

**Relaxing the Stringent Procedural Rules Governing Private Prosecutions in Kenya**

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By

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To my late grandfather Simon Mwangi, the pursuit for wisdom lives on.

My sincere gratitude goes out to my parents, family and friends for their love and support.

Special thanks to Ms Mukami Wangai for accompanying me through this intellectual journey.

**Declaration**

I, MELISSA KATHLEEN WANJIRU MUNGAI, 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.

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

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## ABSTRACT

The application of the right to private prosecutions in criminal proceedings in Kenya has been challenged by rigid procedural rules of the State. These rules are set out in case law dating as far back as 1985 with the landmark case of *Kimani v Kahara*. Subsequent judicial precedent, occasioned by strict adherence to the principle of *stare decisis*, is a repetition of these requirements with a view of making the procedure more constricted and consequently, this has impeded access to justice.

This dissertation makes the argument for the relaxation of the stringent procedural rules governing private prosecutions. It looks into the historical background and rationale behind instituting private prosecutions emphasising its benefits against public prosecutions. Secondly, it studies the attitude of the court towards prosecutions by private persons through an analysis of cases determined both pre- and post- the 2010 constitution. Thirdly, it makes the argument that the powers of the DPP are too wide and unchecked to the point of interfering negatively with the institution of private prosecutions especially his unfettered discretion over criminal proceedings with the only restriction being that he cannot discontinue a proceeding without the authority of the court.

Through a comparative analysis, some recommendations are drawn from the Crown Prosecution Service, which is charged with the administration of private prosecutions in the United Kingdom, for the resolving of the current regime's shortcomings. In addition, the paper advocates the enacting of the Kenyan Private Prosecutions Bill of 2007 which will contribute greatly in the streamlining of the substantive and procedural aspects of private prosecutions.

### **List of abbreviations**

AG	Attorney General
CPC	Criminal Procedure Code
CPS	Crown Prosecution Service
DPP	Director of Public Prosecutions
UNDP	United Nations Development Programme

## List of cases

*Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene & 7 others* [2016] eKLR.

*Bryan Yongo v Jacob Juma* [2015] eKLR.

*Elirema and another v Republic* [2003] KLR.

*Ezekiel Muchesi v Republic* [2006] eKLR.

*Floriculture International Limited and others* High Court Misc. Civil Application No. 114 of 1997.

*Gouriet v Union of Post Office Workers* [1973] All ER.

*Gregory and another v Republic thro' Nottingham and 2 others* [2004] KLR.

*Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others* [2013] eKLR.

*Issa Timamy v Republic* [2006] eKLR.

*Kimani v Kahara* [1983] eKLR.

*Meixner & another v Attorney General* [2005] eKLR.

*Mohanlal Karamshi Shah v Ambalal Chhotabhai Patel and 5 others* [1954] EACA.

*Moses Miheso Lipeya v Republic* [2007] eKLR.

*Nunes v R* [1935] KLR.

*Otieno Clifford Richard v Republic* [2006] eKLR.

*Peter Ngungiri Maina v Director of Public Prosecutions & 2 others* [2017] eKLR.

*Republic v Chief Magistrate's Court Mombasa ex-parte Ganijee & another* [2002] 2 KLR 703.

*Republic v Islam Omar & 2 others* [2007] eKLR.

*Roselyne Miano & another v Edward Kariuki Ngige & 5 others* [2015] eKLR.

*Rufus Riddlesbarger v Brian John Robson* [1959] EA.

*Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18.

*Tenywa Maganda v Attorney General* [1954] EACA.

*The Republic through Devji Kanji v Davendra Valji Halal* [1978] KLR.

### **List of legal instruments**

*Constitution of Kenya (1963).*

*Constitution of Kenya (2010).*

*Criminal Procedure Code (Cap 75).*

*Judicature Act (Cap 8).*

*Office of the Director of Public Prosecutions Act (Act No. 2 of 2013).*

*Private Prosecution Bill (2007).*

*Prosecution of Offences of England and Wales (Cap 23 of 1985).*

## CHAPTER ONE: INTRODUCTION

### 1.1 Background

From independence the Kenyan criminal justice system has been described as a playground for the contest of political wills. Wanyoike writes that there was a time in our history when criminal law became a tool for punishing political dissents.<sup>1</sup> Further, the judiciary could not safeguard the innocence of its people because it had no money.<sup>2</sup> Parliament was solely in charge of the official funding in the central government and it used this power to undermine the judiciary financially.<sup>3</sup> As succinctly put by the retired chief justice: ‘the judiciary was so frail in its structures, so thin in resources, so deficient in integrity, so weak in public confidence that one would be considered wildly optimistic for expecting delivery of justice from such an institution that was designed to fail’.<sup>4</sup> This meant that the protection of human rights was jeopardised. With the promulgation of the Constitution (2010), Kenyans chose to place access to justice at the forefront.<sup>5</sup> A report prepared by the United Nations Development Programme (UNDP) states that access to justice should be defined as ensuring that judicial outcomes are just and equitable because it involves more than improving an individual’s access to the courts or guaranteeing legal representation.<sup>6</sup>

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<sup>1</sup> Wanyoike W, ‘The Director of Public Prosecutions and the constitution: Inspiration, challenges and opportunities’ in Ghai Y and Ghai J (eds), *The legal profession and the new constitutional order in Kenya*, Strathmore University Press, Nairobi, 2016,170.

<sup>2</sup> Kivuva J, ‘Restructuring the Kenyan State’ The Society for International Development, Constitutional Working Paper Number 1, 2011, 15 <http://www.sidint.net/sites/www.sidint.net/files/docs/WP1.pdf> on 27 January 2017.

<sup>3</sup> See Section 99, Constitution of Kenya (1963). It should also be noted that the entire chapter (Chapter IV) on the Judiciary did not have express provision on a secured fund specific to the financial capacity of the judiciary. Article 173 of the 2010 Constitution cured this anomaly by expressly providing a Judiciary Fund for administrative expenses.

<sup>4</sup> Retired Chief Justice Mutunga W, Progress Report on the transformation of the judiciary the first hundred and twenty days, speech delivered on 19 October 2011. This speech is available at <http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/> on 16 February 2017.

<sup>5</sup> There was more incorporation of traditional justice systems which are home-grown systems that spew confidence onto the criminal justice system in the eyes of the people. This is exactly what the maxim justice must be seen to be done speaks to. See Article 159 (3), *Constitution of Kenya* (2010). Other ways in which this has been secured is through acknowledging the judiciary and the office of the Director of Public Prosecutions as independent state actors.

<sup>6</sup> UNDP, *Access to justice: Practice Note*, 2004, 6. Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ACCESSTOJUSTICEUNDPPRACTICENOTE.pdf> on 3 January 2017.

The most recent police report published in 2015 reveals that in the same year the crime rate went up by four percent as compared to the previous year.<sup>7</sup> This was attributed to an increase in offences against morality, theft of stock, economic crimes, criminal damage and possession of dangerous drugs among others.<sup>8</sup> When it comes to criminal justice, the government has an exclusive role to take judicial action on behalf of the alleged victim so as to restore social welfare.<sup>9</sup> Kenya in particular, vests this duty on the Director of Public Prosecutions (DPP) who is constitutionally mandated to direct the police department in investigation of criminal conduct where detected and to exercise state powers of prosecution.<sup>10</sup> Nevertheless, the public have always had a role to play in curbing crime; after all they are the victims in the strictest sense.<sup>11</sup> In fact, private revenge was the rule of the day up until the nineteenth century before the court systems were formalised.<sup>12</sup> John Stuart Mill thought it fit that the state should only possess power over its citizens for the sole purpose of preventing harm.<sup>13</sup> Can citizens, therefore, resort to self-protection if the state fails to prevent harm on their behalf? When the citizens are left stranded one of the straws they may clutch at was described by Lord Wilberforce as a valuable constitutional safeguard against inertia and partiality on the part of authority.<sup>14</sup> This is what is known as private prosecutions. It is a creature acquired from the British whose private prosecution system today has been formalised by the Crown Prosecution Service,<sup>15</sup> the equivalent of Kenya's Office of the DPP.

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<sup>7</sup> This is amid developing trends such as possession of light weapons, radicalisation of the youth and incitement by political officials. See more National Police Service, *Crime situation report*, 2015, 1.

<sup>8</sup> National Police Service, *Crime situation report*, 2015, 1.

<sup>9</sup> Reid S, *Crime and criminology*, 7ed, Harcourt Brace College Publishers, Texas, 1994, 4.

<sup>10</sup> Article 157 (4) and (6), *Constitution of Kenya* (2010).

<sup>11</sup> In Kenya, this was appreciated by establishing the *Nyumba Kumi* Initiative which aims at enhancing national security awareness in the country from a community context. Through the initiative, better ties between the justice system and the citizens are supposed to be created. See more <http://www.nyumbakumisecurity.com/index.php/about> on 31 January 2017.

<sup>12</sup> Langbein J, 'The origins of public prosecution at common law' 17 *American Journal of Legal History*, 1973, 317.

<sup>13</sup> Mill J, *On liberty*, Ticknor and Fields, Boston, 1863, 23. This book is available at [https://books.google.co.ke/books?id=7DcoAAAAYAAJ&printsec=frontcover&dq=john+stuart+mill+on+liberty+pdf&hl=en&sa=X&redir\\_esc=y#v=onepage&q=self%20protection%20&f=false](https://books.google.co.ke/books?id=7DcoAAAAYAAJ&printsec=frontcover&dq=john+stuart+mill+on+liberty+pdf&hl=en&sa=X&redir_esc=y#v=onepage&q=self%20protection%20&f=false) on 27 January 2017.

