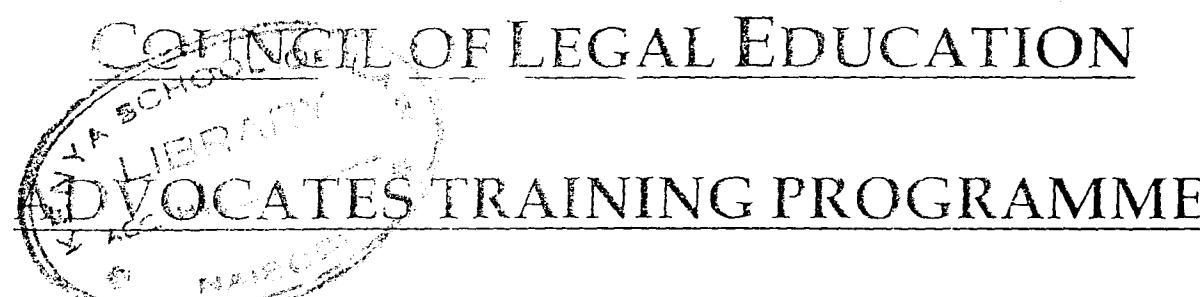


Dunn Cole

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SCHOOL OF LAW

FIRM 9A

CRIMINAL PROCEDURE

LECTURER: MR. KOIKO KILUKUMI

PRIVATE PROSECUTION  
IN KENYA

MONDAY 14<sup>TH</sup> SEPTEMBER 2009

would be required to reduce the complaint into a written charge and proceed with the case.

In *R through Richard Kimani and Another vs Nathan Kahara*<sup>7</sup>, it was stated that the right of a private individual to commence private prosecution is held to be a constitutional safeguard against capricious, corrupt or biased failure or refusal of prosecuting authorities to prosecute offenders. One therefore needs to show that the prosecuting authorities have either refused or neglected to prosecute the suspect, that the complaint discloses an offence known to law and that the intending prosecutor has locus standi to prosecute. The court in the case also held that a private prosecutor must prove locus standi; apply for permission in the presence of the intended accused and show that he reported to the police and they have declined to prosecute.

When emphasizing that the right to private prosecution is a constitutional safeguard, the court noted that the safeguard is to counteract attempts by wealthy and influential people to stifle prosecution when offences they allegedly committed are reported to police.

### A PRIVATE PROSECUTOR

There is no definition as to who is a private prosecutor both in the Constitution and in the Criminal Procedure Code.

Momanyi Bwonwong'a in his book criminal procedures in Kenya defines a private prosecutor as a prosecutor other than a public prosecutor<sup>8</sup>.

Section 88(1) of the CPC provides an idea of who a private prosecutor is; it authorizes the magistrates' courts to permit any private person to conduct a prosecution. Further, sections of the code provide features of a private prosecution.

Sections 85 and 88(1) do indicate that a private prosecutor is one who is not subject to the express instructions of the Attorney- General, can only prosecute with the permission of the magistrates' court, that in the event of a failed prosecution he may be condemned to pay costs to the accused person, and the AG may take over the prosecution from him.

These are the main features of a private prosecution and, by operation of law, he is also a state prosecutor. In *Riddlesbarger v Robson*<sup>9</sup> the court, in interpreting section 88(1) of

<sup>7</sup> (1985) KLR 79

<sup>8</sup> Page

the code observed that the crown is the prosecutor in law and normally acts through the public prosecutor but a special provision is made in section 88(1) to enable the crown to act through a complainant in cases in which a public prosecutor does not wish to act. In such a case, the permission of the magistrate is required before the complainant can conduct a prosecution.

This implies that both the private prosecutor and the public prosecutor are prosecuting agents of the Republic and are therefore state prosecutors.

#### A SUMMARY OF THE PROCEDURE FOR INSTITUTING A PRIVATE PROSECUTION

An application must first be made under Section 88 (1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution.

It is after permission has been granted for the private prosecution to be conducted that Section 89 and Section 90 of the Criminal Procedure Code can be brought into effect and the criminal proceedings instituted.

