REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Misc Civ Suit 720 of 2005

OTIENO CLIFFORD RICHARD…….....…….……..PLAINTIFF

VERSUS

REPUBLIC ……..……..…..……..DEFENDANT

J U D G M E N T

On 19th May 2005, the Plaintiff, **Otieno Clifford Richard**, moved this court by way of an Originating Summons dated the same date. The Originating Summons was brought pursuant to **Sections 60, 65, 77(9) 84, 123 (8)** of the **Constitution** of Kenya, **Rule 10 (b)** of the (Protection of Fundamental Rights and Freedoms of the individual) **Practice and Procedure Rules**; the inherent jurisdiction and all other powers and enabling provisions of the law. The Plaintiff sought the following orders;

1. A declaration that the termination of the private prosecution which was intended in Chief Magistrate's Misc. Criminal Application No. 5 of 2005 OTIENO CLIFFORD RICHARD V H.E. MRS. LUCY MUTHONI KIBAKI by the Attorney General is an unlawful and unacceptable interference with the functions of the Judiciary by the Executive arm of Government and violation of the principle of separation of powers between the Legislature, Executive and the Judiciary embodied in the Constitution;

2. A declaration that the entry of the *nolle prosequi* by the Hon. Attorney General is an abuse of the powers conferred by the Constitution under Section 26;

3. An order consequential upon the above declarations that the *nolle prosequi* dated 16th May 2005, signed by one Philip Murgor and tendered to the Hon. Chief Magistrate in Chief Magistrate's Court Misc. Application No. 5 of 2005 be expunged from the record, and the Hon. Chief Magistrate's Court be directed to proceed with the hearing and determination of the Application in accordance with the law;

The application was premised on the following grounds:

(a) The conduct of the Hon. Attorney General has denied the Plaintiff an independent, impartial, and fair hearing and determination of the Application before the Chief Magistrate in flagrant violation of Section 77 (9) of the Constitution of Kenya;

(b) The conduct of the Hon. the Attorney General contravened the principle of separation of powers as against the Executive, Legislature, and the Judiciary and amounts to an interference with the functions of the Judiciary by the Executive in which the Attorney General is an ex officio member of the Cabinet;

(c) The entry of the *nolle prosequi* is an abuse of office to protect an individual and leave another without any option to a court of law for redress for a criminal wrong;

(d) The action of the Hon. Attorney General offends the rule of law;

(e) The action of the Hon. the Attorney General encourages criminal impunity and lawlessness.

The Originating Summons was supported by an affidavit sworn by the Plaintiff on 19th May 2005, annextures thereto and skeleton arguments filed on 11th October 2006 by Plaintiff's Counsel.

The Originating Summons was opposed and a replying affidavit was sworn by the Director of Public Prosecutions **Mr. Keriako Tobiko** on 4th October 2005; annextures thereto and skeleton arguments were filed on 9th October 2006.

The Plaintiff was represented by **Mr. Imanyara** whereas **Mr. Tobiko**, the Director of Public Prosecutions, appeared for the State.

THE FACTS

The facts leading to this case are as follows;

"***The Plaintiff, a photojournalist working with KTN, lodged a complaint against the First Lady, Her Excellency Mrs. Lucy Muthoni Kibaki, with the Chief Magistrate Court Nairobi on 16th May 2005. The Application sought permission to conduct the intended private prosecution and issuance of Summons to procure the attendance of the First Lady before the court to answer two charges."***

Mrs. Lucy Muthoni Kibaki was alleged to have assaulted **Otieno Clifford Richard** on the night of 2nd and 3rd May 2005 at Nation Centre and unlawfully damaged a digital video camera recorder serial No. 249688 worth Kshs.180,000/= the property of **Otieno Clifford Derick**.

In the Application of 16th May 2005, the Plaintiff sought the following prayers;

i) That the Plaintiff be granted permission to conduct intended private prosecution against the First Lady;

ii) That the court admit the charge that had been drawn and filed by the Plaintiff's Counsel;

iii) That the court issue Summons compelling the First Lady to appear in court at a date specified in the Summons;

iv) That the Summons be served on the First Lady by the Commandant of the Presidential Escort through the Kilimani Police Station or any other Police Station nearest to the First Lady.

When the application came up in court, the Plaintiff's Counsel sought one prayer for Summons, but the then Director of Public Prosecutions **Mr. Philip Murgor**, stood up and informed the court that he had special instructions from the Attorney General to take over the proceedings and immediately terminate them.

The Director of Public Prosecutions presented a ***nolle prosequi*** signed by him to the court and stated the reasons why. Counsel for the Plaintiff raised objection to the entry of the ***nolle prosequi*** and after

hearing submissions from both sides, on 18th May 2005, the Magistrate rendered her ruling and accepted the ***nolle prosequi*** and terminated the Plaintiff's proceedings. The Plaintiff was aggrieved by the entry of the ***nolle prosequi*** and termination of the private prosecution and filed this Originating Summons on 19th May 2005 challenging the same.

THE PLAINTIFF'S SUBMISSIONS

Mr. Imanyara, Counsel for the Plaintiff explained in his submissions the reasons why they preferred a private prosecution. These were that, even though the alleged offences were committed by the First Lady in the presence of Police Officers, they took no action to apprehend the First Lady; the Plaintiff made a report to Police but no action was taken; when the Plaintiff went to Police Station on 13th May 2005, 2 weeks after the incident when he went to pick up his P3 form, Police advised him in the hearing of his Advocate, **Mr. Ojwang Agina**, that since the matter related to the President's wife, the Plaintiff's only recourse was to file a private prosecution. Further to the above, Statehouse issued a statement questioning why the Plaintiff was at Nation Centre when he was an employee of KTN and hence justified what had happened to the Plaintiff.

In his submissions, **Mr. Imanyara**, Counsel for the Plaintiff heavily relied on the holding in the case of **KIMANI V KAHARA [1985] KLR 79** which set out the guidelines in the filing of private prosecutions. Counsel said that it was held in the above case that there must be a formal charge sheet signed by a magistrate before leave can be granted to institute a private prosecution and that the Plaintiff has to appear in court. According to **Mr. Imanyara,** the Director of Public Prosecutions intruded in the proceedings, which were made ex parte to the magistrate.

Counsel noted the Director of Public Prosecutions conceded to have been aware of the complaint by the Plaintiff at the Police Station but that the Attorney General had not had sufficient time to act and that there was no evidence that the Attorney General had refused to act. Counsel said that if the time was short for the Attorney General to act on the complaint or there was no report to the Attorney General, the Magistrate had the power to adjourn the matter to give the Attorney General sufficient time but if it was a straight forward case the court could grant permission to commence the private prosecution. **(See KAHARA CASE)** He argued that the Director of Public Prosecutions therefore interfered with the magistrate's performance of her duties by preventing her from doing what the law requires her to do and the magistrate did observe in the ruling that her hands were tied and yet there was not yet a formal charge before the court. Counsel submitted that the entry of ***nolle prosequi*** was null and void because when it was entered, the magistrate had not signed the charge sheet and the magistrate should have rejected the ***nolle prosequi***. Counsel further argued that it was all due to interference by the Director of Public Prosecutions that resulted firstly in the denial of the Plaintiff's application and secondly a breach of the principle of separation of powers.

