

# Testing Alternatives: Private Prosecutions as a Useful Anti-Corruption Tool in Kenya

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## Abstract

Kenya's legal framework affords the Director of Public Prosecutions (DPP) vast powers to decide when to prosecute. As described sharply in the 2010 Constitution, the DPP is not subject to any person or authority, nor does he/she require the consent of any authority to commence a criminal case. Whereas corruption has grown exponentially in the past two decades, there are only a handful of convictions. Perhaps, this demonstrates the DPP's poor follow-through in prosecuting corruption-related offences, despite their more than adequate discretion in prosecutions. Analysing judicial decisions, the paper advocates private prosecutions as a useful check on the DPP's discretion not to prosecute graft cases. The paper is arranged along three arguments. First, corruption is rampant in Kenya and as corruption swells, the authority with the power to wrestle it through prosecution, which is the DPP – and the AG before it – has been slow to prosecute corruption cases historically. Secondly, the DPP enjoys near monopoly over the authority to prosecute to-date. Third, private prosecutions offer an avenue for the anti-corruption crusade by checking the DPP's power, which has practical and legal limitations.

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## 1. Introduction

Kenya's history has shown that there is a relationship between the fight against corruption and the exercise of prosecutorial authority. An unchecked exercise of prosecutorial power compromises instituting and conducting of prosecutions on corruption. Accordingly, there is need for an accountability mechanism, which ensures that State authorities charged with prosecutions perform their functions as required by the law. This paper argues that private prosecutions could serve as such accountability mechanism in three respects.

First, the 2010 Constitution and related legislations redesigned public prosecutors' exercise of prosecutorial authority by providing sufficient controls, which include *allowing persons other than the DPP to prosecute or challenge the DPP's decision to prosecute*. Second, jurisprudence from Kenyan courts has recognised private prosecutions and empowered the capacities of private prosecutors. Third, there is a clear indication from this jurisprudence that private prosecutions *per se* safeguard against public prosecutors' discretion not to prosecute cases unlawfully or unreasonably.

Kenya adopted the English design of prosecutorial powers at independence where the Executive (Crown) had vast discretion in investigative and judicial processes. Under the British model, an office of the Attorney General (AG) is created where the "AG appoints the departmental head responsible for public prosecution and although the prosecutor makes decisions on what cases to prosecute, sometimes the consent of the AG is required before prosecution."<sup>1</sup> Through Section 26 of Kenya's repealed Constitution, this model was adopted and conferred the AG prosecutorial power "in any case in which he considers it desirable to do so."<sup>2</sup>

This section had no inkling of limitation to the AG's powers and hence, it became wrought with excesses over time. For instance, Kivuva described the AG as a 'presidential surrogate' owing to the large number of selective and politically-motivated prosecutions, not to mention acquittals.<sup>3</sup> In spite of the AG's significant constitutional powers, Wanyoike points out that:<sup>4</sup>

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<sup>1</sup> Waikwa Wanyoike, 'The Director of Public Prosecutions and the Constitutions: Inspiration, Challenges and Opportunities' in Yash Ghai and Jill Ghai (eds), *The legal profession and the new constitutional order in Kenya*, (Strathmore University Press, Nairobi, 168).

<sup>2</sup> Sec 26 (3).

<sup>3</sup> Joshua Kivuva, 'Restructuring the Kenyan State' (2011), Society for International Development Constitutional Working Paper Number 1, 8 <<https://www.sidint.net/sites/www.sidint.net/files/docs/WP1.pdf>> accessed 2 August 2019.

<sup>4</sup> Ibid, Waikwa Wanyoike, 169.

The AG 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.

The 2010 Constitution transferred the power of public prosecutions from the AG to an independent Director of Public Prosecutions (DPP). Still, the DPP has wide discretion because he/she is not subject to any person or authority nor requires the consent of any authority to commence a criminal case.<sup>5</sup> However, to limit what has been a dangerous excess of power, Article 157 of the Constitution obliges the DPP to exercise their functions with regard to public interest, administration of justice and the need to prevent abuse of legal office.<sup>6</sup>

Despite these progressive steps to empower the DPP, Wachira Maina notes that Kenya's current approach in resolving corruption "is largely tactical, too legalistic and prosecution-driven."<sup>7</sup> Moreover, the prosecutions take on an "anti-corruption strategy that has always been rather benign; it is 'capture-mark-release', a little like ecological methods of estimating the population in an ecosystem. It is never meant to harm the corrupt."<sup>8</sup> This speaks to an abundance of corruption cases initiated by the DPP and a likely reluctance to secure convictions.

Conferring prosecutorial authority on the Ethics and Anti-Corruption Commission (EACC) has been suggested to resolve the DPP's apparent reluctance. The independent commission conducts investigations on unethical and corrupt practices either on its own initiative or through a complaint made by any person.<sup>9</sup> Following an investigation, the EACC reports the results to the DPP.<sup>10</sup> In 2019, Member of Parliament Peter Kaluma re-introduced a Bill that gives EACC "limited powers to prosecute serious economic crimes, fraud, and bribery among other weighty offences."<sup>11</sup> In his words: <sup>12</sup>

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<sup>5</sup> Art 157 (10) Constitution of Kenya 2010.

<sup>6</sup> Art 157 (11).

<sup>7</sup> Wachira Maina, *State Capture: Inside Kenya's Inability to Fight Corruption*, Africa Centre for Open Governance, 2019, page viii.

<sup>8</sup> *Ibid*, page 41.

<sup>9</sup> Section 13 (2) (b), Ethics and Anti-Corruption Commission Act, 2011.

<sup>10</sup> Section 35, Anti-Corruption & Economic Crimes Act, 2003.

<sup>11</sup> Davis Ayega, 'MP Wants EACC Given Powers to Prosecute Corruption Offences' *Capital News* (18 February 2019) <<https://www.capitalfm.co.ke/news/2019/02/mp-wants-eacc-given-powers-to-prosecute-corruption-offences/>> accessed 22 August 2019.

<sup>12</sup> *Ibid*.

Very few cases of corruption and economic crimes proceed to prosecution and end up with convictions and this is largely because the commission merely investigates and reports cases including serious corruption cases.