The case of *Floriculture international limited and others*<sup>10</sup>, sets out principles to be applied by subordinate courts and conditions, which every individual applying for permission to privately prosecute must satisfy before permission is granted as a safeguard not to open it for possible abuse.

Kuloba, J. held at page 38 to 39: - "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;

1. That a report of the alleged offence was made to the Attorney General or the Police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and

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<sup>9</sup>(1959) E.A 841 C.A

<sup>10</sup>High Court Miscellaneous Application Number 114 of 1997

2. That the Attorney General 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; and either the decision or reticence must be clearly demonstrated; and
3. 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; and
4. 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; and
5. The basis for the *locus standi*, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and
6. That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or Police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counteract the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice."
7. The proceedings are then instituted either by:-
  - (i) Making a complaint under Section 89(1) of the Criminal Procedure Code; or
  - (ii) Bringing before a magistrate a person who has been arrested without warrant under Section 89(1) of Criminal Procedure Code; or
  - (iii) Presenting a formal charge under Section 89(5) of the Criminal Procedure Code.

#### **WHEN IS A CASE DEEMED TO HAVE COMMENCED?**

Section 88(1) talks of permission being granted in a matter already pending before court that is why it says "a magistrate trying a case" and that permission is granted to institute

and not to commence prosecution. Here, we will deal with the difference between commencing a suit and instituting a suit.

In the High Court case of *Otiemo Clifford v Republic*<sup>11</sup> the judges held that “we think private prosecution is a special kind of proceedings where an aggrieved party approaches the court by way of an application seeking first and foremost permission to:-

- Privately prosecute a case; and
- Institute criminal proceedings

The proceedings are deemed to have commenced once an Applicant lodges his application for permission under Section 88(1) of the **Criminal Procedure Code** before a subordinate court. However, at that stage the “trial of the accused person” cannot be regarded as having begun because:-

- (1.) Permission to prosecute privately had not been granted and therefore the jurisdiction of both the court to try the case and of the private prosecutor to prosecute had not been invoked; and
- (2.) There was no formal charge duly signed by the Magistrate even if a charge may have been filed contemporaneously with the application for permission; and
- (3.) The subject/accused person was not before the court.”

Therefore, the application seeking permission to institute a private prosecution is done ex parte, then private prosecution commences with both parties present in an inter partes application. The said application is done through a Notice of Motion and an affidavit setting out the grounds that the private prosecutor seeks to rely on.

## INSTITUTING A PRIVATE PROSECUTION

The right of an individual to prosecute those who have infringed the provisions of the criminal law is a Constitutional right and there are enabling provisions in the Criminal Procedure Code, however, the conditions mentioned above must be fulfilled by a private prosecutor before the magistrate grants permission. Such conditions were also stated by the High Court of Kenya in the case of *Richard Kimani and M Maina vs Nathan Kahara*<sup>12</sup> thus:

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<sup>11</sup> Miscellaneous Civil Suit 720 of 2005

<sup>12</sup> High Court criminal (revision) case number 11 of 1983

"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 Attorney -General or to a police and with what result. The magistrate should also ask himself how is the complainant involved? What is his locus standi? Has he personally suffered injury or damage or is he motivated by malice, or political consideration?"

Thus, in granting permission for a private prosecution, the discretion of the magistrate must be exercised judicially, sparingly and only on extremely good grounds. This is to avoid misuse of the right to private prosecution for personal vendetta and vengeful intentions. The court further emphasized the importance of private prosecution by stating: "....the right of Private Prosecution is essential to counteract attempts by the wealthy and influential people to stifle prosecution when offences by them are alleged in reports to the police."<sup>13</sup>

## CONDITIONS TO BE MET BY A PRIVATE PROSECUTOR BEFORE INSTITUTING A PRIVATE PROSECUTION

The following three are the main conditions that have to be met.

1. That the prosecuting authorities have either refused or neglected to prosecute the suspect. The prosecuting authorities include among others, the police, office of the AG, factories inspectorate, labour inspectorate etc
2. that the intending prosecutor has the *locus standi* (the legal right to prosecute)
3. That the complaint discloses an offence known to the law.