Mr. Imanyara also submitted that under **Section 3** of the Judicature Act, Chapter 8 Laws of Kenya, the courts of law are enjoined to apply the law in accordance with the **Constitution** which recognized the three arms of government, that is, the Executive, the Legislature, and the Judiciary. Counsel said that though the Attorney General sits in Parliament as an ex officio member and in Cabinet as the Chief Legal Advisor of Government, he has no seat in the Judiciary, and has no role in the manner in which decisions are made by the Judiciary when he exercises his powers under **Section 26** of the **Constitution** and yet that is exactly what the Attorney General did in the Plaintiff's case so that the court found its hands tied. Counsel contends that the court should have been left to exercise its discretion and grant or deny the leave sought by the Plaintiff. It is the duty of this court, in exercise of its supervisory jurisdiction, under **Section 65** of the **Constitution** to ensure that justice is administered.

Counsel further submitted that under **Section 77 (9)** of the **Constitution**, there is an inbuilt requirement that a person who appears before a court of law or any adjudicating authority which determines a person's criminal rights, that that court or authority has to act fairly, give a fair and impartial hearing within a reasonable time. Counsel said that our judicial system is all about obligations or rights and consequences and that **Section 251** of the **Penal Code** imposes an obligation on people not to commit assaults so that if one does it, there are consequences. He said that the rights to a fair and impartial

hearing are available to both civil and criminal proceedings. Since there were 2 parties before the court, that is the complainant, **Otieno Clifford Richard** and the Respondent, **Mrs. Lucy Muthoni Kibaki,** it was incumbent upon the court to give both sides a fair hearing but instead the Attorney General interfered, entered a ***nolle prosequi*** and therefore there was no fair hearing. Counsel said that the right of access to justice must not be impeded by instruments that take it way. Apart from the **KAHARA CASE**, Counsel also cited the following cases:

1. **SUGUMAR BALAKRISHMAN V PENGARAH N. SABAH (2000) 1 LRC 301** – a Malaysian case, which dealt with the question of right of access to court. The court in that case held that the **Constitution** protected the right to equality before the law and equal protection of the law and the public decision maker had a duty to act fairly.

2. **GREGORY & OTHERS V REP [2004] 1 KLR 55**

In the above case, the court observed that though the Attorney General had wide powers under **Section 26 (3)** to enter a ***nolle prosequi***, such power was subject to distortion or abuse and where the ***nolle prosequi*** is against public policy or is oppressive, that power would be subject to the court's oversight and such decision can be reviewed by the High Court under **Section 123 (8)** of the **Constitution**. Counsel further said that it is up to the court to consider the merits of the private prosecution but not the Attorney General.

Counsel said that in the instant case, had a ***nolle prosequi*** not been entered, the court would have been allowed to consider the Application to start the private prosecution on merit and the Attorney General's action amounted to an abuse of the court process and should be subject to review by this court.

In **SMYTHE V USHEWOKUNZE & ANOTHER [1998] 4 LRC 120** – a Zimbabwe case, the court observed that the prosecutor must dedicate himself to the achievement of justice without impartiality and place before the court all material essential for investigation. In the instant case, Counsel said that the Attorney General should have told the court all the reasons why the proceedings should not continue but he failed to do so. In the above decision the court also observed that the court has a duty to interpret provisions of the **Constitution** in a wider manner while considering violation of the individual rights.

In the case of **IVAN V AG [1999] 2 LRC 716,** the court held that the Attorney General's power to prosecute is not absolute or unfettered but is open to review. If that power is not controlled, it will be condoning the use of executive power to pervert the criminal justice system.

On the question of the Plaintiff having an alternative remedy as contended by the Defendant, **Mr. Imanyara** argued that availability of an alternative remedy is not a bar to the Plaintiff seeking a constitutional remedy. See **DIRECTOR OF PUBLIC PROSECUTIONS V LEBONA [1998] 4 LRC 524 (LESOTHO).** The court held that to withhold a remedy on the ground that other adequate means of redress were available would be a mockery of the intention underlying the constitutional guarantee of a fair hearing.

THE DEFENDANT'S SUBMISSIONS

In rebuttal, the Director of Public Prosecutions **Mr. Tobiko** relied on an affidavit sworn by himself dated 4th October 2006 and skeleton arguments filed on 9th October 2006.

He opened his submissions by distinguishing the **KAHARA CASE** which is the anchor of the Plaintiff's submissions, with this case. **Mr. Tobiko** said that whereas the **KAHARA CASE** involved the granting of permission to a private prosecutor to prosecute, interpretation of **Section 88 (1)** of the **Criminal Procedure Code** and hearing at a trial, the issue of ***nolle prosequi*** was not the subject of consideration in that case.

The learned Director of Public Prosecutions submitted that in the **KAHARA CASE**, the court was considering the principles which should guide the magistrate under **Section 88(1)** of the **Criminal Procedure Code** in granting permission to a person other than a public prosecutor or other officer generally or specifically authorized by the Attorney General to conduct a prosecution of any other person, and that such person cannot apply for permission or leave in the absence of the subject or person to be charged. The court also held in **obiter** that before the Attorney General can exercise control over a private prosecution he must take over the case. Consequently, the Director of Public Prosecutions argued, the principles set out in that case have no application to this case and there is no issue as to whether or not the Attorney General took over the proceedings.

Secondly the Director of Public Prosecutions argued that though Counsel for the Plaintiff argued that the Plaintiff had adopted the procedure in the **KAHARA CASE** in the application before the lower court, that was not true because the Plaintiff had skipped the procedure by first asking for issuance of summons under **Section 90** of the **Criminal Procedure Code** before complying with **Section 89 (4**) of the **Criminal Procedure Code**, where the magistrate should have accepted the complaint made on oath, signed the charge sheet and thereafter **Section 88 (1) Criminal Procedure Code** would have been invoked where the prosecution seeks permission to commence a private prosecution. It was the Director of Public Prosecutions submission that the Plaintiff had not followed the proper procedure for commencement of a private prosecution.

As regards the magistrate's ruling upon being presented with a ***nolle prosequi***, the Director of Public Prosecutions submitted that all the magistrate expressed was that she could not question the ***nolle prosequi*** as the law was clear and she had no choice but comply. The Director of Public Prosecutions submitted that the magistrate never imputed any impropriety on the Attorney General regarding the entry of ***nolle prosequi***.

The Director of Public Prosecutions further submitted that the Plaintiff has not demonstrated that any of his constitutional rights under **Sections 70** to **83** of the **Constitution** has been breached or violated as there is no right known as bringing a private prosecution. That the stoppage of the commencement of a private prosecution by entry of a ***nolle prosequi*** is not a violation of any constitutional right. The Director of Public Prosecutions argued that there is no specific provision of the law that has been referred to that provides for private prosecution. The Director of Public Prosecutions relied on the **GREGORY CASE** (supra) where the court found that the claim of a general right to a private prosecution was not tenable because under **Section 26 (3) (b)** of the **Constitution** it is the Attorney General who has the right to institute or undertake any criminal prosecutions and finding that one had a general right of prosecution would be contrary to public policy.

