent application of the ODPP's powers; and the need to harmonise the legal framework, being the NCI Act and the Penal Code, in relation to hate speech, incitement to violence, and protection of freedom of expression. This research is an effort to explain the link between hate speech and violence, and the crucial role of the ODPP in restoring and maintaining public order. It has also attempted to demonstrate that the inconsistent application of the ODPP's powers to instances of hate speech has done more to harm than help the cause of garnering more convictions.

This inconsistency may come to mean that the law does not apply equally to all persons. It appears that the treatment of politicians differs from that applied to citizens<sup>174</sup>. The fact is, hate speech perpetrated by persons of influence<sup>175</sup> has more far reaching and dangerous effects than inflammatory statements made by ordinary citizens<sup>176</sup>. It is paramount for the ODPP to recognise the threat hate speech poses to groups targeted by such utterances and the citizenry at large. This responsibility does not fall solely on the DPP's shoulders, the legislature and courts also have significant roles to play in preventing and convicting criminal activities related to hate speech.

The problems in prosecuting hate speech stem from the laws on hate speech themselves, and the application of these laws to relevant situations. Hate speech laws in the NCI Act and the EO Act are well drafted but inexorably have contributed to a disjointed prosecution procedure. For instance, the NCI Act (Section 13) could be expanded to include violence as the intent of

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<sup>174</sup> *Alan Wadi Okengo v Republic* [2015] eKLR.

<sup>175</sup> This is not limited to politicians, it may also include celebrities and media personalities. This research focuses on statements made in the political sphere. The variety of what persons of influence includes was present in the case of *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR.

<sup>176</sup> *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 28.

the perpetrator, the position of influence as an aggravating circumstance, and a clear definition of persons of influence, that includes generally persons who command a large following in the form of supporters of a certain identifiable group. The EO Act limits the advocacy of hatred and incitement of violence to an election period<sup>177</sup>. The act acknowledges that the exercise of undue influence during an election period is illicit and attracts criminal sanctions, it is considered illicit only when it impedes the proper conduct of the voting process<sup>178</sup>, however it fails to place special restrictions on candidates and persons commanding large following during the election period.

The courts are mindful of this lacuna. In the case of *Johnstone Muthama & 8 others v Inspector General of Police & 2 others*<sup>179</sup> it noted that the accused persons had the potential of defeating the aims of justice due to the large support each of them commanded. Consequently, the public is exposed to the adverse effects of this “power”, especially when the politicians intend to target a group using hateful utterances<sup>180</sup>.

The prosecution and investigation procedure of hate speech must also significantly improve. If Kenyan Courts have recognised the threat hate speech has on the common good, the prosecutor should not enter *nolle prosequi* orders in hate speech cases without proper justification<sup>181</sup>. Certainty is crucial in determining what consists hate speech or not. The court already has a firm foundation in Article 33 of the CoK as a starting point. It may also rely on some case law that had a broader outlook in determining whether hate speech existed in a particular circumstance.

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<sup>177</sup> Section 13(f)(i), Election Offences (Act No. 37 of 2016).

<sup>178</sup> Section 10, Election Offences (Act No. 37 of 2016).

<sup>179</sup> [2016] eKLR.

<sup>180</sup> *Johnstone Muthama & 8 others v Inspector General of Police & 2 others* [2016] eKLR, para 28.

<sup>181</sup> *Khalef Khalifa v Republic & 3 others* [2014] eKLR.

It is anticipated that an applicable test can be determined by the courts to aid them in deciding cases. The approaches suggested by this research can provide a secondary point of reference after the considerations provided in the Kenyan legal framework. This would guide not only the DPP in aligning the evidence compiled from investigations to an ascertainable standard, but also the courts in adjudicating these matters.

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