It must be noted that harm is not the only consideration for giving up self-preservation rights to the State in order to curb crime. There are some crimes that must be prevented, whether or not they harm individuals, because their effect is more catastrophic. See Cross R, 'Unmaking criminal laws' 3(4) *Melbourne Law Review*, 1962, 418-419.

<sup>14</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL.

<sup>15</sup> This is a national prosecution service created by the enactment of the *Prosecution of Offences Act of England and Wales* (1985) and it comprises of a professional lawyer, separate from the investigation and independent of the police, acting on behalf of the DPP. See AG Grieve D, 'The case for the prosecution: Independence and the public interest' Speech delivered at Queen Mary University of London School of Law, 13 March 2013, available at

The right to institute private prosecutions is set out explicitly in the Criminal Procedure Code.<sup>16</sup> It only allows citizens to seek recourse where the State has no intention to prosecute and the magistrate is satisfied that the problem can be resolved judicially. The courts have also recognised this alternative to public prosecutions with judicial precedents dating as far back as 1985 with the *Kimani v Kahara* case.<sup>17</sup> The suit provided the guidelines that should be considered when an individual institutes private criminal proceedings. These include: making a formal complaint to the police or the Attorney General (AG), now a power of the DPP, and secondly the determination of *locus standi* of the complainant which involves questioning whether the complainant is motivated by malice or political considerations and whether the complainant has personally suffered any injury. Subsequent judicial precedents are a repetition of these requirements with a view of making the procedure more constricted and consequently resulting in impeded access to justice. For instance the High Court ruling by Justice Kuloba in the *Floriculture International Limited* case<sup>18</sup> where it was held that in order to institute a private prosecution the person should have exhausted the public machinery of a public prosecution before embarking on it himself, the public prosecutor or AG should have either declined to institute the proceedings or has been silent on the matter for an unusual but reasonable period of time and that the crime cannot go unprosecuted because it will be a grave failure to public and private justice. It also re-defined *locus standi* to mean the complainant has suffered special, exceptional and substantial injury or damage, that is peculiarly personal to him.

## 1.2 Problem Statement/ Justification of study

Kenya has failed to develop and maintain the right to institute and consequently conduct private prosecutions despite being expressed both explicitly and implicitly in the constitution,<sup>19</sup> the Criminal Procedure Code (CPC)<sup>20</sup> and the Office of the Director of Public Prosecutions Act.<sup>21</sup> An

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<https://www.gov.uk/government/speeches/the-case-for-the-prosecution-independence-and-the-public-interest> on 3 January 2017. The Act terms these professional lawyers as Crown Prosecutors who have the rights of audience enjoyed by any solicitor with a practicing certificate. See Section 4 (1), *Prosecution of Offences Act* (1985 Cap 23).

<sup>16</sup> Section 88, *Criminal procedure Code* (Cap 75).

<sup>17</sup> 1985 eKLR.

<sup>18</sup> *Floriculture International Limited & Others*, High Court Misc. Civil Application No. 114 of 1997.

<sup>19</sup> *Constitution of Kenya* (2010).

<sup>20</sup> *Criminal Procedure Code* (Cap 75).

analysis of various landmark cases reveals that the major inhibiting factor is the unclear procedural guidelines provided in statute which are narrowly interpreted by the courts. As a consequence, there have been no successful private prosecutions since 1985.

### 1.3 Statement of Objectives

The study will attempt to give much needed insights on how to achieve some consistency in the criminal justice system especially in private prosecution proceedings. This is after having recognised that the present framework is inefficient to the point of rendering the legal provisions governing private prosecutions a dead letter law.

The research seeks to question private prosecutions' necessity in Kenya's criminal system. Secondly, it analyses the effectiveness of the legal framework governing these prosecutions. Lastly, the study intends to draw conclusions as to the feasibility of the maintenance of private prosecutions in Kenya.

### 1.4 Literature Review

Although the constitution makes it seem like the state has exclusive authority over the prosecutorial process, these same constitutional provisions are limited.<sup>22</sup> The former constitution implicitly recognised the place of private prosecutions by reading into the powers of the AG in Section 26(3) (b).<sup>23</sup> This arose from the mere fact that the AG could take over and continue any criminal proceedings where they had been instituted or conducted by a **person other than the state**.<sup>24</sup> However, these powers were rather wide and to this effect Article 157 (6)(b) expressly states that the power of the DPP to take over and continue may only be exercised in any court (other than court martial), in any criminal proceeding which has been conducted by a person and

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<sup>21</sup> *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

<sup>22</sup> Lumumba P, *Criminal procedure in Kenya*, LawAfrica Publishing Limited, Nairobi, 2005, 3.

<sup>23</sup> Article 26 (3) (b), *Constitution of Kenya* (1963).

<sup>24</sup> Lumumba P, *Criminal procedure in Kenya*, 3. Emphasis own

authority only after obtaining these private persons' permission.<sup>25</sup> The go-ahead from the magistrate's court is also crucial for those who institute the private proceedings. The Criminal Procedure Code at Section 88(1) stipulates that private persons must seek permission from the court before conducting the proceeding. The DPP must also obtain the same permission in order to discontinue proceedings.<sup>26</sup> Lumumba's analysis of this requirement reveals that there is an anomaly whereby a person can still institute a private proceeding without permission from the relevant authorities as long as all parties are aware of this circumvention and the prosecution has already concluded their case.<sup>27</sup>

Private prosecutions are conducted by persons in their individual capacity or through an advocate.<sup>28</sup> In Kenya, unlike other jurisdictions, there are no specific qualifications required for advocates to act as a private prosecutor.<sup>29</sup> This perhaps led Bwonwong'a to define a private prosecutor as one other than a public prosecutor.<sup>30</sup> Private prosecutors in Kenya face tight *locus standi* rules which have continued to weaken the system. *Locus standi* determines whether or not permission will be granted by the courts to initiate and consequently conduct the proceedings. Not only does a person have to show that they have suffered an injury particular to them but they must show that the DPP has no interest in prosecuting and that the case concerns an offence recognised by law.<sup>31</sup>

How feasible then is the sustenance of private proceedings in criminal law? From the mentioned provisions of the law, it is clear that there is a legitimate intention to give private persons the right to seek redress in the event of state failure. This is not a given. Kiage writes that there existed the 'signal paradox' whereby an individual would institute proceedings only to be exposed to unnecessary interventions by the AG. The AG would then take up the private

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<sup>25</sup> Article 157 (6) (b), *Constitution of Kenya* (2010).

<sup>26</sup> Article 157 (8), *Constitution of Kenya* (2010).

<sup>27</sup> The case of *The Republic through Devji Kanji v Davendra Valji Halal* [1978] KLR discussed this issue and the court was of the view that if from the beginning of the case to the closing of the prosecution submissions there has been no objection and all parties are aware that the proceedings are of a private nature then it is correct to infer that the trial is valid and may proceed with the defence's case. See Lumumba P, *Criminal procedure in Kenya*, 4.

<sup>28</sup> Section 88 (3), *Criminal Procedure Code* (Cap 75).

<sup>29</sup> The American Bar Association has set out a code of conduct or general standards specific to the role of prosecutors which includes private prosecutors. Apart from maintaining professional conduct they ought to seek justice and not focus on seeing that the alleged criminal goes to jail. See generally, [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html) on 2 February 2017.

<sup>30</sup> Bwonwong'a M, *Procedures in criminal law in Kenya*, East African Educational Publishers, Nairobi, 1994, 142.

<sup>31</sup> Bwonwong'a M, *Procedures in criminal law in Kenya*, 143.

proceedings (where he had previously failed to prosecute) only to terminate through entering a *nolle prosequi*. Accordingly this led to public outcry for checks on the AG's powers in this regard.<sup>32</sup> Section 28(3) of the Office of the DPP Act is a positive response to the outcry as it explicitly requires the DPP to take over or discontinue any private prosecution subject to the constitution.<sup>33</sup> Even so, Akech and Mbote note that there is a growing trend in 'private modes of security' in Kenya because of lack of faith in state-approved systems to the type of corporate security and illegal means like public lynching of criminals.<sup>34</sup> This should not be a cause for panic. Benson opines that the private sector plays a vital complementary role in the criminal justice system especially through activities like victims' active participation in the prosecutorial process, public arrests and eventual prosecution.<sup>35</sup> Specially, private prosecutions do not reflect a deficit in expertise or resources in resolving politically sensitive issues like corruption.<sup>36</sup>

On the other hand, Kaufman approaches the limitations of private prosecutions from a practical viewpoint stating that the high costs involved make people reluctant to take on this venture owing to the economic hurdles they must bear.<sup>37</sup> Similarly, Peachey writes that in the United Kingdom, private prosecutions are a reserve for the wealthy because they are the only ones who can afford it.<sup>38</sup> Fairfax thinks that private prosecutions disclose issues pertaining to prosecutorial discretion which in his view is a non-delegable sovereign act, ethical issues (such as conflict of interest), performance and accountability of private actors.<sup>39</sup> It creates a two-tier system of justice where private prosecutions are highly unregulated owing to the mushrooming of private

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<sup>32</sup> Kiage P, *Essentials of criminal procedure in Kenya*, LawAfrica, Nairobi, 2010, 68-69.