On the question whether there were criminal proceedings in existence at the time of entry of the ***nolle prosequi*** by the Director of Public Prosecutions, he submitted that a ***nolle prosequi*** cannot be exercised in a vacuum and that there are 2 ways in which to institute criminal proceedings; that is by making a complaint or bringing a person before a magistrate who can be arrested without a warrant. The Director of Public Prosecutions said that it is a complaint that originates criminal proceedings. **Section 2** of the **Criminal Procedure Code** defines a complaint as an allegation that a person known or unknown has committed or is guilty of an offence and in this case, the Complainant had made a complaint on oath, sworn and signed by the Plaintiff on 16th May 2005 and it was received and registered by the court. That there was a draft charge signed by the Complainant's Advocate and in the Counsel's view, the filing of the complaint and its acceptance by the court constituted adequate criminal proceedings.

The Director of Public Prosecutions relied on the case of **OKELLO V REP [CR AP NO. 426 OF 2001]** which considered what proceedings before a court of law meant and that court referred to **BLACKS LAW DICTIONARY 5TH ED pg 1083** which defines "**proceedings to be the form and manner of conducting juridical business before a court or a Judicial Officer, from commencement to the execution of judgment".** In that case, the court found that mentions were part of the court proceedings. The Director of Public Prosecutions concluded that there was an exercise before a Judicial Officer on 16th May 2005 which are proceedings. He said that unlike the **KAHARA CASE** which held that the subject had to be present to plead and was interpreting the procedure of trying a case, in this case,

the question is when criminal proceedings are deemed to have been instituted. The Director of Public Prosecutions also cited the cases of **REP V OLE NTIMAMA [HC CR REV NO. 23 OF 1995]** and **RAILA V PROF SAITOTI & OTHERS [MISC APPL NO. 31 OF 1995]** where the courts considered similar issues and found that there were proceedings in existence and the ***nolle prosequi*** was entered properly. The Director of Public Prosecutions argued that **Section 26 (3) (b) & (c)** of the **Constitution** provides that where the Attorney General considers it desirable he can take over, continue or discontinue criminal proceedings instituted by another person or authority at any stage before judgment is read and in the present case, the Director of Public Prosecutions informed the magistrate about the instructions he had, to terminate the proceedings and the Attorney General did not require the court's leave to take over or terminate the proceedings.

On the submission that the entry of the ***nolle prosequi*** by the Attorney General interfered with functions of the Judiciary and hence a violation of the principle of separation of powers, the Director of Public Prosecutions argued that although the Attorney General sits in Parliament as an ex officio member he does not enter a ***nolle prosequi*** as a member of the cabinet but he does so pursuant to the provisions of the **Constitution**. He cited instances where the Attorney General interacts with the Judiciary, for example, he is a member of the Judicial Service Commission under **Section 68** of the **Constitution**, he represents the Judiciary or Judicial Officers in proceedings brought against them and that cannot be seen to be a breach of the principle of separation of powers. Counsel said that the Plaintiff has not demonstrated how the interference occurred. The Director of Public Prosecutions dismissed the authorities cited on this point as irrelevant.

On the question of whether by entering the ***nolle prosequi*** the Attorney General denied the Plaintiff an impartial, independent and fair hearing, the Director of Public Prosecutions said that **Sections 77 (1)** and **77 (9)** of the **Constitution** deals with the issue of fair hearing. Learned Counsel explained that **Section 77 (1)** relates to a criminal case where one is charged and provides that such a person ought to be given a fair hearing within a reasonable time by an impartial and independent court. That the section is not applicable to this case because the Plaintiff was not charged, instead he had complained. The learned Director of Public Prosecutions argued that **Section 77 (9)** of the **Constitution** relates to adjudicating of civil rights and does not deal with criminal proceedings and so does **Section 77 (10)** of the **Constitution,** which provides that all proceedings will be conducted in public except where otherwise agreed by the parties. Counsel denied that the proceedings could have fallen under **Section 77 (9)** of the **Constitution**. Learned Counsel argued that **Section 89** of the **Criminal Procedure Code** envisages proceedings by a private prosecution being of a criminal nature but not civil and therefore the Plaintiff has failed to demonstrate which of his rights under **Sections 70** to **83** of the **Constitution** have been violated nor has he demonstrated in what manner they were violated. Counsel relied on the case of **SHABRACK ITHINJI V REPUBLIC [HCCC NO. 331 OF 2002]** where the court observed that the Plaintiff had failed to show which provision of law had been infringed and the manner in which it was infringed.

In reply to the allegation that the Attorney General had abused his powers, the Director of Public Prosecutions submitted that though the Attorney General had wide and unfettered powers to institute or take over and discontinue criminal proceedings, the said powers were not absolute and had to be exercised judiciously, fairly and reasonably. He noted that under **Section 123 (8)** of the **Constitution**, the court can interfere with Attorney General's exercise of the said powers if the Attorney General takes into account irrelevant matters, acts in bad faith, (*mala fides*) or acts unreasonably. Counsel observed that it is upon the one who alleges to prove interference, ill will or bad faith or consideration of irrelevant matters. The Director of Public Prosecutions also noted that the Attorney General had no obligation to give reasons to the lower court as to why the ***nolle prosequi*** was entered, yet the Director of Public Prosecutions acted in good faith and gave reasons which were that, the Attorney General was aware of the complaint, it was made on a Friday 13th May 2005 and on 16th May 2005 the proceedings were commenced and so the Attorney General was not given ample time to act on or process the complaint. He further urged that even if the Plaintiff was informed by a Police officer that the Police could not take action because the subject was the wife of the President, the Plaintiff should have sought advice from the Attorney General.

In response to the Counsel for the Plaintiff and contrary to what the Plaintiff said that it was peculiar in

nature because of the personage concerned, the learned Director of Public Prosecutions argued that because of the peculiar nature of the personage against whom the complaint was made, the Plaintiff should have sought advice of the Attorney General who had to take into account several considerations including whether there was sufficient admissible evidence, and whether it was in the public interest to institute a private prosecution. This is because even if there was overwhelming evidence, but the case touched on State Security or national interest, the Attorney General may have decided not to prosecute due to the public interest.

The Director of Public Prosecutions also submitted that though a party can bring a private prosecution under the **Criminal Procedure Code**, it must be brought in good faith otherwise if the Attorney General was made to believe that it was not commenced in good faith, he can stop it. Counsel made reference to **AMWONA & OTHERS V KBL [HC MISC APP NO. 19 OF 2004]** where the court indicated the steps to be followed before instituting a private prosecution;

(1.) report to police;

(2.) report to Attorney General, and if no response is received;

(3.) institute private prosecution.

In a brief reply to the submissions by the Director of Public Prosecutions, **Mr. Imanyara** submitted that in the **KAHARA CASE,** the Director of Public Prosecutions had appeared for Attorney General as *Amicus curae* and asked the court to state the principles applicable to private prosecutions and the Director of Public Prosecutions has limited the said principles which were meant to guide whoever intended to bring such applications.

He argued that after reporting a complaint to Police it was not necessary to report to the Attorney General again and that the court said there were only 2 stages in making of a complaint, to a magistrate or to police. Since it is the Attorney General who asked the court to set the guidelines, the Attorney General cannot purport to prevent the same court from applying the same principles. Counsel said that there was no requirement that a report be made to Attorney General.

Whereas Counsel agreed that there has to be consideration of public interest, yet, in this case, he questioned whether it was in the public interest for the subject to interfere with the operations of the media in coverage of events that are of public importance. His view was that it is in the public interest to protect freedom of the press and public interest dictated that the ***nolle prosequi*** should not have been entered.