### 1. Refusal or decline to prosecute by prosecuting authorities

#### a) By police

Although the majority of the prosecutions are conducted by the police, they cannot prosecute all the alleged crimes reported to them; some alleged crimes turn out to be minor offences for example assault, trespass and especially those offences that involve family members) which they may decline to prosecute in the public interest.

The police can also refuse to prosecute a case because it is of a civil character. For example in the case of *Tobias Onyango v William Okal Okuonga*,<sup>14</sup> the police declined

<sup>13</sup> ibid

to prosecute the respondent on charges of trespass to land, malicious damage and forcible detainer apparently on the ground that the complaints were of a civil character and hence should be dealt with in a civil court. On prosecution the accused was acquitted on all the three charges.

b) By the AG

There are certain offences that the office of the AG may decline to prosecute for such reasons as lack of sufficient evidence to warrant a prosecution and public interest.

In some instances, the office may take the view that the complainant is not reliable such that a prosecution cannot be proceeded with. In *Riddlesbarger v Robson*<sup>15</sup> the AG refused to prosecute the accused on a charge of obtaining execution of a document by false pretence. The complainant sought and was given permission to prosecute, a prosecution which ended in an acquittal.

However, there are also cases where the AG has declined to prosecute as a result of which the complainant institutes a private prosecution and manages to secure a conviction

## 2. The need for locus standi

It is a general requirement that an intending private prosecutor has to show that he has suffered a wrong or an injury entitling him to prosecute. This injury or wrong suffered by an individual is the reason that drives him to file a private prosecution and is what is referred to as *locus standi*.

The issue of locus standi was considered in *Richard Kimani and another v Nathan Kahara* in which the two complainants were councilors of Nairobi City Council and the accused was the Mayor. The complainants filed 39 charges in the magistrates' court against the accused. They applied to a senior resident magistrate under section 88(1) of the Criminal Procedure Code for permission who granted them permission in the absence of the accused. Subsequently, the accused appeared before the Chief Magistrate and

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<sup>14</sup> Criminal Appeal No. 316 of 1989 High Court, Kisumu , unreported

<sup>15</sup> (1959) E.A 841 C.A

pledged not guilty to all the charges after which his advocate successfully sought an adjournment to raise a lengthy preliminary objection.

The Chief Magistrate dismissed all the charges and discharged the accused on the grounds that the Attorney General had not given consent to the said private prosecution.

The complainants applied for revision of the discharging order in the High Court. The court agreed to revise the order and held that the permission granted to the complainants to prosecute in the absence of the accused by the senior resident magistrate was null and void; permission should have been applied for in the presence of the accused for the purpose of pleading to the charges.

The court further held that in deciding whether to grant or refuse permission to prosecute a magistrate has to consider whether the crime was reported to the police or the Office of the Attorney General and with what result and whether the complainant has suffered personal injury or damage or is being motivated by malice or political considerations (i.e. *locus standi*)

Finally the court ruled that the Chief Magistrate was wrong in dismissing the charges and discharging the accused on the ground that the Attorney General has ultimate and undisputed control over all criminal prosecutions and rejected the argument that the consent of the Attorney General is required to file a private prosecution. Thus the court proceeded to set-aside the order dismissing the charges and discharging the accused.

In its ruling on the above case, the High Court observed that the right of private prosecution is a constitutional safeguard to counteract attempts by wealthy and influential people to stifle prosecutions when the offences they allegedly commit are reported to the police.

Also before the Attorney General can control a private prosecution he must take it over after which he may either continue or discontinue it. The court noted that to allow a private prosecutor to prosecute on behalf of the public is to usurp the powers of the Attorney General.

The requirement of *locus standi* is a further limitation on a private individual who wants to set in motion the machinery of the criminal law. Whereas a private prosecutor is entitled to apply to the magistrate for permission to mount private prosecution in cases where the public prosecutor has declined to prosecute under section 88(1) of the Criminal

Procedure Code empowers the magistrate to permit the prosecution to be conducted by any person, and not necessarily the aggrieved person, while section 34 authorizes a private person to arrest a person who has, in his view committed a cognizable offence.