*Nolle prosequi* is a power of the DPP (and AG pre-2010 constitution) which enables him to discontinue proceedings at any stage of the proceedings except where a judgment has been entered. This power can only be used for legitimate reasons otherwise it will equate to a breach of duty to prosecute crimes and protect victims of crime. Therefore valid reasons could be insufficient evidence, successful plea bargaining and just general filtering out of petty cases which may just need an admonishing or warning. See Kiage P, *Essentials of criminal procedure*, 63.

<sup>33</sup> Section 28(3), *Office of the Director of Prosecutions Act* (Act No.2 of 2013).

<sup>34</sup> Mbote P and Akech M, *Kenya justice sector and the rule of law*, Open Society Foundations, 2011, 140.

<sup>35</sup> Benson B, *To serve and protect: Privatisation and community in criminal justice*, New York University Press, New York and London, 1998, 3-4.

<sup>36</sup> <https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-4-edmonds-jugnarain-20160505.pdf> 29 January 2017.

<sup>37</sup> Kaufman I, 'Criminal procedure in England and the United States: Comparisons in initiating prosecutions' 49(1) *Fordham Law Review*, 1980, 28.

<sup>38</sup> Peachey P, 'Two-tier justice: Private prosecution revolution' *Independent*, 16 August 2014 <http://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html> on 1 February 2017.

<sup>39</sup> Fairfax R, 'Delegation of the criminal prosecution function to private actors' 43(411) *University of California, Davies*, 2009, 427-441.

investigation companies that defy police investigatory powers of arrest and searches just to get information to build up the private prosecutor's cases.<sup>40</sup>

In admitting that the current rules governing private prosecutions in Kenya are on the verge of becoming a dead letter law, the author appreciates that there is an attempt to streamline the system. An overview of the Private Prosecutions Bill of 2007 reveals that with some amendments for instance changing any mention of the AG to the DPP the provisions once enacted will make the procedure clearer and efficient.<sup>41</sup> In the author's view, one of the best contributions that the enactment will bring is the provision on reimbursement of the private prosecutor's expenses in the event that the DPP decides to take over the proceedings.<sup>42</sup> This is not only another way of checking the DPP's powers but an incentive to counter biased failure on the side of the State.

### 1.5 Hypothesis

The primary hypothesis is that the provisions in the Criminal Procedure Code<sup>43</sup> and the Office of the Director of Public Prosecutions Act<sup>44</sup> are ineffective as they are seldom implemented. Secondly, the powers of the DPP are too wide and unchecked to the point of interfering negatively with the institution of private prosecutions especially his unfettered discretion over criminal proceedings with the only restriction being that he cannot discontinue a proceeding without the authority of the court. Thirdly, the court does not entertain private prosecutions as readily as it would public prosecutions by focusing on the procedural over substantive regulations that govern private prosecutions. Fourthly, there is a "tug-of-war" between the courts and the DPP when it comes to who should grant leave to an individual who wishes to institute these proceedings.

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<sup>40</sup> <http://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html> on 1 February 2017.

<sup>41</sup> A copy of the bill is available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/Unpublished/200707.pdf> on 1 February 2017.

<sup>42</sup> Section 7, *Private Prosecutions Bill* (2007).

<sup>43</sup> Section 88, *Criminal Procedure Code* (Cap 75).

<sup>44</sup> A person must send a written notification to the DPP within 30 days. Section 28(2), *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

## **1.6 Methodology**

Desk-based research will be used. Literature review and case law analysis of both local and international content forms the bulk of the research. The primary sources relied on will be the DPP Act, the CPC, the Constitution of Kenya, and textbooks on criminal procedure and the English legal system. Secondary sources will include judicial decisions, journal articles, reports, discussion papers and news sources (newspapers and internet sources). A bias is given to the common law systems governing private prosecutions in the United Kingdom and the United States because they serve as fitting comparators.

## **1.7 Limitations**

Private prosecutions although a functioning part of the criminal justice system in Kenya are not widely written on. In this regard, there is scanty research material to draw informed conclusions from a local perspective. Secondly, the dissertation will not sufficiently cover all the relevant grounds pertaining to private prosecutions due to restraints in time.

## **1.8 Chapter Breakdown**

This first chapter has given an overview of the topic by way of introduction underlining the background of the study, some of the hypotheses relied on and justification of the study. The second chapter describes the history behind private prosecutions in Britain and their subsequent formalisation to what its colonies (specifically Kenya) have maintained up to date. The third chapter delves into the stringent procedural rules manifested through case law which date as far back as 1985 with the *Kimani* case. It is through these cases that the distinction between instituting a case and conducting a case will be highlighted. Furthermore, the trend which the courts have opted to adopt in dealing with these cases up to 2015 with the *Bryan Yongo v Jacob*

*Juma* case<sup>45</sup> which still echoes some of the principles in the *Kimani* case. In addition, the ill-effects of these procedural rules will be discussed as they spill over to the relationship between the DPP and the magistracy. The fourth chapter looks at the development of the right in Kenya through legislation and its state enforcers mainly the AG and the DPP pre- and post- the 2010 Constitution of Kenya. This will involve a discussion on their respective duties with regard to ensuring access to criminal justice is achieved. Lastly, the fifth chapter provides some concluding remarks.

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<sup>45</sup> 2015 eKLR. The learned judge emphasised that at the stage for seeking leave to conduct a private prosecution, it is not the duty of the learned magistrate to *suo moto* interrogate any persons who have been called as persecution witnesses as investigating officers.

## **CHAPTER TWO: THE CONCEPTUAL AND HISTORICAL FRAMEWORK OF PRIVATE PROSECUTIONS IN KENYA**

The current criminal laws adopted in Kenya have their origins intrinsically linked with that of its legal system. Indeed, such influence is observed in other laws where a cut-and-paste approach is maintained leading to a lack of indigeneity. Coldham, writing on penal systems in Africa, is of the opinion that despite the fuss over injecting African values, African traditions and African socialism into government policies, there has been little effort put into such incorporation.<sup>46</sup> With the criminal laws, it is not apparent that Kenya intends to follow England's lead with regard to private prosecutions. This is because while England has established an independent office to deal with these proceedings, Kenya has a private prosecutorial system that needs streamlining beginning with an appreciation of the rationale behind the system. This chapter seeks to provide some of the grounds and motivations behind the establishment of private prosecutions in the Kenyan legal system.

### **2.1 The concept of privatisation in criminal prosecutions**

Privatisation of public roles often leads to the debate concerning private rights versus public rights. Which one holds more weight? The working definition of privatisation is the use of private entities by the government for the implementation of state policy or for the provision of state services.<sup>47</sup> This is usually based on contractual agreements between the state and private entities which essentially attract personal rights and duties to the exclusion of those not privy to the contract.<sup>48</sup> As a consequence, privatisation has been seen as a way of discouraging accountability of state actors because of this aspect of self-regulation.<sup>49</sup>

In some smaller jurisdictions in the United States privatisation of criminal prosecutions is organised through the outsourcing of private attorneys who are called upon by the state on a contingency fee or flat annual fee or flat rate per individual case basis, to try less serious criminal

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<sup>46</sup> Coldham S, 'Criminal justice policies in Africa: Trends and prospects' 44(2) *Journal of African Law*, 2000, 223.

<sup>47</sup> Metzger G, 'Privatisation as delegation' 103(6) *Columbia Law Review*, 2003, 137.

<sup>48</sup> Vandenberg M, 'The private life of public law' 100(2) *Columbia Law Review*, 2007, 112.

<sup>49</sup> Vandenberg M, 'The private life of public law', 112.

offences.<sup>50</sup> This delegation empowers the attorneys to handle all aspects of the investigation, to assess the case and determine whether it may proceed, to try the case and cater for all its costs.<sup>51</sup> However this sort of privatisation, were it to be sustained in Kenya, raises some well-worn concerns. Firstly, as brought out by Lord Wilberforce that the state officers act on behalf of the state and therefore have no general power to interfere with the assertion of private rights and accordingly private persons, in general, have no power to assert public rights.<sup>52</sup> This merges with the perspective of Dorfman and Harel who opine that there are some government decisions that cannot be executed successfully by private entities since their outcomes yield *inherently public goods* which should be necessarily controlled by the state.<sup>53</sup>

To the contrary, Freeman thinks that the non-delegable argument is ill-informed considering that the Executive arm of government has wide discretionary powers which it can use to guide private discretion even to the point of making private actors liable as if they were state actors.<sup>54</sup> He further argues that if the problem is regulation then preserving flexibility in the process (of regulation) should be adopted so that the best potential of privatisation is achieved while still checking on private power.<sup>55</sup> The preceding assertions shed light on some of the lingering perceptions of the state actors and the public at large with regard to prosecutorial authority.

## 2.2 History of private prosecutions in England and Wales

Langbein writes that up until the nineteenth century the English relied upon a predominant, although not exclusive, component of private prosecution.<sup>56</sup> According to Friedman:

*“Under English law, any Englishman could prosecute any crime. In practice, the prosecutor was usually the victim. It was up to him to file charges with the local magistrate, present evidence to the grand jury, and, if the grand jury found a true bill, provide evidence for the trial.”*<sup>57</sup>

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<sup>50</sup> Fairfax R, ‘Outsourcing criminal prosecution? The limits of criminal justice privatisation’ 2010 *University of Chicago Legal Forum*, 2016, 280-282.

<sup>51</sup> Fairfax R, ‘Outsourcing criminal prosecution? The limits of criminal justice privatisation’, 278. Costs include secretarial support such as word processing, printing, photocopying, office supplies, expert witnesses and training of associates in criminal prosecution topics.