On separation of powers, **Mr. Imanyara** replied that the inclusion of the Attorney General in the Judicial Service Commission is an affront to the principle of separation of powers and the court needs to give meaning to the said principles that are implied in the **Constitution**.

Counsel urged the court not only to look at **Section 77 (9)** but also **Section 65** of the **Constitution** and do justice.

THE ISSUES

The issues for determination as we perceive them from the submissions made by the Plaintiff's Advocate and the learned Director of Public Prosecutions for the Defendant are as follows:

1. How should a Plaintiff seeking permission to conduct private prosecution approach the court;

2. Whether there were proceedings in which ***nolle prosequi*** could be entered;

3. Whether the Plaintiff's rights to a fair hearing and access to justice were violated;

4. Whether there is a constitutional right to institute and conduct private prosecution;

5. Whether the entry of the ***nolle prosequi*** breached the principle of separation of powers;

6. Whether the Attorney General abused his powers;

7. Whether the availability of an alternative remedy is a bar to a party alleging contravention of his constitutional rights.

HOW SHOULD AN APPLICANT SEEKING PERMISSION TO CONDUCT PRIVATE PROSECUTION APPROACH THE COURT

Mr. Imanyara submitted that the ***nolle prosequi*** entered in the Plaintiff's case before the subordinate court, was entered prematurely since the subject/accused was not before the court and the charge had not been accepted by the trial magistrate, and that therefore there were no proceedings in which the ***nolle prosequi*** could be entered. **Mr. Imanyara** relied on the case of **KIMANI VS. KAHARA [1985 KLR 79]** for this proposition. At page 88 of the **KAHARA CASE** (supra), **Simpson** and **Sachdeva JJ** stated: -

"***In the context of section 88, however, trying we think must include taking a plea. It is we think clear that the trial of the case cannot start before the accused person is before the court. As soon as an accused person is before him in court for the purpose of pleading to a formal, duly signed charge no magistrate can properly be described as "trying that case". It is at this stage that an application may be made for permission to prosecute. If in the absence of the accused person permission is purportedly granted to a private prosecutor to conduct a prosecution the power to grant permission cannot be taken to have been exercised by a magistrate trying a case."***

Mr. Imanyara urged that just like the granting of permission for private prosecution in the absence of the accused is premature, null and void, equally the entry of the ***nolle prosequi*** at a similar stage is premature and invalid. That ***nolle prosequi*** could not be entered before permission was granted for private prosecution of the case. **Mr. Imanyara** submitted that the court should adopt that reasoning as the correct position since entry of ***nolle prosequi*** before the trial begun as envisaged in the **KAHARA CASE**, (supra), denied the Plaintiff an opportunity to oppose entry of the ***nolle prosequi*** and that besides the proposed accused person may have opposed the entry of ***nolle prosequi*** in favour of the case being heard in order to accord her an opportunity to clear her name.

Mr. Tobiko did not agree with **Mr. Imanyara's** submission and he urged us to find that in fact the **KAHARA CASE** did not apply to the instant case. **Mr. Tobiko** submitted that the **KAHARA CASE** was easily distinguishable with the instant one on the basis that the **KAHARA CASE** was involved with the meaning of '**a court trying a case**' for purposes of granting permission for private prosecution under **Section 88(1)** of the **Criminal Procedure Code** and not with the issue of when criminal proceedings are deemed to have been instituted. **Mr. Tobiko** argued that under **Section 88(1)** of the **Criminal Procedure Code,** a trial could not be deemed to have commenced in the absence of the subject.

Mr. Tobiko urged us to find that the **KAHARA CASE** set out principles to guide magistrates' courts while exercising their powers under **Section 88(1)** of the **Criminal Procedure Code**, in determining whether or not to grant leave for private prosecution.

We think that the **KAHARA CASE** is relevant to this case and both Counsel have misapprehended the court's decision. We understand the judges in the **KAHARA CASE** to be saying, *inter alia* that in the context of **Section 88** of the **Criminal Procedure Code** "trying a case" includes taking a plea and that no criminal trial can start before the accused is before the court to plead to the charge. That interpretation is quite correct. However, **Mr. Imanyara's** argument was that the Attorney General could not enter a ***nolle prosequi*** in the lower court because the trial had not begun. We shall get back to that issue later in this judgment. We must however point out that there is a difference between institution of proceedings and "**a trial of an accused**" as we shall shortly demonstrate in the subsequent passages of this judgment.

Mr. Tobiko argued that the Plaintiff adopted a wrong procedure before the subordinate court, which did not comply with the provisions of **Section 89(4)** of the **Criminal Procedure Code**. The Director of Public Prosecutions submitted that by applying for summons to issue to the proposed accused before the application for leave to conduct a private prosecution was granted and before the charge was admitted as drawn and signed by the court, the Plaintiff's application was faulty. The Director of Public Prosecutions argued therefore that contrary to his contention, the Plaintiff had not complied with the laid down procedure in **KAHARA CASE**.

Section 85 to **Section 88** of the **Criminal Procedure Code** deal with "**Appointment of Public Prosecutors and conduct of prosecutions".** On the other hand **Section 89** to **Section 90** of **Criminal Procedure Code** deal with the "**Institution of proceedings and making of complaint"**. We think that in the case of 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. We believe that the principles set out in the **KAHARA CASE** at page 89 are good law and provide guidance to a subordinate court when determining the question whether to allow a private prosecution since it spells out certain issues which must be addressed by the court when considering the application for permission to privately prosecute before granting it. We shall set them out again herein below: -

"***Principles to be applied;***

When an application is made under section 88 to conduct a private prosecution we think that the magistrate should question the Plaintiff to ascertain whether a report has been made to the Attorney General 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."

These principles have not been expressly upheld or stated in any cases we are aware of. However, there is at least one High Court case to which our attention was drawn by the Director of Public Prosecutions, which 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. This is **FLORICULTURE INTERNATIONAL LIMITED AND OTHERS**, **[HIGH COURT MISC. CIVIL APPLICATION NO. 114 OF 1997]**, **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

(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 and 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 counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice."

These two cases give guidance to the lower court in the exercise of its powers under **Section 88(1)** of the **Criminal Procedure Code**. In **AMWONA CASE**, (supra) cited to us by the Director of Public Prosecutions, at page 19 and 20 **Emukule J**. states: -

"***In our custom and practice, where an offence is alleged to have been committed, or that there is a conspiracy in the air to commit a crime, an offence, cognizable in law, the first public right of defence is to hie and hasten to report the matter to the nearest Police Station. That is the exhortation of "Utumishi Kwa Wote" that is spread all over the city*** **"to help us fight crime."** ***If there is no response from the Police, or the Police appear reluctant to take up the matter, the next course of action is to report or write to the Attorney General who has power under Section 26(4) of the Constitution to require the Commissioner of Police to investigate any matter which, in the Attorney' General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner is bound to comply with that requirement and is further bound to report to the Attorney General upon such investigation. If the Plaintiff has exhausted those channels and to his dismay, neither the Police, nor the Attorney General take up his complaint he/she is legally entitled to seek permission under Section 88(1) of the Criminal Procedure code, to institute what is commonly called a "private" or a "citizen's" prosecution."***

We think that **Emukule J.** in this case was commenting on the various steps an individual may take to have his complaint acted upon by the public prosecutorial mechanism and how they graduate from the Police to the Attorney General and finally to private prosecution, but was not setting hard and fast rules that must be complied with in that process. We understand the Judge in **AMWONA CASE**, (supra) to be also saying, and with which we associate, that the authority vested with the jurisdiction to grant permission to privately prosecute criminal proceedings lies with a magistrate and not the Attorney General.