In view of the statutory powers of arrest conferred on a private person and the fact that a prosecution can be conducted by any person, the requirement of *locus standi* in the administration of the criminal law has to be balanced against the legal duty imposed on every individual to maintain law and order which is of necessity includes prosecuting suspects by private individuals.

### 3. Disclosure of offence

Before an intending private prosecutor is granted permission to prosecute he must show that his complaint, oral or written, discloses an offence known to the law. Section 89(3) of the CPC enables the complainant to lodge either a written or oral complaint to the magistrate.

In practice, a private prosecutor files a sworn affidavit in court accompanied by the proposed charges upon which the magistrate issues summons requiring the attendance in court of the potential accused person on a given date. If the complaint is made orally, the magistrate is empowered, by the provision to reduce it into writing. This essentially means that the complaint ought to disclose an offence known to law for it to be reduced into writing.

In *Jopely Constantine Oyieng v R*<sup>16</sup> the appellant lost his job in the civil service and he formed an opinion that his colleagues had schemed against him and that subsequently a crime had been committed. As a result, the appellant filed a private prosecution in the magistrate's court and accordingly sought permission from the magistrate to prosecute.

The magistrate refused him permission on the grounds that the complaint did not disclose an offence known and consequently, exercising his power under section 89(5) of the CPC, made an order refusing to admit the complaint. The appellant challenged this position in the High Court and Court of Appeal as a constitutional issue but was unsuccessful.

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<sup>16</sup> Criminal Appeal No.45 of 1988. Court of Appeal, Nairobi, unreported.

## VALIDITY OF A PRIVATE PROSECUTION COMMENCED AND/OR ACCOMPLISHED WITHOUT PRIOR PERMISSION OF THE MAGISTRATE

From the foregoing, it is clear that there are certain conditions which the magistrate must consider when granting or refusing permission for private prosecution. One would assume that without the magistrate's permission any prosecution or purported prosecution by a private individual is a nullity. However, the question has arisen as to the validity of a private prosecution commenced and/or accomplished without prior permission of the magistrate.

This issue was raised in the case of *the Republic through Devji Kanji v Davendra Valji Halai*<sup>17</sup> in that case, the appellant brought a private prosecution in the Senior Resident Magistrates's Court, Nairobi against the respondent. Both parties were represented by counsel, and at the close of the prosecution case, counsel for the respondent took the objection that the private prosecutor had not obtained permission from the court to prosecute the case as required by section 88(1) of the Criminal Procedure Code.

The Senior Resident Magistrate upheld the objection, and held the proceedings to be a nullity. He was upheld by the High Court( Sachdeva J) exercising reversionary jurisdiction which had been invoked. The appellant appealed against the High Court decision and it was held that where all persons concerned are aware of that private prosecution and the parties are represented by counsel, if no objection is raised to the absence of the formal permission from the magistrate to the institution of such proceedings in accordance with section 88 of the Criminal Procedure Code until after the close of the prosecution case, such permission may be properly inferred from the fact that the trial has been allowed to proceed so far.

The court in the same case substantially lifted the limitation of a private prosecutor in appeal cases by stating that a private prosecutor as a party to proceedings in revision in the High court is entitled in accordance with section 361(1) and (7) of the Criminal Procedure Code to appeal from that decision to the Court of Appeal, subject to the residuary control exercised by the Attorney- General over all criminal proceedings. The Court further observed:

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<sup>17</sup> [1978] KLR 178

"Further, by section 361(1) of the Criminal Procedure Code any party to an appeal from a subordinate court may appeal against the decision of the High Court in its appellate jurisdiction to this court". A private prosecutor is such a party.

Section 361(7) equates an order of the High Court made in its revisional jurisdiction with a decision made in its appellate jurisdiction. We are accordingly satisfied that a private prosecutor as a party to the proceedings in the High Court has a right to appeal to this court subject to the residuary control by the Attorney General over every criminal case under the provisions of section 82 of the Criminal Procedure Code.