<sup>52</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL.

<sup>53</sup> Dorfman A and Harel A, ‘The case against privatisation’ 41(1) *Philosophy & Public Affairs*, 2013, 68.

<sup>54</sup> Freeman J, ‘Extending public norms through privatisation’ 116(5) *Harvard Law Review*, 2003, 1304.

<sup>55</sup> Freeman J, ‘Extending public norms through privatisation’, 1373.

<sup>56</sup> Langbein J, ‘The origins of public prosecution at common law’ 17 *American Journal of Legal History*, 1973, 317.

This system was then subsumed into the public prosecutorial system following a need to formalise the practice for easier and better control of crime. As decades have gone by, private prosecutions have been resurrected into the legal scene. This perhaps proves their necessity. To this end, it is incumbent to study their origins.

The narrative harks back to the medieval times where there was no court system and citizens would voluntarily report their grievances to a self-informing jury. The members of the jury had two main traits: they were men who were likely to be already informed [of the material facts] and they were drawn from the neighbourhood where the crime was committed.<sup>58</sup> These jurors actively gathered information whilst living in small, tight-knit communities where rumours, gossip, and local courts kept everyone abreast with their neighbours' affairs for the sake of an anticipation of a trial.<sup>59</sup>

This system went through formalisation because of its unreliability. It is argued that it provides an avenue for cases where there are no aggrieved citizens who survive to prosecute, and others where the aggrieved citizens will decline to prosecute, or are inept at it.<sup>60</sup> Friedman writes that the perceived problems of private prosecutions at the time were:

*“Entrapment where the perpetrators were persuaded to commit the crimes by confederates whose real purpose was to betray them for the reward. Secondly, the existence of these rewards was thought to have a negative effect on the attitude of the jury because the jurors knew that the witnesses expected to share in the reward from conviction and thus they discounted their testimony accordingly”.*<sup>61</sup>

Furthermore, the jurors became lax in their duties of gathering extensive knowledge on a particular case therefore delivering verdicts based on their subjective notions of culpability.<sup>62</sup> Consequently, the journey towards the installation of a public prosecutor who would officially

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<sup>57</sup> Friedman D, 'Making sense of English Law enforcement in the eighteenth century' 2(2) *University of Chicago Law School Roundtable*, 1995, 476.

<sup>58</sup> Langbein J, 'The origins of public prosecution at common law', 314.

<sup>59</sup> Klerman D, 'Was the jury ever self-informing' USC Public Policy Research Paper Number 01-10, 2000, 1 <https://poseidon01.ssrn.com/delivery.php?ID=422073103008124080109121089066004088018013055019019054113024088100104066030029020056022028014084116071101072096030087026033038082121100127072066097099102121041036071089075125082066005007094098115088075090007072102085064087081126101068119126026&EXT=pdf> on 8 August 2017.

<sup>60</sup> Langbein J, 'The origins of public prosecution at common law', 318.

<sup>61</sup> Friedman D, 'Making sense of English Law enforcement in the eighteenth century', 477.

<sup>62</sup> Klerman D, 'Was the jury ever self-informing', 2.

take up the task of charging crimes on behalf of the private citizen began. This journey involved four key players: the assize judges, parish constables, justices of the peace and the victims. It is of interest to note that the entire criminal justice system in the eighteenth century was run by amateurs; the assize judges, the justices of peace and the parish constables were all lay men.<sup>63</sup> Lyman writes that the justices of peace were 'usually chosen from amongst the gentry' while the parish constables, owing to a series of notorious practices, was made up of the 'parish's poorest and most unfit'.<sup>64</sup>

The assize judges would conduct trials of a criminal (mostly felonies) or civil nature in the six counties of England twice a year.<sup>65</sup> Parish constables were the rudimentary form of police officers and together with the justices of peace they would conduct a pre-trial analysis of cases after which they would present their findings to the judges. The pre-trial analysis included examination of evidence from witnesses and the victims. Eventually, the two began to present cases on behalf of the victims as opposed to working as a conjunctive unit.<sup>66</sup>

Justices of peace contributed significantly to the face of private prosecutions. One of the key reasons was because their duties were founded on the Marian Committal Statute of 1555 which had an effect on private prosecutions in the subsequent ways.<sup>67</sup> Firstly, this statute transformed the role of the private accuser from option to obligation.<sup>68</sup> Secondly, in the event that there were

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<sup>63</sup> Langbein J, *The trial jury in England, France and Germany 1700-1900*, 2012, 21

[https://law.yale.edu/system/files/documents/pdf/Faculty/langbein\\_theTrialJury.pdf](https://law.yale.edu/system/files/documents/pdf/Faculty/langbein_theTrialJury.pdf) on 6 August 2017.

<sup>64</sup> Lyman J, 'The Metropolitan Police Act of 1829' 55(1) *Journal of Criminal Law and Criminology*, 1964, 141.

<sup>65</sup> Their origin can be traced to the Assize of Clarendon of 1166 who ordained that in every county twelve lawful men should be sworn to present all reputed criminals of their district in each county court. See Stephen J, 'The growth of trial by jury in England' 10(3) *Harvard Law Review*, 1896, 156.

They would also be brought matters that were considered novel, important or difficult. See Oldham J, 'Informal law-making by the twelve judges in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries' 27 *Law and History Review*, 2011, 12.

<sup>66</sup> Langbein J, *The trial jury in England, France and Germany 1700-1900*, 20.

<sup>67</sup> The specific provisions of the statute read: "And that the said Justices or one of them being of the Quorum, when any such prisoner is brought before them for any Manslaughter or Felony, before any Bailment or Mainprise, shall take the examination of the said Prisoner and information of them that brings him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing before they make the same Bailment". Another section read: "That from henceforth such Justices or Justice before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination". See Kry R, 'Confrontation under the Marian Statutes: A response to Professor Davies' 72(2) *Brooklyn Law Review*, 2007, 498.

<sup>68</sup> There was an Act of 1361 titled "What sort of persons shall be Justices of the Peace; and what authority shall they have" which assigned (thus the concept of obligation or duty) to every county in England "one lord and with him three or four of the most worthy in the county with some learned in the law to keep the peace, arrest and imprison

no private accusers or when the private citizens did not have sufficient evidence, the justice of peace had the mandate to investigate, bind witnesses and appear at the courts of assize to orchestrate the prosecution. Further, at trial stage he could testify about his investigation and interrogate witnesses before the jury.<sup>69</sup> Lastly, the private citizen was bound to attend trial and testify only in the circumstances of a felonious crime thus reducing the aspect of voluntariness in the private prosecutorial system.<sup>70</sup>

On the other hand, parish constables began to initiate and conduct prosecutions on behalf of the aggrieved private citizens by virtue of the Metropolitan Police Act of 1829 which reformed the police system. According to a report by the Royal Commission, before 1886, the conduct of the prosecution in cases initiated by the police was the responsibility of the police who either presented the case in the magistrates' courts themselves or hired out lawyers.<sup>71</sup>

In 1986, the Prosecution of Offences Act<sup>72</sup> was enacted which at Section 6 re-established, now formally, the private prosecutorial system which is under the authority of the Crown Prosecution Service.<sup>73</sup> Prior to this, the system had been terminated to pave way for state offices such as the Attorney General who would represent cases made against the government in the courts.

### 2.3 The establishment of private prosecutions in Kenya

Ghai defines a common law country as that:

*“Which has among its formal sources of law, common law and equity are the major ingredients and the forms and the procedures of their superior courts are based upon those of England. They have also received or adapted a large part of the statute law of England. Their conventions of*

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offenders and hear and determine felonies and trespasses”. There was another known as the Act of 1363 which ordered (hence the concept of obligation) the justices to hold Quarterly Sessions (these tried petty offences). Read more Maudsley R and Davies J, ‘The justice of peace in England’ 18(3) *University of Miami Law Review*, 1964, 519.

<sup>69</sup> Langbein J, The origins of public prosecution at common law, 323.

<sup>70</sup> Langbein J, The origins of public prosecution at common law, 322.

<sup>71</sup> Royal Commission on Criminal Justice, *Report*, 6 July 1993, 69.

<sup>72</sup> *Prosecution of Offences Act of England and Wales 1985* (Cap 23).

<sup>73</sup> <http://www.cps.gov.uk/about/> on 10 August 2017. Section 6 (1) reads: “...nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director’s duty to take over the conduct of proceedings does not apply”. See Section 6, *Prosecution of Offences Act of England and Wales 1985* (Cap 23).

*drafting and interpretation likewise derive from England. An English visitor to the high courts of these countries will find much in the mode of legal argumentation, as well as the procedure and the trappings-to say nothing of wigs and gowns- to remind him of the Strand*".<sup>74</sup>

The above perspective is adopted by the author to make the argument that private prosecutions in Kenya are thus a creature of English common law. The point of departure nonetheless is all the developments taking place from and after the year 1985 with the enactment of the Prosecution of Offences Act in England and coincidentally the determination of Kenya's landmark case on private prosecutions. The right to private prosecution is a common law practice as shown in part one of this chapter. In fact, the same primordial components of private prosecutions can be observed in Kenya. Communities had their own efficient criminal justice systems. Kariuki writes that prior to colonialism, indigenous African tribes applied their laws and customs in resolving conflicts and disputes and this contributed to social cohesion and peaceful coexistence.<sup>75</sup> In the same wavelength, according to the Criminal Justice Report, Kenya initially had an informal customary justice system which was dictated over by local chiefs and council of elders in remote villages where the formalised police and court structures were not readily accessible.<sup>76</sup>

Kenya's first common law courts were established in 1897.<sup>77</sup> There was an issue in reconciling localised disputes because the judges did not have an appreciation of African customary law which they tried to interpret with common law. Why then was such a failing source of law allowed to reign post-Independence? Joireman explains that:

*"Without exception in Africa, colonies adopted the legal system of the metropole at independence. This occurred for two distinct reasons. First, throughout the entire colonial experience, indigenous peoples were forced to live with a particular system, either the continental civil codes or British common law. At independence, what experience of a national legal system existed was that designed by the continental European powers or the British.*

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<sup>74</sup> Ghai Y, 'Law development and African scholarship' 50 *Modern Law Review*, 1987, 750-751. The Strand is a thoroughfare in the City of Westminster, Central London.