It is quite clear in light of the various authorities cited to us by both parties, that on this question of a private prosecution and institution of proceedings by a private person that first and foremost, permission must be sought for and obtained from a subordinate court before institution of the private prosecution under **Section 88(1)** of the **Criminal Procedure Code**. Before permission is granted there cannot be said to be a prosecutor in that court. It is after the permission has been granted that the private prosecutor acquires competence to act as one and to institute proceedings. 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**.

The Director of Public Prosecutions submitted that the proceedings instituted by the Plaintiff before the lower court were faulty and the procedure adopted wrong by reason of the fact that the Plaintiff applied for issuance of summons which was prayer 3 of his Notice of Motion, before the permission to

privately prosecute the matter, which was prayer 1 of his application, was granted. We have already set out prayer 3 of the Notice of Motion before the Chief Magistrate's court, but we shall set it out again here under for convenience;

*"**3. That the Hon Court be pleased to issue summons compelling the attendance of Her Excellency Mrs. Lucy Muthoni Kibaki to appear before the Hon. Court on a date specified in the summons to enable the Hon. Court deal with the charge."***

We note that the Plaintiff was applying for issuance of summons in order for the court to deal with the charge against the accused. The Plaintiff was not asking for summons to enable the presence of the accused person as the application for permission to privately prosecute her was being sought or urged. The prayer is very clear and it seeks summons to be issued to the accused person to answer the charges brought against her. In so far as the Plaintiff was applying to the court to have the accused person compelled to attend court to answer the charges before the plaintiff was permitted by the court to conduct private prosecution, then the plaintiff was overstepping and not following the proper procedure. We agree with the Director of Public Prosecutions' observation in that regard. We think that in order to avoid the confusion that seems to have attended applications of this nature we recommend that in order to have some proper procedure that a private prosecution in criminal proceedings should be commenced, first by an application before a subordinate court under **Section 88 (1) of Criminal Procedure Code** for permission to conduct private prosecution. That application should be heard first and determined. The magistrate hearing such an application should be guided by the principles in the **KIMANI VS. KAHARA CASE**, (supra), and **THE FLORICULTURE INTERNATIONAL LIMITED CASE**, (supra), as set out in this judgment. After permission has been granted, only then can the Plaintiff institute criminal proceedings in any of the three ways we have set out hereinabove. After the complaint is accepted, a charge should then be framed and signed by the Complainant and also the Magistrate. After the charge has duly been signed by the Magistrate, then only, can the Magistrate issue either summons or warrant to compel the attendance of the accused person before the court under **Section 90** of the **Criminal Procedure Code,** that is, if the accused has not already been brought before the court on arrest without warrant as envisaged under **Section 89(1)** of the **Criminal Procedure Code**. Once the accused person has appeared before the court, the trial should then commence with the magistrate reading out the charge to the accused person in the language that he or she understands.

We find and hold that the Plaintiff in his application for permission to conduct a private prosecution before the subordinate court overstepped the proper procedure by applying for issuance of summons under **Section 90(1)** of the **Criminal Procedure Code** before permission to institute private prosecution under **Section 88(1)** of the **Criminal Procedure Code** was granted and that, in the circumstances the Application for the issuance of summons was incompetent.

WHETHER THERE WERE PROCEEDINGS IN WHICH NOLLE PROSEQUI COULD BE ENTERED

The next issue we shall consider and which is closely related with the former is, were there proceedings in existence at the time the ***nolle prosequi*** was entered? Or in other words at what stage can the Attorney General enter a ***nolle prosequi*** in a criminal case? **Mr. Imanyara** in his submissions argued that the Attorney General can only enter ***nolle prosequi*** after the trial has commenced and that the trial cannot commence until the charge has been signed and the accused person is before the magistrate. **Mr. Imanyara** reasoned that it would be wrong for the Attorney General to exercise his power to enter ***nolle prosequi*** before the trial commences because he would be acting in a vacuum and that it prevents an Plaintiff from opposing the entry of ***nolle prosequi*** and more importantly, denies the accused person the right to choose to face the trial and clear his or her name. The Director of Public Prosecutions on the other hand, in addition to his submission that the Plaintiff adopted a faulty procedure in bringing the application to court, which we have agreed with, added that in any event the Attorney General had power to enter into the proceedings and enter ***nolle prosequi*** on the grounds that there was a draft charge, which even though not signed by the magistrate was nevertheless signed by the Plaintiff's Advocate and stamped by the court. The Director of Public Prosecutions submitted that there were in fact proceedings conducted by the court when it heard the Plaintiffs Advocate for issuance of summons as evidenced by

the annexed proceedings of the trial court.

The hand written proceedings are before us and are marked "**KTI"** in the Defendant's replying affidavit. We must comment that the **Coram** of the court was not properly recorded in so far as it indicates that the court prosecutor was **Mr. Murgor** the Director of Public Prosecutions then. As of the 16th May 2005, there was no prosecutor before the trial magistrate. There was only an application for permission to institute a private prosecution.

The record shows **Mr. Imanyara** making an address as follows: -

"***Imanyara:*** ***This is a Misc. Application for leave to institute a private prosecution. For now I pray for order 3 in the notice of motion. It is to appear before the Hon. Court on a date specified in the said summons to enable the court deal with the charge in line with the decision in Kahara's case where such proceedings cannot be held in the absence of the said party.***

Signed

Mrs. Mutoka

16/5/05"

We also note the Director of Public Prosecutions' address in which he indicated that the Attorney General had just learnt of the case and that he had not received any investigation file on it or report from the Complainant and that the Attorney General was of the view that the proceedings were commenced for extraneous reasons and therefore his decision to take over the proceedings and terminate them under **Section 26(b)** and **(c)** of **Constitution** and **Section 82** of the **Criminal Procedure Code**.

The Director of Public Prosecutions urged us to consider the definition of "**complaint**" under **Section 2** of the **Criminal Procedure Code** to find that since a complaint originates proceedings, there were already proceedings in court at the time the ***nolle prosequi*** was entered. Under **Section 2** of the **Criminal Procedure Code**, "**complaint**" **means** "**an allegation that some person known or unknown has committed or is guilty of an offence**". A "**complainant**" **means** "**a person who lodges a complaint with the police or any other lawful authority**"

The Director of Public Prosecutions relied on case of **OKELLO VS. REPUBLIC [H.C. MISC. CRIMINAL APPLICATION NO. 426 OF 2001]** at page 9 where **BLACK's LAW DICTIONARY 5th edition** page 1083 is quoted as giving the following definition of proceedings: -

"***Proceedings: in a general sense, is the form and manner of conducting judicial business before a court or judicial officer. Regular and orderly process in form of law, including all possible steps in an action from its commencement to the execution of judgment."***

The Director of Public Prosecutions also relied on the case of **REPUBLIC THROUGH JOSEPH NAMU MBUGUA & OTHERS VS. WILLIAM OLE NTIMAMA, [H. COURT CRIMINAL REVISION NO. 23 OF 1995]** at page 14 of the said judgment **Aluoch** and **Amin JJ** observed: -

"***We find that the learned chief magistrate duly signed the summons as provided in section 89 of the Criminal Procedure Code. The complaint was made in writing. It was duly signed by the Chief Magistrate. There were adequate proceedings before the Chief Magistrate which the court had signed and duly authorized. These were proceedings instituted in terms of section 89(1) of the Criminal Procedure Code…"***

In the **Ntimama Case**, (supra), the court held that once the trial magistrate signed the summons requiring the accused person to appear before court and answer the charges in a private prosecution, then there were adequate proceedings before the court.