Private prosecutions, therefore, could offer a corrective response to the DPP's reluctance and limited powers of the EACC. Notably, the Judiciary has acknowledged the significance of private prosecutions in Kenya whose foundations lie in English jurisprudence. In this regard, the go-to case, *Kimani v Kahara* (Kahara case)<sup>13</sup> restated the importance of private prosecutions as phrased by Lord Diplock in the landmark case of *Gouriet v Union of Post Office Workers*.<sup>14</sup> His judgement read in part:

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* (emphasis added).

This paper is arranged along three arguments. First, corruption is rampant in Kenya and as corruption swells, the authority with the power to wrestle it through prosecution, the DPP – and the AG before it – has been slow to prosecute corruption cases historically. Secondly, the ODPP enjoys near monopoly over the authority to prosecute to-date. Third, one avenue available for the anti-corruption crusade and to check the DPP's power is private prosecutions, although it has practical and legal limitations.

## 2. Prosecution of Corruption Cases in Kenya

Corruption has been rampant in the country since Independence. Pointedly, the Moi (1978-2002), Kibaki (2003-2013) and Kenyatta eras (2013 to present) have all been plagued by major corruption scandals. Despite the astounding amounts misappropriated from Government coffers, there has been a laxity to prosecute the scandals. For analysis' sake, this section selects three major scandals, one from each regime, namely: Goldenberg, Anglo-Leasing, and Eurobond.

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<sup>13</sup> [1985].

<sup>14</sup> *Gouriet v Union of Post Office Workers* [1973] All ER 94.

Goldenberg was reportedly the biggest corruption scandal during the Moi regime owing to the large amounts of money stolen, the seniority of the perpetrators and Government's commitment to defeat justice. The Commission of Inquiry into the Goldenberg Affair (Bosire Commission) revealed that about Ksh 27 billion was spent on fictitious export of gold and diamonds.<sup>15</sup> Top-level government officials were implicated including the Vice-President and his aides.<sup>16</sup> At the time, Peter Warutere remarked, President Moi's regime was:<sup>17</sup>

...not only reluctant to have the scam investigated but also interfered with the machinery of justice to shield the perpetrators of the economic crime from being prosecuted and convicted.

In the same vein, the Bosire Commission particularly faulted the AG for carrying out prosecutions haphazardly.<sup>18</sup> In reaction, the Law Society of Kenya (LSK), and later Raila Odinga, filed private prosecutions against some of the accused.<sup>19</sup> According to the Bosire Commission, the AG moved in swiftly to terminate both private prosecutions. Consequently, the AG filed nine prosecutions, which were dropped in 2003 when the Bosire Commission was established.

The Commission surmised that the prosecutions were chaotic and ostensibly selective. To illustrate, public prosecutors orchestrated needless delays by filing cases against the same accused persons leaving out others.<sup>20</sup> In some instances, a file was withdrawn in unexplained circumstances. Therefore, the Commission recommended further investigations and prosecutions.<sup>21</sup>

However, in 2013, the court terminated 11 charges levelled against Kamlesh Pattni, one of the accused.<sup>22</sup> In his defence, Pattni argued that the snail-paced prosecution on the scandal had violated his constitutional rights. Agreeing with

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<sup>15</sup> The actual quoted figure is Ksh. 27, 079, 578, 684. See, Report of the Judicial Commission of Inquiry into the Goldenberg Affair (Bosire Commission Report), 2005, page 301, <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf>> accessed 19 August 2019.

<sup>16</sup> Ibid.

<sup>17</sup> Peter Warutere, 'The Goldenberg conspiracy: The game of paper, gold, money and power' Institute for Security Studies, Paper 117, September 2005, 1 <<https://oldsite.issafrica.org/uploads/Paper117.pdf>> accessed 19 August 2019.

<sup>18</sup> Ibid, Bosire Commission Report, para.773.

<sup>19</sup> Ibid, para.766-767.

<sup>20</sup> Ibid, para. 780-783.

<sup>21</sup> Ibid.

<sup>22</sup> Galgallo Fayo, 'Court Formally Terminates Goldenberg Case' *Business Daily* (3 May 2013) <<https://www.businessdailyafrica.com/news/Court-formally-terminates-Goldenberg-case/539546-1841044-li7xwvz/index.html>> accessed 20 August 2019.

Pattni, the court upheld the ruling in *Republic v George Saitoti*, which adjudged the Bosire report unreliable because some of its provisions were inaccurate.<sup>23</sup> Similarly, the flawed report justified the release of former Central Bank of Kenya Governor Eric Kotut in 2008. Kotut had been sued for conspiracy, alongside Pattni and his former deputy Eliphias Riungu, in a theft case worth Ksh 5.8 billion. Justices Nyamu, Wendoh and Dulu reasoned that prosecuting Kotut nearly 15 years after charging him violated his right to fair hearing.<sup>24</sup>

Spilling over from the Moi era into Kibaki's term, the second graft scandal was typified by larger amounts of misappropriated Government funds, apparent involvement of Government officials, silencing of whistle-blowers who attempted to uncover the suspicion surrounding the transaction, and unsettled investigations and prosecutions. In 2000, the Kenyan Government planned to replace its passport printing system through restricted tender marking, allegedly, the genesis of the Anglo Leasing scandal.<sup>25</sup> Although the tender was first quoted at Ksh 6 billion, the tender was awarded to a British company, Anglo Leasing Finance, at Ksh. 2.67 billion.<sup>26</sup>

The circumstances around the award were suspicious. First, the Government had initially disqualified three bids because they failed to meet the specifications in the invitation tender.<sup>27</sup> Following this, the Government intended to redesign expansively the printing system to incorporate other components.<sup>28</sup> Before the Government invited tenders for the enhanced system, the British firm offered a bid insinuating improperly obtained foreknowledge.<sup>29</sup> Nonetheless, the Government contracted Anglo Leasing and paid about Ksh 91 million as a commitment fee.<sup>30</sup>

The Government muzzled attempts to expose its misdeeds. Then Permanent Secretary for Governance and Ethics, for instance, delivered a letter infamously termed "Githongo Dossier" to President Kibaki in 2005. The dossier presented findings from investigations on Anglo Leasing between 2004 and 2005 implicating the Vice President, and the Cabinet ministers then responsible for justice and

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<sup>23</sup> *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex-parte George Saitoti* [2006] eKLR.