#### **FILING OF THE COMPLAINT OR CHARGES.**

##### **a) In the Name of the Republic**

In a criminal case there are only two parties, the Republic (who is always the prosecutor or complainant) and the accused person (who is always the defendant or accused).

When a private person is filling a prosecution in court it is the Republic that is acting at the instance of the private individual. In law it is improper for the private prosecutor to institute the proceedings in his name, as he is not a party to the proceedings. In this respect the court of Appeal for Eastern Africa, in *Riddlesbarger v. Robson*,<sup>18</sup> supra, observed that the filing of a private prosecution in the name of the private complainant without indicating that he is acting on behalf of the Republic has led to confusion because the parties fail to realize that even in such a prosecution the prosecutor is in law the Crown (now the Republic) at the instance of the private prosecutor. In this case the parties in the magistrate's court were cited as:

**RUFUS RIDDLESBARGER.....COMPLAINANT**

**VERSUS**

**BRIAN JOHN ROBSON.....ACCUSED**

This citation was held to be wrong and should have been as follows:

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<sup>18</sup> (1959) EA 841. CA

REGINA THRO' RUFUS RIDDLESBARGER.....PROSECUTOR

VERSUS

BRIAN JOHN ROBSON.....ACCUSED<sup>19</sup>

A proper citation of the parties in a private prosecution of the appellate level in post – independence Kenya is in the case of *Republic thro' Devji Kanji v. Davendra Valji Halai*,<sup>20</sup> which was properly filed as such in accordance with the law. It will be noted that the legal procedural requirements are important not only in showing who the parties are in law but also in avoiding giving room for legal objections in matters of form.

b) Presence of the Accused Person.

In *Richard Kimani and another v. Nathan Kahara*,<sup>21</sup> supra, it was held that the application for permission to prosecute must be made in the presence of the accused person and earlier decided cases did not hold that the accused had to be present.

In *Kyagonga v. Uganda*<sup>22</sup>, the private prosecutor did not formerly apply for permission to prosecute but he was nevertheless allowed to lead evidence in support of the charge and it was held that permission to prosecute had been impliedly given.

In *Nunes v. R.*<sup>23</sup>, the private complainant was allowed to give evidence without obtaining express permission to prosecute though it was held that permission to prosecute had been impliedly given.

In *Republic thro' Kanji v. Davendra H. Halai*, supra, the court of Appeal for Kenya quoted with approval the decision in the case of *Nunes*, a decision which was also referred to in the case of *M.K. Shah v. Ambalal C. Patel*.<sup>24</sup> without disapproval, and proceeded to hold that the two decisions correctly interpreted the law in holding that a

<sup>19</sup> The term Regina stands for the Queen and Rex stands for the King. Kenya, then a British colony, was obliged in law to use either Rex or Regina depending on whether it was the Queen or King who was ruling monarch in Britain.

<sup>20</sup> (1978) KLR 178

<sup>21</sup> Criminal Revision No. 11 of 1986, Nairobi (unreported)

<sup>22</sup> (1973) EA 486 (HCU).

<sup>23</sup> (1935) 16 KLR 126 (SCK).

<sup>24</sup> (1954) 21 EACA 236.

private prosecutor who has been allowed to lead evidence without express permission from the magistrate is deemed to have been granted permission to do so. The court of appeal observed that this rule (in the case of Nunes) had been in operation for over forty (40) years and its authority had not been challenged.

Therefore, it seems that the requirement in Nathan Kahara's case that permission should be sought in the presence of the accused person was given *per incuriam* (in forgetfulness) of the rule in Nunes' case. Moreover, it cannot stand with the decision in Halai's case because the decision in this latter case is that of the Court of Appeal which is binding on the High Court in Nathan Kahara's case.

In England, the presence of the suspect is not required before permission to prosecute is granted and all that is required from an intending private prosecutor is to lay a charge in a magistrate's court which may subsequently issue a summons against the suspect to attend court for hearing.<sup>25</sup> The English practice seems to be in line with the decision in the case of Halai.