The Director of Public Prosecutions also relied on the case of **RAILA ODINGA VS. PROF. SAITOTI & OTHERS [MISC. CRIMINAL REVISION APPLICATION NO. 31 OF 1995]** at page 132 of the Judgment, **Pall** & **Juma JJ** held: -

"***Plain and ordinary meaning of Section 89 of the Criminal Procedure Code is that as soon as a complaint is made to a magistrate having jurisdiction of the wrong doing of a person or persons criminal proceedings are instituted and come into existence. Once criminal proceedings are instituted the Attorney General is empowered under Section 26 of the Constitution to take over either straight away or at any subsequent stage of the existence of those criminal procedures before the verdict or judgment is given."***

We have been urged by **Mr. Imanyara** to find that the two decisions of **Ntimama case** and **Saitoti case**, were decided ***per incuriam*** and were not binding on this court.

The **Ntimama case** was concerned with an application for revision of an order of the Chief Magistrate recording a ***nolle prosequi*** and terminating the proceedings against the accused person before the appearance of the accused person in court but subsequent to service of summons upon him to answer the charges as laid out in the complaint.

The **Saitoti case** was concerned with an application for revision of an order of the Chief Magistrate in which she allowed the Director of Public Prosecutions to take over the private prosecution against the accused persons and in the absence of the Plaintiff's Advocate, under **Section 26(3**) of the **Constitution** and to terminate them under **Section 82(1)** of the **Criminal Procedure Code**. This was after summons to the accused persons had been issued and served upon them but before they appeared in court. Even though the facts and circumstances of the two cited cases are different from those in the instant case in that no summons had been issued in this case, we think that the courts' findings as to what constitutes criminal proceedings and the powers of the Attorney General to take over such proceedings apply to the circumstances of this case.

We have already found that the "**trial of the accused person**" had not begun because the accused person was not before the court. However, the proceedings of the case had commenced. The proceedings commenced the moment the complaint was filed in court in writing together with the Notice of Motion application brought under **Sections 88(1), 89** and **90** of the **Criminal Procedure Code** seeking among other prayers permission to conduct private prosecution and when steps were taken by the Plaintiff to prosecute his application. We think that 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: -

(i) Privately prosecute a case; and

(ii) 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.

The application for permission to privately prosecute a criminal case is part of a process that needs to be ventilated in full before the subordinate court. It is good practice and an important safeguard if the application were served on the accused person and the accused should be free not only to be allowed in

court at the hearing of the application for permission to prosecute but also to address the court if he or she desires to do so. It is at this stage that the court must apply the principles and safeguards we have set out above to satisfy itself that before the Plaintiff filed the application in the subordinate court for permission: -

(1.) He had reported to the Police and or the Attorney General; and

(2.) reasonable opportunity was accorded to either of the two state agencies to commence public prosecution; and

(3.) that the two public prosecutorial machineries have declined to institute the criminal proceedings or have acted with culpable inertia and partiality; and

(4.) that the decision not to institute public prosecution by the state agencies is ***mala fide***, without reasonable cause; and,

(5.) that the Plaintiff has a prima facie case, has suffered injury or damage personal to himself and that he is not actuated by malice, politics or ulterior considerations devoid of good faith.

The Plaintiff did not follow the due procedure as aforesaid denying the magistrate an opportunity to satisfy herself that the Plaintiff had exhausted the public prosecutorial machinery, whose custodian is the Attorney General, before filing the application for permission to privately prosecute. Since the Plaintiff overstepped his bounds in the manner he prosecuted his application before the lower court, we are satisfied that the Attorney General was right to enter into the proceedings and take over the proceedings, in exercise of his constitutional power under **Section 26(3)** of the **Constitution** and by entering ***nolle prosequi*** in exercise of his statutory power under **Section 82(1)** of the **Criminal Procedure Code**. The Plaintiff's argument before this court that there were no proceedings for the Attorney General to take over and that therefore the entry of the ***nolle prosequi*** at the stage it was presented to court was premature lacks in merit. The Plaintiff was in a great hurry to institute the criminal proceedings to the extent of circumventing the due legal processes available to him as indeed to all citizens and aggrieved parties through the public prosecutorial machinery and government agencies. We find the opinion of the Attorney General that the Plaintiff's action was motivated by ulterior motives and bad faith was reasonable in all the circumstances of the case. Even though the due process was not followed by the Plaintiff in the manner in which he prosecuted his application before court, we find there was judicial action undertaken by the court on receipt of the Plaintiff's Notice of Motion and written complaint, by causing a file to be opened and setting the application before the trial Magistrate who proceeded to hear the Plaintiff's advocate and the Director of Public Prosecutions.

We find and hold that that lodging of the application in Court and the placing of the matter before a magistrate for consideration resulted in proceedings. We find and hold that proceedings did exist at the time the ***nolle prosequi*** was entered before the trial magistrate by the Attorney General. We shall go further and find that the Attorney General had power not only to enter into the proceedings on the first day that the Plaintiff appeared before the court, but could as well have filed the ***nolle prosequi*** or could have opted to appear and enter it in court even before the Plaintiff's Advocate was allowed to address, with the resultant effect of effectively terminating the proceedings. The Attorney General's powers to enter ***nolle prosequi*** before the lower court, was unfettered subject only to the oversight powers of the High Court under **Section 123(8)** of the **Constitution** to commence criminal proceedings.

We further find and hold that there were proceedings in court at the time the ***nolle prosequi*** was entered and that therefore the entry of the ***nolle prosequi*** at that stage was not premature.

WHETHER THE PLAINTIFF'S RIGHTS TO A FAIR HEARING AND ACCESS TO JUSTICE WERE VIOLATED

The Originating Summons has been brought under **Sections 60, 65, 77(9)** and **84** of the **Constitution**. **Mr. Imanyara** argued that **Section 77(9)** of the **Constitution** applied to this case. Counsel submitted

that the said section had 2 limbs;