<sup>24</sup> *Eric Cheruiyot Kotut v S.E.O. Bosire & 2 others* [2008] eKLR, page 29-30.

<sup>25</sup> Evans Nelson, 'Auditor's Report on Passport Scandal' *Daily Nation* (20 May 2004) <<https://www.nation.co.ke/lifestyle/1190-11116-dpfc2z/index.html>> accessed on 20 August 2019.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

transport. Further, not only was Anglo Leasing a non-existent company but the scandal comprised a series of 18 contracts valued at approximately Ksh 56.3 billion, which were a baseline scheme to finance the 2007 elections.<sup>31</sup> Threat messages throughout the early phases of investigation, a determined opposition to inquiries and lukewarm support from President Kibaki ensued and eventually Githongo, fearing for his life, went into self-imposed exile in the United Kingdom in 2005.<sup>32</sup>

Likewise, the courts barred the Kenya Anti-Corruption Commission (KACC) from investigating the scandal because that would amount to a breach of some contracts (approved by the AG) between the Government and Anglo Leasing companies. Additionally, investigations needed mutual legal assistance.<sup>33</sup> The courts similarly blocked KACC's attempts to obtain these reasoning that only the AG could seek or receive mutual legal assistance.<sup>34</sup>

The AG's unwillingness and inability to prosecute implied that his office had a hand in the scandal. The LSK, for instance, filed criminal charges against the AG for abandoning his mandate and apparent involvement in the scandal.<sup>35</sup> In reaction, the AG requested the DPP to terminate the proceedings whose mission, in his view, was to malign him.<sup>36</sup> Besides, the (repealed) Constitution gave his office powers to terminate any case at any stage before judgement was rendered.<sup>37</sup>

In 2009, KACC admitted that investigations into Anglo Leasing had collapsed.<sup>38</sup> Ten years later, the High Court found Githongo guilty of defaming Chris Murungaru (the former Minister of transport) by implicating him in the

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<sup>31</sup> Ibid, Wachira Maina, page 23.

<sup>32</sup> Ibid.

<sup>33</sup> Refers to aid given or received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters. They are based legal assistance agreements between Kenya and other countries or international entities. See, Mutual Legal Assistance Act (Act No. 36 of 2011).

<sup>34</sup> African Centre for Open Governance, Five Years On: How Effective is the KACC in Kenya's Fight Against Corruption? December 2009, page 9 <<https://africog.org/reports/KACC.pdf>> accessed 20 August 2019.

<sup>35</sup> African Centre for Open Governance, 'Assessing Amos Wako's Performance: Poisoned Legacy' August 2011, page 8 <[https://africog.org/reports/Poisoned\\_Legacy.pdf](https://africog.org/reports/Poisoned_Legacy.pdf)> accessed 20 August 2019.

<sup>36</sup> Jillo Kadida & David Mugonyi, 'AG Moves to Stop LSK from Suing Him on Graft' *Daily Nation* (5 March 2005) <<https://www.nation.co.ke/news/1056-47634-1197p25/index.html>> accessed on 20 August 2019.

<sup>37</sup> Section 26 (3) (c).

<sup>38</sup> Lucas Barasa, 'Ringera Admits Failure over Anglo Leasing' *The East African* (6 February 2009) <<https://www.theeastafrican.co.ke/news/2558-525600-view-printVersion-oxyb00/index.html>> accessed on 20 August 2019).

scandal. He was ordered to pay Murungaru Ksh 27 million.<sup>39</sup> Warah expressed concern that this move could silence those who, in the future, might be inclined to report corruption or wrongdoing within the Government.<sup>40</sup>

Lastly, huge unexplainable sums of State funds, speculative findings on investigations and lack of prosecutions characterised the Eurobond saga, which began shortly after President Kenyatta's first term. In 2014, the Government borrowed Ksh 250 billion through a Eurobond, sovereign bond.<sup>41</sup> Opposition leader, Raila Odinga, agitated the government to explain its expenditure.<sup>42</sup> Following investigations by the EACC and Director of Criminal Investigations (DCI), the DPP concluded that there was no crime committed in Eurobond.<sup>43</sup> Nonetheless, he directed the Auditor-General to undertake a special audit into the sovereign bond.<sup>44</sup>

To date, it is uncertain whether the loan was received or spent. President Kenyatta ridiculed the Auditor-General's attempts to unearth the truth thereby stifling the investigations.<sup>45</sup> In the financial year 2014/2015, the Auditor-General's findings revealed that Ksh 215 billion of the Eurobond could not be clearly accounted for. By contrast, PKF—an audit firm hired by the Government to conduct a separate audit—reported that there was “sufficient evidence that cash from the Eurobond were all received in the government's main account and paid

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<sup>39</sup> *Christopher Ndarathi Murungaru v John Githongo* [2019] eKLR, para. 60 <<http://kenyalaw.org/caselaw/cases/view/172350/>> accessed 8 September 2019.

<sup>40</sup> Rasna Warah, 'In Whose Interest? Reflecting on the High Court Ruling Against John Githongo' *The East African* (27 May 2019) <<https://www.theeastafricanreview.info/op-eds/2019/05/27/in-whose-interest-reflecting-on-the-high-court-ruling-against-john-githongo/>> accessed on 20 August 2019.

<sup>41</sup> *Ibid.*, Wachira Maina, page 25.

<sup>42</sup> Olive Burrows, 'No Money Lost in Eurobond Funds Transfer – DPP Tobiko' *Capital News* (31 May 2016) <<https://www.capitalfm.co.ke/news/2016/05/no-money-lost-eurobond-funds-transfer-dpp-tobiko/>> accessed 27 August 2019.