<sup>75</sup> <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf> on 8 August 2017.

<sup>76</sup> National Council in Administration of Justice, *Criminal justice in Kenya: An audit*, 2016, 35.

It should be noted that for traditional societies their justice systems were in no way "informal". In terms of structure, punishment and reach traditional justice mechanisms were systems.

<sup>77</sup> Joireman S, 'Evolution of common law: Legal development in Kenya and India' 41(2) *Commonwealth and Comparative Politics*, 2006, 13.

*Therefore, just as newly independent colonies chose to keep the languages of the metropolises for the conduct of governmental activities, so too they retained the legal and other political institutions left behind*.<sup>78</sup>

The right to institute private prosecutions is set out explicitly in the Criminal Procedure Code.<sup>79</sup> It only allows citizens to seek recourse where the State has no intention to prosecute and the magistrate is satisfied that the problem can be resolved judicially. The courts have also recognised this alternative to public prosecutions with judicial precedents starting with the forerunner case of *Kimani v Kahara* [1985].<sup>80</sup> It established the ground rules that a private citizen must follow when exercising this right. As the years have gone by, the courts have tried to expand their interpretation of this right. In the *Floriculture International Limited* case<sup>81</sup> it was held that in order to institute a private prosecution the person should have exhausted the public machinery of a public prosecution before embarking on it himself. This is one among many of the limitations pegged upon the right which in the author's view connotes a setback in the system.

The concept of *stare decisis* has therefore maintained the practice of private prosecutions in Kenya. Notwithstanding the presence of statutes such as the CPC and the Director of Public Prosecutions Act<sup>82</sup> which provide for private prosecutions, the most active source is the jurisprudence developed by the courts which espouse English common law decisions on the right to institute private prosecutions.

Chapter three seeks to give an in-depth analysis of the jurisprudential developments by the Kenyan judiciary in interpreting the right to private prosecutions.

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<sup>78</sup> Joireman S, 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' 39(4) *Journal of Modern African Studies*, 2001, 11.

<sup>79</sup> Section 88, *Criminal procedure Code* (Cap 75).

<sup>80</sup> [1985] eKLR.

<sup>81</sup> *Floriculture International Limited & Others*, High Court Misc. Civil Application No. 114 of 1997.

<sup>82</sup> *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

## CHAPTER THREE: THE KENYAN COURTS' INTERPRETATION OF PRIVATE PROSECUTIONS

This chapter delves into the stringent procedural rules manifested through case law which date as far back as 1985 with the *Kimani v Kahara* case which has set a precedent on the guidelines that should be considered when an individual institutes private criminal proceedings. Subsequent judicial precedent is a repetition of these requirements with a view of making the procedure more constricted and consequently, this has impeded the implementation of the right to access to justice.

### 3.1 The Position of the Kenyan Courts from 1985 to 2010

The backdrop against which the courts from 1985 adopted in arriving at the meaning of the right to private prosecutions hailed from their interpretation of the constitutional and statutory provisions. The common view of the courts was that the right was constitutionally provided for, albeit by implication.<sup>83</sup> Furthermore and conversely, Section 88(1) and 88(3) of the CPC expressly set out this right thus allowing anyone to conduct or institute (respectively) a private prosecution subject to the authority of a magistrate.<sup>84</sup>

Pointedly, the courts at the time were steadfast in their well-worn perception of who was to lawfully qualify as a prosecutor whether public or private. In *Riddelsbarger v Robson* (1956) the courts take on Section 88 was as follows:

*“Under s.88 the persons who can conduct a prosecution fall into two classes: a prosecutor, in this sense, must either be a public prosecutor or other officer generally or specially authorised by the Governor in this behalf or else a person whom the magistrate may permit to conduct the*

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<sup>83</sup> *Kimani v Kahara* [1983] eKLR, 3-4.

<sup>84</sup> Section 88(1) and 89(2), *Criminal Procedure Code* (Cap 75). Section 88(1) reads: “A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission”. Section 89(2) provides: “A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction”.

prosecution. No other class of prosecutor, that is, a person entitled to conduct a prosecution, is recognised".<sup>85</sup>

The judgement aimed at emphasising that there was no such thing as a private prosecutor because the function of prosecuting crime always lay with the State in the absence of special circumstances. The case relied on submissions which described that 'all prosecutions whether private or not are Crown prosecutions'.<sup>86</sup> These assertions were inspired by the 1935 case of *Nunes v R* where it was stated that 'even in a private prosecution the prosecutor is in law the Crown at the instance of the private prosecutor, whoever he may be'.<sup>87</sup> Similar averments were made in the 1954 cases of *Shah v Patel* and *Tenywa Maganda v AG* which held that the 'Crown is the prosecutor in law; but the Crown must, of course, act through someone'.<sup>88</sup>

The dictum of Lord Diplock in *Gouriet v Union of Post Office Workers* (1973) influenced the interpretation of the courts notably highlighting the importance of private prosecutions amid similar holdings of the East African Courts:

*"It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and bring criminals to justice and the creation of the office of Director of Public Prosecutions, the need for prosecutions undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law".*<sup>89</sup>

In later years the court held that the law sets out who is qualified to be a public prosecutor, as opposed to a private prosecutor. In *Elirema v Republic* (2003) a private prosecutor was defined as simply any person prosecuting with the permission of the court granted under Section 88(1) of the CPC while public prosecutors must meet the requirements in Section 85 of the CPC.<sup>90</sup>

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<sup>85</sup> *Rufus Riddlesbarger v Brian John Robson* [1959] EA, 847.

<sup>86</sup> *Riddlesbarger v Robson*, 844.

<sup>87</sup> *Nunes v R* [1935] KLR, 126.

<sup>88</sup> *Mohanlal Karamshi Shah v Ambalal Chhotabhai Patel and 5 others* [1954] EACA, 236. See also *Tenywa Maganda v Attorney General* [1954] EACA, 290.

<sup>89</sup> *Gouriet v Union of Post Office Workers* [1973] All ER, 94.

<sup>90</sup> *Elirema and another v Republic* [2003] KLR, 540.

The courts have interpreted these provisions strictly leaving no leeway for a progressive understanding of this right. The anomalies as evidenced above begin with the courts stance that public and private prosecutions are one and the same yet the statutory and constitutional provisions seem to differentiate them. This has led to problems in identifying the rights holder and consequently the exercise of the right which has implications on *locus standi* before the court.

### 3.1.1 The “Elementary Guiding Principles” of Private Prosecutions formulated in *Kimani v Kahara (1985)*

The High Court case of *Kimani v Nathan Kahara (Kahara case)* was an appeal emanating from a private prosecution filed at a subordinate court.<sup>91</sup> Sometime in November 1982, a complaint sworn by two councillors of the Nairobi City Council, Richard Kimani and SM Maina, was made to a senior resident magistrate to level a charge against Nathan Kahara (then Mayor of Nairobi) with conspiracy to defraud the public. In addition, Mr Kahara was neither present nor represented when the two councillors through their advocates successfully applied under Section 88 of the CPC for permission to prosecute the case.

On December 1982, Mr Kahara appeared before the chief magistrate where he pleaded not guilty to all the charges. The chief magistrate gave his ruling on 9 February 1983 dismissing all the charges against Mr Kahara and discharging him. This holding was based on the notion that the AG had ultimate and undisputed control over all prosecutions. Even so, permission had been granted by the senior resident magistrate for the private prosecution to be instituted. The learned chief magistrate tackled this inconsistency by stating that he had no appellate jurisdiction to reverse the senior magistrate’s decision. As such, the author concludes that it was reduced to a

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This case was about the prosecution by unauthorised persons i.e. two police officers of the rank of Corporal (usually for police officers to act as public prosecutors they must not be below the rank of Assistant Inspector). Section 85 of the CPC provides: “(1) The Director of Public Prosecutions, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases; (2) The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case; (3) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions”.

<sup>91</sup> Private Prosecution No. 7 of 1982.

mere unfortunate turn of events that the senior resident magistrate did not consider the *locus standi* of the complainants before granting permission.