(i) Civil and

(ii) Criminal

He urged that crime was an obligation with penal consequences and that the Plaintiff was in this case specifically not relying on **Section 77(1)** of the **Constitution**. **Mr. Imanyara** urged that the subordinate court had the right and power under **Section 77(9)** of the **Constitution** to conduct a fair hearing, independently and impartially to determine the existence and extent of the Plaintiff's criminal right or obligation. Counsel submitted that the Attorney General had no power to direct the subordinate court in the exercise of those powers and that there was interference and that the magistrate was prevented from exercising her judicial function thereby preventing the Plaintiff from accessing the court and from having a fair hearing. Counsel submitted that the learned trial magistrate was outraged by the manner in which the ***nolle prosequi*** was entered. Counsel relied on the language used by the trial court in its ruling to demonstrate that the court was outraged. He quoted from the court's ruling such words as "**court was very unhappy with the conduct of the Director of Public Prosecutions**" and "**the entry of *nolle prosequi* was unfair, contrary to public expectation and public policy**" and that it "**trampled on the rights of the vulnerable, helpless and downtrodden**" etc. Counsel submitted that the learned trial magistrate felt frustrated by the entry of the ***nolle prosequi*** and that the said entry prevented justice from being administered. **Mr. Imanyara** submitted that under **Section 77(9)** of the **Constitution** the court was granted power to act independently, fairly and impartially to determine the existence and extent of criminal right or obligation and that in those circumstances, the court should have been given the chance to hear both parties. Counsel argued that the entry of the ***nolle prosequi*** was used to impede the right of access to court. He relied on two authorities and urged us to apply the same language in the interpretation of the right to access court. The first one is **SUGUMAR BALAKUSHNAN vs. PENGARAN SABAH and ANOTHER (2000) 1 LRC 301)** at page 302-paragraph f – g and page 303 paragraphs (a) thus: -

"***Article 8(1) of the Federal Constitution, which protected the right to equality before the law and to equal protection of the law, struck at the heart of arbitrariness in public decision making by imposing upon a public decision maker a duty to act fairly. The duty to act fairly was recognized to comprise two limbs: procedural fairness and substantive fairness. Procedural fairness required that when arriving at a decision, a public decision maker had to adopt a fair procedure. The doctrine of substantive fairness required a public decision maker to arrive at a reasonable decision and to ensure that any punishment he imposed was not disproportionate to the wrongdoing complained of. It followed that even if in arriving at a public law decision, the decision maker observed procedural fairness, his decision could nevertheless be struck down if it was found to be unfair in substance.***

303 (a) The federal Constitution entrusted to an independent judiciary the task of interpreting the supreme law and, indeed, all laws enacted by the legislative arm of government. Hence, it is to the courts that a citizen had to turn to enforce rights conferred by the Federal Constitution or other written law or existing at common law. Article 5(1) of the Federal Constitution, which contained a guarantee of personal liberty, should be given a broad and liberal interpretation so as to include the liberty of an aggrieved person to go to court and seek relief such as, inter alia, judicial review of administrative action."

The second case quoted is **GREGORY AND ANOTHER vs. REPUBLIC THRO' NOTTINGHAM & 2 OTHERS (2004) 1 KLR 547** at page 574: -

"***The private prosecutor, therefore, requires leave of the Court, and it is for the Court to consider the merits of the intended prosecution and to authorize institution of the proceedings. But even then, the Attorney General remains in the background and, at his discretion, he could take over the conduct of those proceedings or even terminate them. There is no doubt, of course, that powers so broad are amenable to distortion or abuse. Suppose the Attorney General, while conducting a prosecution that to all right-thinking people ought to be pursued, abruptly terminates the proceedings by entering nolle prosequi, can this be challenged under the law? It is now clear from case law that the exercise of the***

power to terminate criminal Proceedings is quasi-judicial in nature: Kimani v. Kahara [1985] KLR 79; Gouriet v Union of Post office Workers & Others [1977] 3 ALL ER 70".

We do not see how the **Gregory** case, (supra), supports **Mr. Imanyara's** proposition. Counsel urged that the Attorney General supplanted himself into the proceedings and that by terminating them, the Attorney General usurped powers that were exclusively the preserve of the court.

The Director of Public Prosecutions was of the view that **Section 77(9)** of the **Constitution** did not apply as the same applied only to civil proceedings where a court or adjudicating authority was determining the existence or extent of a civil right or obligation. He submitted further that under **Section 77(10)** the parties to proceedings had the right to have them held in any other way other than in public, a jurisdiction, he submitted, which was not ordinarily available to parties in criminal proceedings.

Section 77(9) of the **Constitution** provides: -

"***A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."***

It is quite clear to us that this subsection was meant to give direction to the court or tribunal set up to determine the existence or extent of a right or obligation in civil proceedings by providing for the manner and speed in which the proceedings should be conducted. It gives constitutional safeguard for a fair hearing and for the determination of the civil matter within a reasonable time. In our view the phrase, "**civil right**" or "**obligation**" must be read disjunctively as the court or adjudicating authority under **Section 77(9)** of the **Constitution** is to determine, firstly, the existence of a civil right, or obligation and secondly the extent of that civil right or obligation. This provision cannot be imported into the criminal proceedings and has certainly no application in this case.

Section 77(1) of the **Constitution** gives similar protection to a person charged with a criminal offence pertaining to the trial by specifically providing for a "fair trial within a reasonable time by an independent and impartial court". We believe that having provided for this protection under **Section 77(1**) the draftsman did not intend **Section 77(9)** to apply to proceedings of a criminal nature for otherwise there was nothing easier than for the draftsman to specifically state so in that subsection as he did in all other subsections of that section.

On the issue of the court feeling frustrated and prevented from performing its judicial function, and the magistrate's alleged outrage of the entry of ***nolle prosequi,*** **Mr. Tobiko** submitted that the learned trial magistrate never made comments on the propriety or otherwise of the Attorney General's entry of ***nolle prosequi*** or findings or pronouncements about the impropriety or otherwise of the Attorney General's action. The trial magistrate merely emphasized that the law was clear and that the court could not question or refuse the ***nolle prosequi*** even if it was against it.

It is trite law that a subordinate court's jurisdiction, once ***nolle prosequi*** has been entered under **Section 82** of the **Criminal Procedure Code,** subject only to entry of judgment or a verdict in the case, is limited to recording the entry of ***nolle prosequi*** and to acting upon it by immediately discharging the accused person. So long as the final judgment or verdict has not been entered in the case, the proceedings stand terminated immediately on entry of the ***nolle prosequi,*** and the subordinate courts jurisdiction immediately ceases. It is only the High Court which has both the constitutional and inherent powers to question the entry of ***nolle prosequi*** and to oversee the proper exercise by the Attorney General in the management of the prosecutorial powers.

The subordinate court therefore lacked any jurisdiction to make any comments of any nature upon entry of the ***nolle prosequi*** by the Attorney General or to express any misgivings, emotions or views as to the propriety or impropriety of that entry. The Attorney General was not obliged to give any reasons for the entry of ***nolle prosequi*** to the subordinate court and **Mr. Murgor's** submission before the learned trial

magistrate on 16th May 2005 was purely out of courtesy. He was not obliged to give any reasons for tendering the ***nolle prosequi***. **Mr. Imanyara** cannot be heard to say that the Plaintiff or accused subject should have been heard before the ***nolle prosequi*** was entered as that is not provided for in the law and in any event it would be superfluous to make such a provision due to the limited jurisdiction of the subordinate court in the matter.

We find and hold that the Plaintiff was not denied a fair hearing before the subordinate court. We find and hold that **Section 77(9)** of the **Constitution** does not apply to these proceedings. We find and hold that the entry of the ***nolle prosequi*** was not a usurpation of the courts power and neither did its entry interfere or prevent the administration of justice. We find and hold that the subordinate court's jurisdiction upon entry of ***nolle prosequi*** before verdict or judgment is recorded in the case is limited to acceptance of the entry of the ***nolle prosequi*** by making a record of it and by immediately discharging the accused. We find and hold that neither the Plaintiff nor the accused subject or their Advocates have any right to be heard in answer to the entry of the ***nolle prosequi*** made in the subordinate Court.