<sup>43</sup> Kiarie Njoroge, 'DPP Closes Sh. 250bn Eurobond File, Says No Evidence Officials Misused Funds' *Business Daily* (31 May 2016) <<https://www.businessdailyafrica.com/news/No-evidence-State-officials-misused-Eurobond-cash--DPP-says/539546-3226814-3q0sbnz/index.html>> accessed 20 August 2019.

<sup>44</sup> *Ibid.*

<sup>45</sup> At a summit on anti-corruption, President Kenyatta reportedly stated, “When you say that the Eurobond money was stolen and stashed in the Federal Reserve Bank of New York, are you telling me that the Kenyan government and United States have colluded? Who is stupid here? And he (the Auditor-General) says he wants to investigate the Federal Reserve Bank of New York.” See, Neville Otuki, 'President Rubbishes Auditor-General Proposal to Probe US Fed' *Business Daily* (18 October 2016) <<https://www.businessdailyafrica.com/economy/President-ridicules-Auditor-General-plan-to-probe-US-Fed/3946234-3421248-nch0wvz/index.html>> accessed 20 August 2019.

out for authorised purposes.”<sup>46</sup> Consequently, inquiries into the scandal remain inconclusive, while the DPP has openly stated that there being no mischief, there is no need to prosecute. In May 2019, the Government sold another Eurobond worth Ksh 210 billion; with some of its proceeds being designated for settling outstanding costs from the 2014 Eurobond.<sup>47</sup>

I have demonstrated that corruption is pandemic and symptomized by a governmental commitment to defeat justice. Substantial and unaccounted for sums of State funds exemplify such a State-backed commitment. Further, investigations have either been inconclusive or present speculative findings owing to interference. Furthermore, there has been an unwillingness to prosecute or termination of prosecutions conducted by others. Even so, where prosecutions occur, delays abound resulting in the release of culprits.

Article 157 of the 2010 Constitution provides for prosecutorial power naming the DPP as the principal custodian of prosecutorial authority. Secondly, the Inspector General should comply with a direction to investigate from the DPP. Third, he/she can institute criminal proceedings against anyone in any court. Fourth, he/she has power to take over and continue any criminal case undertaken by another person or authority. He/she does not require consent of any person to exercise their functions.

The next section critiques this provision seeking to answer two questions: does the constitution (and related legislations) sufficiently control the DPP’s discretion to perform his/her mandate? Secondly, has that discretion enabled efficient prosecution of corruption?

### **3. Article 157 and the Controls over the DPP’s Discretion to Prosecute Corruption Offences**

In Kenya, the DPP enjoys near monopoly over the authority to prosecute. The Constitution provides that he/she is not answerable to any person or authority.<sup>48</sup> According to the Office of the Director of Public Prosecutions Act (ODPPA),

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<sup>46</sup> Edwin Mutai ‘Treasury Ignores Ouko in Eurobond Cash Use Probe’ *Business Daily* (14 March 2019) <<https://www.businessdailyafrica.com/economy/Treasury-ignores-Ouko-in-Eurobond-cash-use-probe/3946234-5025888-10brwvr/index.html>> accessed 27 August 2019.

<sup>47</sup> Hellen Githaiga & Paul Wafula, ‘Kenya Sells Third Sh210bn Eurobond’ *Daily Nation* (16 May 2019) <<https://www.nation.co.ke/business/Kenya-sells-third-Sh210bn-Eurobond/996-5117296-i606ebz/index.html>> accessed 27 August 2019.

<sup>48</sup> Art 157 (8), Constitution of Kenya 2010.

the DPP manifests discretion over prosecutions in four ways.<sup>49</sup> First, through the decision to prosecute in relation to any offence. Second, by instituting, conducting and controlling prosecutions for any offence. Third, through carrying out any functions which are necessary and incidental to prosecutions and lastly, taking over and conducting prosecutions undertaken by any person/authority with their consent.

Historically, public prosecutors (including the AG) abused this discretion, in particular the power to take over proceedings. By dint of Section 26(3) (b) of the repealed Constitution, the AG, *where he considered it desirable to do so*, could take over and continue any criminal proceedings where they had been instituted or conducted by a person other than the State. Put to effect, Ki age writes that the stipulation resulted in a ‘signal paradox’ where an individual would institute proceedings only to be exposed to unnecessary interventions by the AG.<sup>50</sup> The AG would then take up the proceedings (where he had previously failed to prosecute) only to terminate through entering a *nolle prosequi*.<sup>51</sup>

*Noelle prosequi* was a notorious tool, which enabled the AG to frustrate public and private prosecutions at any stage of the proceedings before a judgment had been rendered. Ordinarily, *nolle prosequi* should be backed with legitimate reasons such as insufficient evidence, successful plea bargaining and just general filtering out of petty cases which could be resolved by admonishing or a warning.<sup>52</sup> Accordingly, this led to public outcry for checks on the AG’s powers in this regard.<sup>53</sup>

Judges were also disempowered from intervening with the AG’s function even in the event of abuse of power. In *Republic v Islam Omar*,<sup>54</sup> for instance, the AG argued that the use of *nolle prosequi* was not amenable to the courts’ scrutiny. Justice Kimaru, in response, reasoned that the role of the trial court was not to rubber-stamp the AG’s decisions where an injustice could be occasioned. In his words:<sup>55</sup>

If it appears that the Attorney General, in exercise of its powers to enter a *nolle prosequi* is acting contrary to the established constitutional norms of fair trial, a trial court is within its right to refuse to enter *nolle prosequi* and refer the matter

<sup>49</sup> Section 23, The Office of the Director of Public Prosecutions Act, Act No. 2 of 2013.

<sup>50</sup> Patrick Kiage, *Essentials of criminal procedure in Kenya* (Nairobi, LawAfrica 2010) 68-69.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid, 63.

<sup>53</sup> Ibid, 68-69.

<sup>54</sup> *Republic v Islam Omar & 2 others* [2007] eKLR.

<sup>55</sup> Ibid.

to a constitutional court for determination as to the legality of the decision by the Attorney General. A trial court cannot fold its arms and say that it cannot hear an aggrieved party who is challenging the exercise of the power vested on the Attorney General by the law.