### c) Vexatious Persons

Individual persons who have been declared to be vexatious litigants by the High Court on the application of the Attorney General are disabled from filing private prosecutions without the written consent of the Attorney General.<sup>26</sup> A vexatious litigant is defined in section 2 of the Vexatious proceedings Act as one who has been declared as such by the High Court on grounds that he had habitually and persistently and without any reasonable grounds instituted vexatious proceedings.

## CONTROL OF PRIVATE PROSECUTIONS

Like public prosecutions, control over private prosecutions is exercised by both the office of the Attorney General and the court. Control by the Attorney General is provided for in the Criminal Procedure Code and the Constitution.

<sup>25</sup> R.M. Jackson, *op. cit.* p.214

<sup>26</sup> Section 4, The Vexatious Proceedings Act, Cap. 41, Laws of Kenya

### a) Control by the Attorney – General

Section 26(3) (b) of the Constitution empowers the Attorney General, being the chief public prosecutor, to take over any criminal prosecutions initiated by any person or authority excluding court martial. This constitutional provision is the Republic acting through the private prosecutor and hence the Attorney-General is enabled to take over such prosecution in his capacity as the officer in charge of state prosecutions.

Besides the Constitution's provisions there are further enabling provisions in section 82 of the Criminal Procedure Code which give the Attorney General residuary control over every criminal case at whatever stage, but before judgment is pronounced.<sup>27</sup>

As it was pointed out earlier the Attorney General has on occasions taken over private prosecutions.<sup>28</sup> In *Republic thro' Herman Asava and another v. Peter F. Kibisu*,<sup>29</sup> the Provincial State Counsel took over the private prosecution and thereafter discontinued it by withdrawing the proceedings.

Before the Attorney -General takes over a private prosecution he has to apply to the court to do so. This was held to the position in the case of *Nathan Kahara*, supra. If the Attorney -General's application is refused he may apply for revision of the order in the High Court as the Republic, on whose behalf the Attorney General acts, has no right of appeal against such refusal. If the High Court confirms the refusal, then the Attorney General may appeal to the Court of Appeal under Section 361(7) of the Criminal Procedure Code; the revisional proceedings of the High Court are deemed to be its appellate proceedings.<sup>30</sup> After taking over the private prosecution it becomes a public prosecution<sup>31</sup> after which the Attorney General may continue with it, often no further evidence or simply withdraw it from the court.

### b) Control by the courts

The court exercises control in three ways:

- i) A private complainant cannot institute proceedings without the permission of the magistrate

<sup>27</sup> M.K. Shah v. A.C. Patel (1954) 21 EACA 236

<sup>28</sup> J M Bwana Wonga "The Emergence of the Private Prosecutor As A Party," paper presented at the First Annual Law Society of Kenya Conference, 26<sup>th</sup>-28<sup>th</sup> Feb. 1986 at Nairobi

<sup>29</sup> Criminal Case No. 1090 of 1985, Senior Resident Magistrate's Court, Kakamega (unreported)

<sup>30</sup> (1978) KLR 178.

<sup>31</sup> Municipal Council of Dar-es-Salaam v. Almeida (1957) EA 244.

- ii) Second, the court is empowered, under section 171(1) of the Criminal Procedure Code to order a person convicted to pay reasonable costs to the public or private prosecutor in addition to the penalty imposed. Section 171(2) on the other hand provides that a private prosecutor will be ordered to pay a person who has been acquitted or discharged reasonable costs as the judge may deem fit
- iii) Third, before a withdrawal is effected leave of that court is necessary, which of necessity imposes on the private prosecutor under section 88 of the Criminal Procedure Code, a duty to state the reasons for withdrawing it.
- iv) With regard to costs, the Criminal Procedure Code has made provision for power of courts to order for costs for and against a private prosecutor according to the circumstances.