The High Court took on the matter through a request by the complainants' advocate to exercise its power of revision in a bid to revise and/or quash the chief magistrate's decision. The petitioners were also adamant in proceeding with the private prosecution and therefore requested the High Court to refer the matter to the resident magistrate with orders to commence the trial and hear the case. The main argument of the petitioners was that the chief magistrate erred in law in holding that the AG's consent or refusal to prosecute must precede the setting in motion of the machinery of private prosecution or at least that the AG and/or police must always be involved in the process. The court agreed with this proposition after analysing the import of Section 26(3)(c) of the Independence Constitution, Section 88 of the CPC which confers the right to any person to conduct the prosecution subject to the permission of any magistrate trying the case while section 89 of the CPC which confers the right to institute criminal proceedings on any person by means of complaint to a magistrate. The learned judges, in this respect, stated: 'Nowhere can it be inferred from the foregoing provisions that the consent of the AG is required before a private prosecution can be instituted or conducted'.<sup>92</sup> Further that the chief magistrate erred in relying on the fact that the AG has 'ultimate and undisputed control over all prosecutions without considering how such discretion is exercised'.<sup>93</sup>

In formulating what the author has coined as the elementary guiding principles for private prosecutions, the court analysed three questions the third of which is relevant: if the magistrate has discretion in granting permission to conduct a private prosecution, on what principles should such discretion be exercised? The court therefore made its landmark precedent in holding:

*"When an application is made under Section 88 to conduct a prosecution we think that the magistrate should question the applicant to ascertain whether a report has been made to the AG or to the police and with what result. If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the police of that fact. The magistrate should also ask himself: How is the complainant involved? What is his locus standi?"*

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<sup>92</sup> *Kimani v Kahara*, 4.

<sup>93</sup> *Kimani v Kahara*, 5.

*Has he personally suffered injury or danger or is he motivated by malice or political consideration? In the present case it is alleged that the public has been defrauded. No case either in England or Kenya was brought to our notice in which a private prosecutor has prosecuted on behalf of the public interest. To prosecute on behalf of the public is to usurp the functions of the AG”.*<sup>94</sup>

The Court concluded by setting aside the chief magistrate’s orders, imploring the petitioners to seek permission from the magistrate trying the case to conduct the prosecution and advising such magistrate to bear in mind their principles when granting permission.

### **3.1.2 The Courts’ Interpretation of the “Elementary Guiding Principles” in subsequent case law (The Floriculture International Limited Case of 1997)**

Twelve years later, in the Floriculture International Limited case (*Floriculture* case) Justice Kuloba expanded the meaning of the guiding principles espoused in the *Kahara* case:

*“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor that the complainant has firstly exhausted the public machinery of prosecution before embarking on it himself. Secondly, that the AG or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings or that he has maintained a more than usual and reasonable reticence. Thirdly, that either the decision or reticence must be clearly demonstrated. Fourthly, that the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued. Fifthly, that unless the suspect is prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice. Sixthly, their locus standi should be based on the fact that he has suffered special, exceptional and substantial injury or damage, peculiarly personal to him. As such, he should not be motivated by malice, politics, or some ulterior considerations devoid of good faith. In essence, there should be demonstrable grounds for believing that a grave social evil is being*

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<sup>94</sup>*Kimani v Kahara*, 6.

allowed to flourish unchecked because of the inaction of a pusillanimous AG or police force guilty of a capricious, corrupt or biased failure to prosecute. Accordingly, the private prosecution should be an initiative to counteract the culpable refusal or failure to prosecute or to neutralise the attempts of crooked people to stifle criminal justice”.<sup>95</sup>

It is only these two cases that have informed the lower courts so far on whether or not they should allow for a private prosecution in the preliminary stages.<sup>96</sup> As such, subsequent case law is a repetition of the elementary guiding principles formulated in *Kahara* with a mention of Justice Kuloba’s wisdom in *Floriculture*.

Notwithstanding these assertions, the courts still battle with the idea that an individual other than the AG and state officials have the power to prosecute. In the case of *Gregory v Republic thro’ Nottingham* (2004) it was held that:

“The private individual is not in general to be regarded as the custodian of the public interest. On this account the private prosecutor must not set himself in competition with the AG, in the conduct of prosecutions. In this case the private prosecution constituted an abuse of the due process of the law and was oppressive to the applicants because it supplanted the authority of the AG”.<sup>97</sup>

Further and consequently, private prosecutions should be few and limited so that the AG’s authority remains entirely uncompromised.<sup>98</sup> In this case the judges also opposed that there is a general right of private prosecution by implication in Section 26(3)(b) because that would be harmful to the ordered management of the administration of criminal justice throwing the court’s case management arrangements out of gear.<sup>99</sup>

Similarly, in *Issa Timamy v Republic* (2006) the principles in *Kahara* were restated with the court noting that ‘even though every citizen has sufficient interest in seeing the law being

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<sup>95</sup> *Floriculture International Limited and others*, High Court Misc. Civil Application No. 114 of 1997, 38-39.

<sup>96</sup> *Otieno Clifford Richard v Republic* [2006] eKLR, 10.

<sup>97</sup> *Gregory and another v Republic thro’ Nottingham and 2 others* [2004] KLR, 575.

<sup>98</sup> *Gregory v Nottingham*, 574.

<sup>99</sup> *Gregory v Nottingham*, 567.

enforced it does not follow that every citizen has a sufficient interest in conducting the prosecution of another citizen for an offence which has caused him no damage or injury'.<sup>100</sup>

### 3.2 The Position of the Courts in light of the promulgation of the 2010 Constitution

The courts have taken it in their stride to maintain the position of the learned judges in *Kahara* and *Floriculture*. This has led to consistency in the application of the elementary guiding principles. In *Isaac Aluochier v Stephen Musyoka* (2013), Justice Mumbi Ngugi stated that the law and judicial precedent governing private prosecutions under the former constitution are still applicable to-date save for the principle on *locus standi*.<sup>101</sup> Justice Lenaola while still relying on the elementary principles held, in *Albert Gacheru v James Maina* (2016), that the court should ensure that private prosecutions do not contravene a person's non-derogable right to a fair trial.<sup>102</sup> Pointedly, the learned judge stressed that an individual had the right to conduct a private prosecution either in person or through an advocate under Section 88(3) of the CPC and could act as a witness in the case.<sup>103</sup> Likewise, in *Roselyne Miano v Edward Ngige* (2015) the court held that the right of a citizen to institute private prosecutions is both statutory under Section 88 of the CPC and a constitutional safeguard through Article 157(6).<sup>104</sup>

#### 3.2.1 Case study: Bryan Yongo v Jacob Juma [2015]

In this case, Mr Yongo filed a private prosecution levelling charges of forgery, perjury and uttering a false document against Jacob Juma. The proceedings failed because it was running concurrent with a civil suit on the same subject matter. Even so, the author selectively points out this case for two reasons. To begin, the principles in the *Kahara* case were relied on. In fact, the learned High Court judge exercising his powers of revision observed that: 'this court only needs to satisfy itself that the learned magistrate addressed himself to the relevant issues that he was

<sup>100</sup> *Issa Timamy v Republic* [2006] eKLR, 4.

<sup>101</sup> *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others* [2013] eKLR, 5-6.

<sup>102</sup> *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene & 7 others* [2016] eKLR, para.92.

<sup>103</sup> *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene & 7 others*, para. 43-46.

Section 88 (3) reads: 'Any person conducting the prosecution may do so personally or by an advocate'.

<sup>104</sup> *Roselyne Miano & another v Edward Kariuki Ngige & 5 others* [2015] eKLR, para. 11.

required to consider in arriving at his decision'.<sup>105</sup> These relevant issues were the elementary guiding principles. Secondly, the private prosecution gathered media attraction because the two parties are renowned for being in a 'litany of winding litigation' against each other.<sup>106</sup> This is an example therefore, of the abuse of private prosecutions making sensible the principle of sufficient interest; the complainant should not be driven by malice or ulterior motives.

### 3.3 An Analysis of the Trends of the Court with regard to Private Prosecutions

#### 3.3.1 *Stare Decisis* as a Setback to Realising the Legitimate Aims of Private Prosecutions in Kenya

The enactment of the Judicature Act subjected and committed the superior courts of Kenya to the common law system in the widest sense for the purposes of constitutional and statutory interpretation.<sup>107</sup> Further, Ojwang writes that through this system the Kenyan judge has squarely been set on a path of law making and quotes Lord Woolf who observed:

*"As we enter the new millennium it is at last accepted, without qualification, that the judges are lawmakers; that they have a constitutional role to keep the common law under review and to develop and refurbish the principles to be derived from our case law; that there are crevices which have to be filled and decay which has to be removed if our law is to remain capable of effectively meeting the needs of contemporary society; that there is law making to be done which the legislator will not undertake".*<sup>108</sup>

<sup>105</sup> *Bryan Yongo v Jacob Juma* [2015] eKLR, 4.

<sup>106</sup> Wambugu B, 'A peek at Kenya's most notorious litigants: Case of Bryan Yongo and Jacob Juma' Daily Nation, 23 May 2015 <<http://www.nation.co.ke/news/Bryan-Yongo-Jacob-Juma-Litigation-Court-Cases/1056-2727426-uujuwx/index.html>> on 21 September 2017.

<sup>107</sup> Ojwang JB, *The common law, judges' law: Land and environment before the Kenyan courts*, Strathmore University Press, Nairobi, 2014, 26. Particularly, Section 3(1)(c), *Judicature Act* [Cap 8] provides: "The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12 of August 1897 and the procedure and practice observed in courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".

<sup>108</sup> Ojwang JB, *The common law, judges' law*, 27.

Lord Woolf, 'The additional responsibilities of the judiciary in the new millennium' in Markesinis B (eds) *The coming together of the common law and the civil law*, Hart Publishing, London, 2000, 134.