Since the promulgation of the 2010 Constitution, the courts have upheld Justice Kimaru's stance. In *Republic v Muneb Wanjiku*,<sup>56</sup> Justice Joel Ngugi surmised that Article 157 (11) that constrains the DPP's powers to public interest, the interests of administration of justice and the need to avoid abuse of the legal process, tranquilised the notorious use of *nolle prosequi* by public prosecutors.<sup>57</sup>

One can say that Article 157(11) dealt a death knell to the practice of using *nolle prosequi* as a political tool to reward political friends and oppressive political enemies. The power to initiate or withdraw cases can no longer be used whimsically and arbitrarily as a tool to oppress individuals or achieve goals other than those in the administration of justice.

In the context of corruption, prosecutorial discretion has registered promising results amid some hurdles. Between 2013 and 2018, the Office of the DPP (ODPP) had filed 508 corruption cases valued at Ksh 60 billion, which implicated 1,462 people.<sup>58</sup> Reportedly, the ODPP secured the highest rate of convictions, at 74%, on corruption cases during the financial year 2016/2017.<sup>59</sup> Yet still, officers prosecuting corruption, more so high-profile cases, have been intimidated through phone calls and house break-ins.<sup>60</sup> In addition, evidence has been destroyed. Further, gathering evidence and a large number of suspects—some of who hail from foreign jurisdictions—lengthen and complicate proceedings.<sup>61</sup> As DPP Noordin Haji remarks, prosecuting corruption “is not as straightforward as people think.”<sup>62</sup>

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<sup>56</sup> *Republic v Muneb Wanjiku Ikigu* [2016] eKLR.

<sup>57</sup> *Republic v Muneb Wanjiku Ikigu* [2016] eKLR, Para 14.

<sup>58</sup> Ibrahim Oruko, 'We Have Filed over 500 Cases on Graft, Says DPP Haji' *Daily Nation* (22 June 2018) <<https://www.nation.co.ke/news/Over-500-graft-cases-filed/1056-4624912-gryv6pz/index.html>> accessed 27 August 2019.

<sup>59</sup> Office of the Director of Public Prosecutions, 'The ODPP Registers the Highest Conviction Rate Ever in Kenya' (*Office of the Director of Public Prosecutions*, 19 December 2017) <<http://www.odpp.go.ke/the-odpp-registers-the-highest-conviction-rate-ever-in-kenya/>> accessed 27 August 2019.

<sup>60</sup> Gloria Aradi, 'DPP: High profile graft suspects are harassing our officers' *Standard Digital* (30 May 2019) <<https://www.standardmedia.co.ke/article/2001327741/dpp-high-profile-graft-suspects-are-harassing-our-officers>> accessed 27 August 2019.

<sup>61</sup> Ibid

<sup>62</sup> Ibid

Some of these delays form the basis of the EACC's request for more prosecutorial power. The independent commission conducts investigations on unethical and corrupt practices either on its own initiative or through a complaint made by any person.<sup>63</sup> Afterwards, the EACC reports the results to the DPP.<sup>64</sup> In 2019, Member of Parliament Peter Kaluma re-introduced a Bill that seeks to give EACC "limited powers to prosecute serious economic crimes, fraud, and bribery among other weighty offences."<sup>65</sup> In his words:<sup>66</sup>

Very few cases of corruption and economic crimes proceed to prosecution and end up with convictions and this is largely because the commission merely investigates and reports cases including serious corruption cases.

Whereas the EACC has power to prosecute, these powers have a limited capacity. In the *Stephen Ndiba* case,<sup>67</sup> Justice Ngaah Jairus granted EACC power to conduct criminal prosecutions pegging his judgement on Article 157 6 (b) of Constitution.<sup>68</sup> The provision allows the DPP to take over and continue any criminal proceedings commenced in any court, which have been instituted or undertaken by *another person or authority* (emphasis added).<sup>69</sup> EACC, therefore, qualified as another authority.

Further the EACC does not "merely investigate and report to the DPP" as Kaluma opined. Section 35 of the Anti-Corruption & Economic Crimes Act (ACECA) stipulates that, "following an investigation the Commission shall report to the DPP on the results of an investigation."<sup>70</sup> Justice Jairus interpreted 'results of an investigation' to mean charging, arresting, detaining and even *prosecuting*.<sup>71</sup> Besides, no provision in ACECA required the commission to seek written consent from the DPP before prosecuting.<sup>72</sup> Despite the progressive judgement, the EACC has not conducted a considerable number of prosecutions on corruption.

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<sup>63</sup> Section 13, Ethics and Anti-Corruption Commission Act, 2011.

<sup>64</sup> Section 35, Anti-Corruption & Economic Crimes Act, 2003.

<sup>65</sup> Davis Ayega, 'MP Wants EACC Given Powers to Prosecute Corruption Offences' *Capital News* (18 February 2019) <<https://www.capitalfm.co.ke/news/2019/02/mp-wants-eacc-given-powers-to-prosecute-corruption-offences/>> accessed 22 August 2019.

<sup>66</sup> Ibid.

<sup>67</sup> *Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & another* [2015] eKLR.

<sup>68</sup> Ibid, page 7.

<sup>69</sup> Constitution of Kenya, 2010.

<sup>70</sup> Section 35 (1), Anti-Corruption & Economic Crimes Act, 2003.

<sup>71</sup> Emphasis added. *Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & another* [2015] eKLR.

<sup>72</sup> *Stephen Mburu Ndiba v Ethics & Anti-Corruption Commission & another* [2015] eKLR.

Nonetheless, this case set a good precedent on checking the DPP's apparent monopoly of powers over prosecuting corruption offences.

The legal foundation of the DPP's control over prosecutions has historically been prone to abuse particularly the power to terminate proceedings through *nolle prosequi*. In a bid to divert dangerous power from flowing into the 2010 constitutional dispensation, the courts have rejected rubber-stamping abuse of office by the DPP. In the context of corruption, the courts have acknowledged and empowered other authorities like the EACC to conduct prosecutions. While the EACC may have prosecutorial powers, these have not matched the DPP's. It follows that the DPP has near monopoly over prosecutions, which necessitates sufficient checks.