By judicial practice a private prosecutor is not compensated for any loss that he may have incurred or suffered in mounting a successful prosecution although section 171(1) of the Code empowers the courts to order a convicted person to pay not only to the private prosecutor but also to the public prosecutor reasonable costs

Section 171(1) of the Criminal Law Amendment states: "*A judge of the High Court or a magistrate of a subordinate court of the first or second class may order a person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as the judge or magistrate may deem fit, in addition to any other penalty imposed.*

*171(2) A judge of the High Court or a magistrate of a subordinate court of the first or second class who acquits or discharges a person accused of an offence may, if the prosecution for the offence was originally instituted on a summons or warrant issued by a court on the application of a private prosecutor, order the private prosecutor to pay to the accused such reasonable costs as the judge or magistrate may deem fit*

*Provided that-*

*i) the costs shall not exceed twenty thousand shillings in the High Court or ten thousand shillings in the case of an acquittal or discharge by a subordinate court; and*

ii) no such order shall be made if the judge or magistrate considers that the private prosecutor had reasonable grounds for making his complaint.

In England, a successful private prosecutor is compensated out of public funds.<sup>32</sup> This is intended to discourage private prosecutions. However, care should be taken not to award excessive costs because the common law principle is that costs should not normally be given to or against the Republic in criminal cases even if the statute so permits except in exceptional circumstances.<sup>33</sup> This is a sound rule which ensures that access to the courts is not made difficult.

### A CRITIQUE OF PRIVATE PROSECUTION IN KENYA

Modern political, economic and social developments have all contributed to the decline of private prosecutions and could be attributed to the following:

- Prosecution costs are prohibitive ( they include witnesses traveling and accommodations expenses and the legal fees for an advocate);
- The legal technicalities of framing charges that a private prosecutor has to contend with as well as piloting the prosecution to its logical conclusion.

There are many other legal problems that a private prosecutor is faced with including matters of court procedure and evidence especially the relevance and admissibility of evidence.<sup>34</sup>

Presently the law on the area of private prosecution is not clear and is spread out in the Constitution and various other statutes. Its availability is at the discretion of the Attorney General. Enactment of a clear law on the subject is deemed necessary.

Also, the Attorney General has got extensive powers to strangle or terminate a privately prosecuted matter as is evidenced in the intended case of *Otieno Clifford Richard v H.E. Mrs. Lucy Muthoni Kibaki*<sup>35</sup> before the Chief Magistrate's Court in where the A.G entered a *nolle prosequi* before it was prosecuted.

<sup>32</sup> RM Jackson, op cit., p.221

<sup>33</sup> Municipal Council of Dar-es-Salaam v. Almeida, *supra* and *Joh son v. R* (1904) AC.817.

<sup>34</sup> J.O. Ogada, "The Role of Kenya's Attorney-General in the Criminal Justice System", LLM Thesis. University of Wales, Cardiff, 1987, pp.218-225. Here more problems facing a private prosecutor are discussed.

<sup>35</sup> Misc. Application No. 5 of 2005

The complainant lodged an application in the High Court (*Otiemo Clifford V. Republic*<sup>36</sup>) to challenge the A.G's exercise of his constitutional privilege. He alleged that the *nolle prosequi* was entered prematurely since the Magistrate had not signed the Charge Sheet before leave could be granted to institute a private prosecution. Technically no proceedings had been commenced against which the Director of Public Prosecution could take over or terminate. The complainant was merely praying for the court to grant him permission to lodge the private prosecution and summons to compel the attendance of Her Excellency pursuant to his application filed on the 16<sup>th</sup> of May 2005. It is at this point that the then D.P.P, Mr. Murgor intervened and terminated the application.

The difficulties make private prosecution very difficult and a law should be enacted to uphold this constitutional right.

### CONCLUSION

Although private prosecutions are usually limited to minor offences like assault and trespass, the institution of private prosecution still remains an important constitutional safeguard against inertia or partiality on the part of prosecuting agencies and also in case where the public prosecutor has, by an error of honest judgment, refused to prosecute. Private prosecution is therefore essential and we therefore highly recommend the introduction of an independent law that governs it.

### REFERENCES

1. MOMANYI BWONWONG'A : PROCEDURES IN CRIMINAL LAW IN KENYA

However, if such an order is inconsistent with an order for transfer a case issued <sup>36</sup> Misc. Civil Suit 720 of 2005