In the interests of uniform, consistent and efficient interpretation of the law, the doctrine of judicial precedent does not gather much odium. Bwonwong's remarks that old authorities which have been followed for many years are generally treated with a lot of respect because they have stood the test of time.<sup>109</sup> Following the trends of the courts, it is crystal clear that they have chosen to adopt the dicta in *Kahara* and *Floriculture* uncontested and unexpanded for three decades. The courts have failed to provide further insight as to how the elementary principles should be conceived. The downfall is that there have been little to no successful private prosecutions so far.

In *Isaac Aluochier v Stephen Musyoka*, Justice Mumbi Ngugi expressed doubt as to the elementary principle on *locus standi*. There was no explanation given. The author opines that the learned judge's reservation could stem from Article 22 whereby everyone has the right to petition the court on the basis of a denial, violation, infringement or threatening of their fundamental freedoms in the Bill of Rights.<sup>110</sup> The courts have taken a stationary approach in the application of their power of law-making through strict adherence to *stare decisis* thereby failing to give meaning to the elementary guiding principles within the changing circumstances.

### **3.3.2 The Need to Streamline the Elementary Guiding Principles with the Existing Criminal Procedural Rules**

In subsequent cases, the courts have tried to use the elementary guiding principles to reconcile issues with the criminal procedural rules. Once the colours do not match, the judges have taken a mixed approach. For instance, in *Albert Gacheru v James Maina*, the magistrate refused to grant permission to conduct a private prosecution because the person was going to act as a witness in their matter. The rationale was based on the fact that prosecutors cannot conduct proceedings where they will have a conflict of interest. Nonetheless, the individual through the elementary guiding principles had qualified to institute a private prosecution. It was held that there is 'no universal prohibition in law against a person conducting a private prosecution also serving as a

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<sup>109</sup> Bwonwong's M, *Procedures in criminal law in Kenya*, East African Educational Publishers, Nairobi, 1994, 23.

<sup>110</sup> Article 22(1), *Constitution of Kenya* [2010].

witness in the criminal case they are privately prosecuting'.<sup>111</sup> Contrastingly, in *Roselyne Miano v Edward Ngige*, the question for determination was whether an individual had *locus standi* to file an appeal against the decision of a subordinate court in a private prosecution. The CPC at Section 348A only allows the DPP to appeal against an acquittal, orders for a removal and dismissal.<sup>112</sup> This means that disgruntled private prosecutors do not have the right to appeal. The court, nonetheless, held that the provisions in Section 348A should not be narrowly-interpreted because in essence the private prosecutor conducts proceedings on behalf of the DPP.<sup>113</sup>

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<sup>111</sup> *Albert Gacheru v James Maina*, para.46.

<sup>112</sup> Section 348 A (1), *Criminal Procedure Code* [Cap 75]. The provision reads: '(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law'.

<sup>113</sup> *Roselyne Miano v Edward Ngige*, para. 20.

## **CHAPTER FOUR: THE CONFLICT BETWEEN THE JUDICIARY AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

This chapter seeks to evaluate the duties of the Judiciary and the DPP which have given rise to a conflict that has stymied the success of the private prosecutorial system in Kenya. Specifically, it highlights and evaluates where there is an overlap and possible ways to resolve it.

### **4.1 The prosecutorial powers of the Director of Public Prosecutions**

The Constitution in Article 157 establishes the Office of the Director of Public Prosecutions. The DPP has state prosecutorial powers over any criminal case to institute, take over and continue, and discontinue before a judgment is rendered in any court (other than the court martial).<sup>114</sup> Interestingly, these functions are highly discretionary because the DPP neither requires the consent of any authority to commence a criminal case nor is he subject to control by any person or authority.<sup>115</sup> In an attempt to limit what could be a dangerous excess of power, the DPP must exercise their functions with regard to public interest, administration of justice and the need to prevent abuse of legal process.<sup>116</sup> Another restraint is the requisite court's permission to discontinue a proceeding before judgement is rendered.

The above is a general picture of the current prosecutorial powers of the DPP which is secured by constitutional guarantees and independence. An evaluation of these powers in the former constitution provides more background.

#### **4.1.1 The Unfettered Discretion of the Attorney General's prosecutorial powers**

The Office of the DPP was previously a department under the State Law Office, discharging responsibilities in the criminal jurisdiction for the Republic of Kenya on behalf of the Attorney

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<sup>114</sup> Article 157(6), *Constitution of Kenya* (2010).

<sup>115</sup> Article 157(10), *Constitution of Kenya* (2010).

<sup>116</sup> Article 157(11), *Constitution of Kenya* (2010).

General (AG).<sup>117</sup> Kivuva describes the AG as a ‘presidential surrogate’ owing to the large number of selective and politically-motivated prosecutions, not to mention acquittals.<sup>118</sup> In addition, the AG though an ex-officio member was considered to be tethered to the Executive.<sup>119</sup> The wording of Article 26 of the former constitution contributed to this creation of a demigod in stating: the AG shall have power in any case in which he *considers it desirable* so to do.<sup>120</sup> Similar to the DPP, the AG could take over, continue and discontinue any criminal proceedings at any stage before judgment.<sup>121</sup> This, according to *Ezekiel Muchesi v R* epitomised the magnitude of the vested discretionary powers.<sup>122</sup> Section 26 had no inkling of limitation to the AG’s powers. It can be deduced, therefore, that the courts were disempowered from intervening with the AG’s functions even in the event of abuse of power. Perhaps such frustration led to the dictum in *Republic v Islam Omar* where it was held that the role of a trial court was not and could not be reduced to merely endorsing the decision of the AG.<sup>123</sup>

#### **4.1.2 The reformed role of the Director of Public Prosecutions: An appreciation of Article 157(8) of the 2010 Constitution**

As aforementioned, the DPP’s powers are bolted down by a constitutional foundation and independence. In as much as discretion is a positive value for the dispensation of justice, limiting it is a bonus. Article 157(8) breathes a new life into the private prosecutorial framework in Kenya by providing for the discontinuance of a criminal proceeding only after the court has granted such a request. This has now empowered the court to ensure transparency of the DPP’s office. The court therefore has the power to review the DPP’s decisions:

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<sup>117</sup> Office of the Director of Public Prosecutions, *Strategic Plan 2016- 2021*, February 2017, 1.

<sup>118</sup> Kivuva J, ‘Restructuring the Kenyan State’ The Society for International Development, Constitutional Working Paper Series Number 1, 2011, 13.

<sup>119</sup> Wanyoike writes: “Although the Constitution seemed to accord the AG significant powers, the AG however, was not immune to the centralisation of the government around the presidency that incrementally took place from 1963 to the late 1990s. In fact, while the independence Constitution had provided for security of tenure for the AG, the 1986 and 1988 Constitutional amendments deleted that security of tenure”. Read Wanyoike W, ‘The Director of Public Prosecutions and the constitution: Inspiration, challenges and opportunities’ in Ghai Y and Ghai J (eds), *The legal profession and the new constitutional order in Kenya*, Strathmore University Press, Nairobi, 2016, 169.

<sup>120</sup> Section 26 (3), *Constitution of Kenya* (1963). Emphasis own

<sup>121</sup> There were additional provisions that heralded an emphasis of this discretion. Notably, the duty to discontinue a case was not subject to the control of anyone. See generally, Section 26, *Constitution of Kenya* (1963).

<sup>122</sup> *Ezekiel Muchesi v Republic* [2006] eKLR.

<sup>123</sup> *Republic v Islam Omar & 2 others* [2007] eKLR.

*‘There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence’.*<sup>124</sup>

#### **4.1.3 The effect of *nolle prosequi* on private prosecutions**

*Nolle prosequi* refers to the discontinuance of a criminal case at any stage before a verdict is rendered. This function is unique to the DPP who, when exercising this duty, must inform the court verbally or in writing.<sup>125</sup> Even so, the DPP may frustrate the efforts of the private prosecutor where he misuses this power. The fundamental change wrought by the Constitution is to limit the powers of the DPP with regard to taking over and terminating prosecutions instituted privately.<sup>126</sup> This limitation not only affects the DPP but the private prosecutor so that order is maintained in the courts. Restraint is a necessary evil so as to subvert an invitation to chaos in the criminal justice system:

*‘To argue that a Magistrate’s Court must accept every case that is presented before it as a private prosecution, whether or not there has been investigation of the alleged offence, and whether or not the institutions charged with the investigation and prosecution of offences have exercised their mandate with regard to the alleged offences that the private prosecutor intends to prosecute, is to invite chaos in the criminal justice system’.*<sup>127</sup>

#### **4.2 The general duties of the judiciary in prosecutions**

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<sup>124</sup> *Peter Ngungiri Maina v Director of Public Prosecutions & 2 others* [2017] eKLR, para 14.

Judge Ngugi went ahead to elaborate on this power stating that, “It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. 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; where the decision-maker fetters the discretion given; where the decision-maker fails to exercise discretion; where the decision-maker is irrational and unreasonable”. See, *Peter Maina v DPP* [2017] eKLR, para 13.

<sup>125</sup> Section 82(1), *Criminal Procedure Code* (Cap 75).

<sup>126</sup> *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others* [2013] eKLR, para. 17.

<sup>127</sup> *Isaac Aluochier v Stephen Musyoka* [2013] eKLR, para. 18.