Against this backdrop, the proceeding sections look into the legal bases and practical limitations of private prosecutions arguing that they could offer an alternative and prove to be a useful anti-corruption tool.

#### 4. Legal Foundations of Private Prosecutions

Kenya inherited private prosecutions from English common law, which is typified by judicial pronouncements. In this regard, the Kenyan leading precedent, *Kimani v Kahara*<sup>73</sup> (Kahara case) restated the importance of private prosecutions as phrased by Lord Diplock in the English case of *Gouriet v Union of Post Office Workers*. His judgement read in part:<sup>74</sup>

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.* (emphasis added).

Together with English jurisprudence, Kenyan judges acknowledged an implied constitutional basis for private prosecutions. Under the repealed Constitution, the AG could take over and continue any criminal proceedings where they had been

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<sup>73</sup> *Kimani v Kahara* [1983] eKLR.

<sup>74</sup> *Gouriet v Union of Post Office Workers* [1973] All ER, 94.

instituted or conducted by a person other than the State.<sup>75</sup> A right by any other person to institute or undertake criminal proceedings can be inferred from these provisions.<sup>76</sup>

Explicitly, Section 88 of the Criminal Procedure Code (CPC) allows anyone to institute a private prosecution subject to a magistrate's permission.<sup>77</sup> Furthermore, the CPC stipulates that private prosecutions can be conducted by persons in their individual capacity or through an advocate and these private persons must seek permission from the court before conducting a private prosecution.<sup>78</sup>

Notwithstanding, private prosecutors faced tight *locus standi* rules, which discouraged the course of their litigation. To succeed in instituting a private prosecution, a private prosecutor had to prove that they had suffered an injury (legal wrong or harm) personally, that the AG had no interest in prosecuting, and the case concerned an offence recognised by law.<sup>79</sup> Particularly, jurisprudence from the courts suggested that magistrates had to consider a lengthy checklist before allowing private persons to conduct private prosecutions. In 1983, Justices Simpson and Sachdeva crafted the subsequent checklist in the *Kahara* case as follows:<sup>80</sup>

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*? 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.

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<sup>75</sup> Section 26 (3) (b).

<sup>76</sup> *Kimani v Kahara* [1983] eKLR.

<sup>77</sup> Section 88(1) and 88(3) 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".

<sup>78</sup> Section 88 (3), Criminal Procedure Code (Cap 75). In Kenya, unlike other jurisdictions, there are no specific qualifications especially for advocates required to act as a private prosecutor. 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>79</sup> Bwonwong'a M, *Procedures in criminal law in Kenya*, East African Educational Publishers, Nairobi, 1994, 143.

<sup>80</sup> *Kimani v Kahara*, page 6.

*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 (emphasis added).*

Thus, private prosecutors had to report or notify State authorities and provide evidence showing that they suffered personal injury. Notably, neither the formalities of how such a report or notification would be made nor the types of results were canvassed. These would have offered clearer insights on how to prove that the AG was not interested in prosecuting.

Twelve years later, in *Floriculture International Limited and Others (Floriculture case)*,<sup>81</sup> Justice Kuloba expanded the principles in *Kahara*. Six pointers were outlined which would assist magistrates in ascertaining that the relevant State authorities (public machinery), even after receiving notification, had shown a reluctance or failure to prosecute. With this, a private prosecution could be lawfully instituted. He rendered himself as follows:<sup>82</sup>

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 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.*" (Emphasis added)

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<sup>81</sup> *Floriculture International Limited and others* High Court Misc. Civil Application No. 114 of 1997.

<sup>82</sup> *Ibid*, 38-39.

These principles had a bearing on the delimitation of private prosecutors' role as somewhat subordinate to public prosecutors. Meeting the high threshold for sufficient interest, that is, "special, exceptional, substantial and peculiarly personal" encumbered instituting private prosecutions. Moreover, the two cardinal judgements ((*Kahara & Floriculture* cases) were delivered at a time when the AG's discretion to prosecute was too wide and unchecked. As illustrated succinctly, in *Gregory v Republic thro' Nottingham*:<sup>83</sup>

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.

As argued in Part III, the 2010 Constitution provides controls on excessive prosecutorial discretion by empowering prosecutions by authorities other than the DPP. Like the foundation of EACC's prosecutorial power, Justice Lenaola averred that Article 157 (6) (b) "presupposes prosecution not undertaken by the DPP and *specifically anticipates private prosecutions*."<sup>84</sup> The DPP can only take over prosecutions with the permission of the private prosecutor while if they wish to discontinue a private prosecution, they must seek the court's permission.<sup>85</sup>

This has elevated the status of private prosecutors rather than the subordinate role they previously played. In some instances, the capacities of a private prosecutor have been defined as equivalent to those of the public prosecutor. Section 348 A of the CPC only names the DPP as the person who may file an appeal against a judgment of a subordinate court. Interpreting the stipulation, Justice Mshila, in *Roselyne Miano v Edward Ngige*,<sup>86</sup> held that a private prosecutor can appeal because in "essence the private prosecutor conducts proceedings on behalf of the DPP" and excluding a private prosecutor would be "a narrow interpretation of the provision."<sup>87</sup>

Progressively, private prosecutors are no longer encumbered by strict *locus standi* rules. Instead of proving direct and specific injury, the magistrate should be satisfied that there has been a failure by the State authorities to act in accordance

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<sup>83</sup> *Gregory and another v Republic thro' Nottingham and 2 others* [2004] KLR, 575.

<sup>84</sup> *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene & 7 others* [2016] eKLR, para 42.

<sup>85</sup> Article 157 (6) (b), Constitution of Kenya 2010.

<sup>86</sup> *Roselyne Miano & another v Edward Kariuki Ngige & 5 others* [2015] eKLR.

<sup>87</sup> *Ibid*, para. 20.

with their constitutional and statutory mandate.<sup>88</sup> Additionally, the ODPPA requires a person to notify the DPP in writing within 30 days of instituting a private prosecution.<sup>89</sup> As a result, a new standard of sufficient interest in private prosecutions has emerged with a caveat that the complainant should not be driven by ulterior motives. Besides, ‘ulterior motives’ should not be arbitrarily discerned but defined by the circumstances of the case.<sup>90</sup> This means that any slightest form of bias cannot then collapse a private prosecution. To illustrate, Justice Lenaola reasoned in *Albert Gacheru v James Maina* that a private prosecutor could serve as a witness in their own case provided that he/she did not allow their interest to negatively impact the neutral and fair conduct of the trial. Otherwise, the court could intervene and terminate such prosecution.<sup>91</sup>

While legislation expressly provides for the right to private prosecutions, judges have interpreted the circumstances that justify instituting private prosecutions in a manner that does not compromise public prosecutorial authority. From the above cases, it is clear that there is a functioning legal system that supports private prosecutions. In addition, the Judiciary has continuously acknowledged the significance of private prosecutions by empowering the capacities of the private prosecutors. This framework has bolstered consistency in adhering to the court-made guidelines on instituting private prosecutions highlighted above.

Of concern, however, is whether this type of litigation applies practically to anti-corruption cases backed with the enabling legal framework. The next section addresses the question: can private prosecutions play a useful role in graft cases? This is argued (affirmatively) by analysing two respects: the failure of the DPP to prosecute and the residual powers of the DPP over prosecutions instituted by others. Insights are drawn from South Africa’s practice.

## 5. Private Prosecutions in Practice: A Check on DPP’s Discretion to Prosecute Corruption

Since the promulgation of the 2010 Constitution, there have not been a considerable number of private prosecutions tackling corruption specifically. Recall

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<sup>88</sup> *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others* [2013] eKLR, para. 23 -27.

<sup>89</sup> Section 28 (2), Office of the Director of Public Prosecutions Act, No. 2 of 2013.

<sup>90</sup> *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene & 7 others* [2016] eKLR, para 87.

<sup>91</sup> *Ibid*, para 88.

that the inaction of the AG during the Goldenberg scandal prompted the LSK and later Raila Odinga to file private prosecutions against some of the accused. Although the AG moved in swiftly to terminate both private prosecutions, the Bosire Commission revealed that these were pivotal in “spurring the AG into action” even adding suspects who had been left out in earlier criminal proceedings.<sup>92</sup> This section, therefore, argues that private prosecutions are an accountability mechanism, ensuring that those accused of corruption offences are brought to book by the DPP.

There is a dearth of analysis on how the court-made guidelines examined in Part IV have been applied in a given context and especially in corruption cases. Based on two factors, namely: culpable refusal to prosecute and residual powers of the DPP; the section teases out some practical concerns in carrying out this type of litigation.

### **5.1. Culpable Refusal to Prosecute**

Deducing from the *Floriculture* case ‘culpable refusal’ comprises three considerations. First, the requirement of filing a report from the DPP or police and the ensuing results. Second, a clear demonstration of a refusal to act by the DPP or that the DPP has without reasonable cause shown a more than usual reticence. Third: the likelihood of a failure of public and private justice if the suspect is not prosecuted at that given time.

While the courts insist unwaveringly that the principles in *Floriculture* are sound guidelines, the three considerations are loosely worded or a mouthful. For instance, should the report be written or oral? Does it serve as a notification? What form of outcomes make for results and when should they be expected? What amounts to a clear demonstration of a reasonable refusal to prosecute? How can a more than usual reticence be measured? Similarly, how is a likelihood of a failure of public and private justice proved?

Nonetheless, the courts have attempted to clear the murk by providing practical insights. In *Isaac Aluochier v Stephen Musyoka*,<sup>93</sup> for instance, the appellants were aggrieved by the refusal to grant leave to privately prosecute an

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<sup>92</sup> Report of the Judicial Commission of Inquiry into the Goldenberg Affair, 2005, para. 771-772, <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf>> accessed 20 August 2019.

<sup>93</sup> *Isaac Aluoch Polo Aluochier v National Alliance & 440 Others* [2017] eKLR.

election offence. In their submissions, the trial court had failed to consider that they had notified the DPP in accordance with Section 28 of the ODPPA. Justice Achode interpreted that ‘culpable failure to prosecute’ could not connote a mere notification. In his view:<sup>94</sup>

...even if the applicants intended private prosecution, they ought to have been given reasonable time to conduct their investigation. The lack on the part of the DPP to prosecute ought to have been clearly demonstrated. The applicant served a notice to the DPP and rushed to court alone does not demonstrate the lack of the DPP to prosecute. In my humble view, there must be consistency of that Office in failing to prosecute cases. That has not been demonstrated in the present case.

Similarly, this interpretation extends to considering police duty to investigate and gather evidence. For instance, in the case of *Brian Yongo v DCI*, Justice Ngenye-Macharia held:<sup>95</sup>

in criminal procedure, where the police have condensed their evidence which they hold sufficient to found a case for prosecution, but the DPP fails to take up the prosecution, the law provides that private prosecution can follow.”

From the above, the courts have given narrow clues on some tangible measures for culpable refusal. Reporting to the DPP is not just a mere notification but extends to providing the DPP and police reasonable time to conclude their investigations and gather sufficient evidence. Of particular note is that the third requirement on proving a likelihood of injustice has been given little to no attention.

In all, private prosecutions must operate within some confines. The legal framework is bent on ensuring that the DPP performs their mandate independently. Consider Justice Achode’s judgement that instructed private prosecutors to demonstrate “a consistency in that Office in failing to prosecute cases.” This perhaps raises the stakes in proving culpable refusal. Herein lies a contestation that the courts have used as a ‘blanket ban’ against private prosecutions. This should not discourage private prosecutors. The next section answers why.

## **5.2. Residual Powers of the DPP**

The courts have construed that the ODPP’s near monopoly over prosecutions promotes its independence. Section 6 of the ODPPA reads that:

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<sup>94</sup> Ibid, para. 18.

<sup>95</sup> *Bryan Yongo Otumba & another v Director of Criminal Investigations & 4 others* [2018] eKLR, para. 40.

Pursuant to Article 157(10) of the Constitution, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings; not be under the control of any person or authority in the exercise of his powers under constitution; be only subject to the Constitution and the law.