Generally courts play an adjudicative role as asserted in *Meixner*: ‘the criminal trial process is regulated by statutes, particularly, the CPC and the Evidence Act. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge’.<sup>128</sup> Alarming, a frequent concern is whether the right to fair trial of the accused will be jeopardised. This is because a *nolle prosequi*, when entered in bad faith, forestalls the criminal proceedings leading to unnecessary delays.<sup>129</sup>

#### 4.2.1 The courts’ authority in private prosecutions

The courts have therefore attempted to read into the provisions with regard to private prosecutions in a bid to curve out their duties. As discussed in Chapter 3, the courts abide by the ‘Elementary Guiding Principles’ without flinching. In addition to these, general principles of criminal law inform the court. In *Ganijee* it was held that: ‘where a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal processes’.<sup>130</sup> In South Africa the courts do not award costs to any of the parties where a *nolle prosequi* has been successfully entered, with the rationale presented below:

*‘Ordinarily the dismissal of a claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the state and in which costs orders are not competent; and the cause of action is that the state allegedly breached an accused’s constitutional right to a fair trial.’*<sup>131</sup>

This situation is similar in Kenya where costs are seldom awarded in criminal proceedings.

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<sup>128</sup> *Meixner & another v Attorney General* [2005] eKLR.

<sup>129</sup> According to Judge Kariuki, “There is no question that the hearing of the criminal case will take a little longer. But the more germane and substantial point is whether the prosecution was abusing the process of the court to obviate having to make submissions in a case which it had been compelled to close prematurely and now faced the prospect or the likelihood of seeing the accused being acquitted. I think the hearing of a criminal case where the prosecution unfairly uses its power under the law to oppress or undermine the rights of the accused cannot be said to be a fair hearing even if it be conducted within a reasonable time”. See, *Moses Miheso Lipeya v Republic* [2007] eKLR.

<sup>130</sup> *Republic v Chief Magistrate’s Court Mombasa ex-parte Ganijee & another* [2002] 2 KLR 703.

<sup>131</sup> *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18, para 44.

### 4.3 The conflict: Power to authorise the instituting of private prosecutions versus power to authorise the conducting of private prosecutions

#### 4.3.1 Lessons from the Crown Prosecutorial Service

The Crown Prosecutorial Service provides a possible solution to the conflict. To begin, when notified of a potential private prosecution, the CPS and the private prosecutor work together to ensure the formal requirements have been met (charges).<sup>132</sup> This interaction is extended to the defendant, albeit in a separate forum, who the CPS requests to tender documents supplied by the private prosecutor.<sup>133</sup> Furthermore, where the police have been active in the investigation and charging of the complainant, the CPS makes a request for relevant material (evidence).<sup>134</sup> The CPS has guidelines on when to allow a private prosecution thus doing away with the burden of understanding the difference between instituting and conducting a prosecution. These include when there is sufficient evidence and public interest as well as the fact that there is no reason for the CPS to prosecute.<sup>135</sup> Pointedly, even where the AG enters a *nolle prosequi* or the CPS decides not to prosecute, they *must provide reasons* to the affected parties.<sup>136</sup>

Following the success of these interactions between the CPS, police and private prosecutors, the CPS has managed to keep a non-exhaustive record of the situations where it must take over and continue a private prosecution.<sup>137</sup> Drafting clearer policies as opposed to heavy reliance on the court's interpretation may help streamline the private prosecutorial framework in Kenya. This is further discussed in Chapter 5.

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<sup>132</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05) on 4 December 2017.

<sup>133</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05) on 4 December 2017.

<sup>134</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05) on 4 December 2017.

<sup>135</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05) on 4 December 2017.

<sup>136</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05) on 4 December 2017.

<sup>137</sup> To sample some of the incidences: '*Where the offence is serious; where there are detailed disclosure issues to resolve; where the prosecution requires the disclosure of highly sensitive material; or, the conduct of the prosecution involves applications for special measures or for witness anonymity and where the prosecution is being used as a device to enable the prosecutor to pursue a personal agenda against the defendant arising from a form of relationship between them*'. [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#an05](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an05) on 4 December 2017.

## CHAPTER FIVE: THE WAY FORWARD

This chapter seeks to provide solutions to the problem of stringent measures governing private prosecutions in Kenya. Two main proposals are given: enacting of the Kenyan Private Prosecution Bill and the drafting of clearer policies on private prosecutions which are borrowed from the Crown Prosecution Service.

### 5.1 Streamlining the “Elementary Guiding Principles” with the Principles of Procedural Fairness: Enacting the Private Prosecutions Bill (2007)

The earlier chapters have demonstrated that there is need to have the substantive and procedural rules speak one voice. A legislative remedy can suffice. The Private Prosecution Bill of 2007 (Bill) offers much insight towards the desired streamlining. First, substantively, the Bill provides that a person has the right to a private prosecution for offences under any written law unless the law reserves such right to the State.<sup>138</sup> When it comes to procedure, the Bill outlines two conditions for the granting of leave to bring a private prosecution in court namely: there is a *prima facie* case and the AG has declared their agreement. (Note that the Bill was drafted in 2007 as such, should this Bill be enacted, the DPP will take up any role mentioned to be under the AG).

The AG’s agreement will not be difficult to obtain because the Bill expressly requires a person to serve the AG with a ‘Notice of Intention to Prosecute’ which should be accepted or rejected (with reasons) within thirty days.<sup>139</sup> Should the AG fail to act upon the notice in thirty days, the person can petition the court directly through a ‘Notice of Motion’.<sup>140</sup> This set of rules is less complex than the common law dicta that the courts have opted to cling to. They also favour the instituting and conducting of a private prosecution. Furthermore, the Bill provides for strict timelines, possible reimbursing of the private prosecutor’s expenses and the right to appeal.<sup>141</sup>

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<sup>138</sup> Section 1, *Private Prosecution Bill* (2007).

<sup>139</sup> Section 4(1), *Private Prosecution Bill* (2007).

<sup>140</sup> Section 4(6), *Private Prosecution Bill* (2007).

<sup>141</sup> Section 9(7), *Private Prosecution Bill* (2007).

These are critical reforms that are not available in the current framework. Therefore, the passing of this Bill will actually result in harmony between the substantial and procedural concerns in private prosecutions.

## **5.2 Establishing a Private Prosecutorial Office: Lessons from the Crown Prosecution Service in the United Kingdom**

Another possible route is the creation of an office charged with the administration of all private prosecution in Kenya under the office of the DPP. Its mandate could mirror that of the CPS which is elaborated in its Code for Crown Prosecutors (Code). The Code sets out both procedural and substantive measures that are pertinent to the guiding of private prosecutions. From the onset, the Code recognises that the decision to prosecute is a serious step that affects suspects, victims, witnesses and the public at large.<sup>142</sup> Secondly, it lays out the conditions for granting the institution of a private prosecution. These are two-fold: the evidentiary test and the public interest test. Collectively the two are referred to as the Full Code Test. The evidentiary test is rudimentary in the sense that there should be a complete investigation and the evidence gathered should be admissible, reliable (speaks to its accuracy and integrity) and credible.<sup>143</sup> The public interest test is laudable because it takes into consideration aspects such as: the culpability of the suspect, the vulnerability of the victim, prosecution as a proportionate response and the impact of the offence on the community.<sup>144</sup> Thirdly, the Code takes into account out-of-court disposals in the event that a prosecution is not the best means to justice. Lastly, there are rules for the reconsideration of decisions to prosecute which are essential especially in the restarting of a prosecution where there was insufficient evidence.

It should be noted that the Code is quite general and its provisions apply to all prosecutors whether public or private. This is a positive lesson for Kenya whose current framework tends to polarise the two. Further, as concluded in Chapter 4, this framework needs clearer and more robust policies. This is because for a long time, the courts have relied on a narrowly-construed

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<sup>142</sup> Para. 2.1, *Code for Crown Prosecutors*, <https://www.cps.gov.uk/publication/general-principles> on 29 January 2018.

<sup>143</sup> Para. 4.6, *Code for Crown Prosecutors*, <https://www.cps.gov.uk/publication/full-code-test> on 29 January 2018.

<sup>144</sup> Para.4.12, *Code for Crown Prosecutors*, <https://www.cps.gov.uk/publication/full-code-test> on 29 January 2018.

understanding of private prosecutions which has been heightened by strict adherence to the principle of *stare decisis*. The Code therefore provides a number of considerations that will aid in the drafting of private prosecutorial policies which will lead to institutional values and processes for the suggested office. For instance, the Code takes cognisance of the impact of crime to the community, specifically the suspect and victim, which is rarely a concern of the criminal justice system.

However, the CPS' glitter is also delusive because it has been criticised for being too centralised and excessively bureaucratic.<sup>145</sup> In addition, because it employs unqualified lawyers to undertake advocacy work in "non-imprisonable" offences, the standard of prosecutors has been under scrutiny.<sup>146</sup> Kenya should therefore opt for a system that has safeguards against commonplace institutional ills such as mismanagement of resources that eventually plays a factor in enabling impunity and incompetence.

### 5.3 Conclusion

Private prosecutions in Kenya are heavily undermined by the rigid rules occasioned by the strict adherence to common law principles. The dissertation set out to prove that this issue can be resolved by having recourse to legislative measures such as the enacting of the Private Prosecution Bill and policy considerations which are similar to the Code for Crown Prosecutors in the United Kingdom in so far as institutional values and procedures are concerned for the setting up of a private prosecutorial office under the supervision of the DPP. The enactment should take place first because it is quite comprehensive as is. The drafting of policy can be a progressive task following the court's responsiveness to the new piece of legislation.

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<sup>145</sup> Elliott C and Quinn F, *English legal system*, 10ed, Pearson Education Limited, Harlow, 2009, 411.

<sup>146</sup> Elliott C and Quinn F, *English legal system*, 412.

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