A decision by the DPP to terminate a case, for example, should be respected because it is a show of their independence. Quoting Justice Mativo:<sup>96</sup>

The court is inclined to respect the decision by the DPP to terminate the case for two reasons; namely:- (a) it is a constitutional imperative that the constitutional independence of the independence of the DPP must be respected, (b) for the court to intervene, there must be clear evidence of breach of the constitutional duty to act on the part of the DPP or abuse of discretion.

It follows that private prosecutions are untenable sometimes because they could be an act of supplanting the DPP's mandate. This was the reasoning in the *John Wambugu* case where Justice Mativo held:<sup>97</sup>

The ex-parte applicant is a complainant and has interest in the outcome of the criminal case. He cannot be seen to be the one pushing the DPP to mount a prosecution without offending Article 157 (10) of the Constitution. If that were to happen, the criminal proceedings would risk being quashed on the grounds that the DPP did not act independently. All that the petitioner is required to do is to present his evidence to the investigating officers (which he did) and leave it to the DPP to independently evaluate the evidence and make a decision whether or not to mount the prosecution.

Justice Mumbi Ngugi also concluded that private prosecutions should observe the order and rules in the criminal justice system lest prosecutions based on inconclusive investigations, weak evidence or unproven particulars of criminal offences overwhelm the magistrates' courts. In her words:<sup>98</sup>

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.

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<sup>96</sup> *Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another* [2018] eKLR.

<sup>97</sup> *Ibid*, para. 41.

<sup>98</sup> *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others* [2013] eKLR, Ruling 2, para. 18.

The judgments belabour the fact that the DPP is in a better position than the private prosecutor to mount prosecutions. Pointedly, evaluation of evidence speaks to the evidentiary test, one of the two criteria on prosecutorial discretion. The other is the public interest test. Respectively, these criteria connote a “reasonable prospect of a successful prosecution and conviction” and that “prosecutors represent the community in criminal trials; a capacity the DPP should ensure promotes the interests of victims and witnesses, without negating their obligation to act in a balanced and honest manner.”<sup>99</sup> It follows that the two tests should permeate the conducting of private prosecutions where permitted by the courts.

In addition, a private prosecutor should also anticipate some hurdles similar to those faced by the DPP when he/she decides to prosecute. Some examples from the *John Wambugu* case included:<sup>100</sup>

Fresh facts which may come to light after an initial decision to prosecute (or not) has been made; unnecessary expenditure of public funds in lodging public prosecutions; the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to trauma caused by being charged with a criminal offence-or worse being wrongly charged.

In my opinion, these serve as an efficient check on private prosecutions as they guard against possible excesses by private prosecutors. Private prosecutors should take cognisance of these factors when challenging the DPP’s failure to prosecute extending these standards to the course of their privately instituted prosecution. This will in turn, inject confidence into this type of litigation.

South Africa’s practice on this front presents some practical considerations on seizing public power to prosecute, in particular, corruption. AfriForum, a civil society organisation, has tested private prosecutions on the fight against corruption. In as much as the lead was former State prosecutor—perhaps bringing beneficial insights on how to manoeuvre the ins and outs of the public prosecutorial framework—the team has brought private prosecutions against powerful political players.<sup>101</sup> In one instance, they succeeded in compelling the National Prosecuting

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<sup>99</sup> *Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another* [2018] eKLR, para. 37.

<sup>100</sup> *Ibid*, para. 56.

<sup>101</sup> AfriForum, ‘Adv. Gerrie Nel Appointed as Head of AfriForum’s Private Prosecuting Unit’ (*AfriForum*, 31 January 2017) <<https://www.afriforum.co.za/en/adv-gerrie-nel-appointed-head-afriforums-private-prosecuting-unit/>> accessed 28 August 2019.

Authority (equivalent to DPP) to review its decision not to prosecute, owing to publicity and media coverage.<sup>102</sup>

However, a double-edged sword is presented in the way AfriForum conducts its private prosecutions. On the one hand, they have publicised corrupt practices and on the other hand, they have been adjudged seemingly partisan in the choice of cases lodged. Reportedly, AfriForum has instituted private prosecutions “almost exclusively on rival [opposition] political leaders, including Tom Moyane (former commissioner of South Africa Revenue Service), Julius Malema (leader of the far-left Economic Freedom Fighters party), and John Block (former chair of the African National Congress).”<sup>103</sup> The lobby group has also demonstrated a bent towards prosecuting black men. In response, Black First Land First (BLF), a South African political party, is in the process of creating its own private prosecution unit to rival AfriForum’s targeting of “black people or people who are or perceived to be of a certain political affiliation.”<sup>104</sup> Such contestation waters down the confidence in private prosecutions as a counter to the ineptness of the NPA.

## 6. Conclusion

This paper has proffered the argument that private prosecutions safeguard against an unlawful, unreasonable and demonstrable failure by the DPP to prosecute corruption. Acknowledging the legal and practical limitations a private prosecutor may encounter, the paper suggested that the private prosecutor should adhere to procedural fairness and steer clear from ill-practices as these water-down the confidence in private prosecutions, which complement, yet still, are a counter to public prosecutions. Moreover, in spite of a history characterised by excessive prosecutorial authority, the current robust legal framework and court-made guidelines have empowered the private prosecutors as capable litigants, perhaps even in confronting corruption.

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<sup>102</sup> Adriaan Basson, ‘Blame the NPA, not AfriForum, for Shambolic Malema Corruption case’ *News24* (23 April 2018) <<https://www.news24.com/Columnists/AdriaanBasson/blame-the-npa-not-afriforum-for-shambolic-malema-corruption-case-20180423>> accessed 28 August 2019.

<sup>103</sup> Kees Thompson, ‘South Africa Exhibits the Pitfalls of Private Prosecutions for Corruption’ (*The Global Anticorruption Blog*, 5 November 2018) <<https://globalanticorruptionblog.com/2018/11/05/south-africa-exhibits-the-pitfalls-of-private-prosecutions-for-corruption/>> accessed on 1 August 2019.

<sup>104</sup> *Ibid.*