WHETHER THERE IS A CONSTITUTIONAL RIGHT TO INSTITUTE AND CONDUCT PRIVATE PROSECUTION

The Director of Public Prosecutions challenged the Plaintiff's case arguing that the Plaintiff had failed to establish which constitutional right had been violated and in which manner the violation had occurred. The Director of Public Prosecutions submitted that there was no constitutional right known as right to conduct a private prosecution and that no such right was provided for under **Sections 70** to **83** of the **Constitution** to either bring or maintain a private prosecution. The Director of Public Prosecutions relied on the case of **SHADRACK M. ITHINJI & OTHERS vs. REPUBLIC [HC CIVL CASE NO. 331 OF 2002]**.

Mr. Imanyara did not respond to this issue in his reply to the Director of Public Prosecutions' submissions. However, in his filed skeletal arguments, Counsel relied on the provisions of **Section 77(9**) of the **Constitution** to contend that the Plaintiff had a right to be heard and a determination be made on his application for permission to conduct a private prosecution and that the entry of the ***nolle prosequi*** denied him the right of access to court and right to be heard.

We have already found that **Section 77(9)** of the **Constitution** does not apply to criminal proceedings and that consequently the subordinate court was not mandated to determine the existence or extent of any right or obligation in the matter before it. The application before the trial magistrate was whether or not to grant permission to the Plaintiff to conduct a private prosecution and as we found, when the Plaintiff went before the learned trial magistrate, the said application was not argued.

Reverting to the Director of Public Prosecutions' submission that the Plaintiff has not demonstrated any violation of a constitutional right or the nature or extent of such violation, the **ITHINJI CASE**, (supra), at page 36 to 38, sets out requirements that must exist for there to be a contravention under **Section 84** of the **Constitution** and it has cited various decisions in which that issue was considered.

NYAMU, WENDOH and EMUKULE JJ had this to say, at Pages 36 – 38: -

*'"**In the case of MATIBA vs AG HC MISC APP. 666/90 the court held: -***

A Plaintiff in an application under Section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution he considers has been infringed in relation to him, and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoked the jurisdiction of this court under the Section. It is not enough to allege infringement without particularizing the details, and the manner of infringement."

In another case of ANARITA KARIMI NJERU v. REPUBLIC (1979) 1 KLR 154, Trevalyan and Hancox J held as follows: -

"***We would however again stress that if a person is seeking redress from the High Court on a matter which invokes a reference to the Constitution, it is important, (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."***

Finally, in the case of CYPRIAN KUBAI vs. STANLEY KANYONGA MWENDA NRB MISC 612/92, Justice Khamoni had to this say; -

"***A Plaintiff moving the court by virtue of section 60, 65, and 84 of the Constitution must be precise and to the point not only in relation to the Section, but also to the subsection and where applicable the paragraph and subparagraph of the Section out of 70 to 83, allegedly contravened plus relevant act of that contravention so that the Defendant knows the nature and extent of the case to enable the Defendant prepare accordingly and also to know the exact extent and nature of the case it is handling....'''***

In this case we find that the Plaintiff made general reference to breach of his fundamental rights and mention was made of **Sections 60, 65** and **77(9**) of the **Constitution**. Except **Section 77(9)**, which we have found, does not apply, the rest were not specifically pleaded as per the requirements set out in the authorities considered above.

On the issue whether there is a constitutional right to conduct a private prosecution, we do not think there is such a right expressly provided for in the **Constitution**. It is a statutory right provided under **Section 88(1)** of the **Criminal Procedure Code** and a constitutional safeguard. In **GREGORY & ANOTHER VS. REPUBLIC**, (supra), **LESIIT, IBRAHIM JJ.** and **OJWANG Ag J.** at page 559 observed: -

"***The objective purpose of the opening for a private litigant to institute prosecution was well stated in the English House of Lords Case, Gouriet v. Union of Post Office Workers and Others [1977] 3 ALL ER 70, and as will be noticed, the central role of the Attorney General in prosecuting on matters of public interest stands out. In the judgment of Lord Wilberforce, the following passage appears [p79];***

"***Enforcement of the law means that any person who commits the relevant offence is prosecuted. So it is the duty… of the Director of Public Prosecutions or of the Attorney General, to take steps to enforce the law in this way. Failure to do so, without good cause, is a breach of their duty… The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earlier days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable Constitutional safeguard against inertia or partiality on the part of authority.***

Our understanding of the foregoing passage from the Gouriet case is that the scope for a private person to commence and proceed with a private prosecution is somewhat limited: it generally excludes serious criminal matters; it largely applies where limited private interests are involved; it is in any case subject to the wider powers of the Attorney General which can only be questioned within the ambit of the High Court's oversight powers."

The **FLORICULTURE INTERNATIONAL LIMITED** case (supra), at page 37 **Kuloba, J.** quoted from **RUFUS RIDDLEBARGER VS. BRIAN JOHN ROBSON [1959] EA 841** at page 845 thus:

"***This being so, a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the***

private proceedings are necessary because the Attorney-General and his officers or the Police, do not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons."

Our understanding of these passages from **GREGORY & ANOTHER VS. REPUBLIC** case and the **FLORICULTURE INTERNATIONAL LIMITED** case, is that the right of an individual to bring a private prosecution is a historical right and a valuable constitutional safeguard against inertia or partiality on the part of public prosecution machinery. It is not an absolute right, is subject to the Attorney General's power to take over and at his absolute discretion either continue or terminate them. We find and hold that the right to conduct a private prosecution exists both as a statutory right under **Section 88(1**) of **Criminal Procedure Code** and a constitutional safeguard under **Section 26(3) (b)** of the **Constitution.**

WHETHER THE ENTRY OF THE NOLLE PROSEQUI BREACHED THE PRINCIPLE OF SEPARATION OF POWERS

Mr. Imanyara submitted that under **Section 3** of the **Judicature Act**, the courts of law are enjoined to apply the law in accordance with the **Constitution** and that under the **Constitution** the three arms of government are recognized; that is the Executive, the Legislature and the Judiciary. Counsel submitted that although the Attorney General sits in Parliament as an ex-officio member without voting rights and in Cabinet as the Chief Legal Advisor of Government, he does not sit in the Judiciary and has no role in the manner in which decisions are made by the Judiciary when he exercises his powers under **Section 26** of the **Constitution** and that, that is exactly what the Attorney General did in the Plaintiff's case. Counsel submitted that this court had the duty, under its supervisory jurisdiction under **Section 65** of the **Constitution** to ensure that justice is administered.

Section 65 of the **Constitution** provides: -

"***65(1) Parliament may establish courts subordinate to the High Court and courts-martial, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.***

(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by subsection (2)."

Counsel relied on the case of **DIRECTOR OF PUBLIC PROSECUTIONS OF JAMAICA V. MOLLISON [2003] 2 AC 411 AT PAGE 411**. In that case, the Respondent had been convicted for murder committed when he was 16 years old and was sentenced to be detained during the Governor-General's pleasure. The Court held as follows: -

"***(1) dismissing the appeal, that by giving the Governor-General as an officer of the executive the power to determine the measure of an offender's punishment section 29 of the 1951 Act infringed the principle of the separation of powers implicit in all Constitutions on the Westminster model, including that of Jamaica, that section 4(1) of the 1962 Order, when given the generous and purposive interpretation appropriate for Constitutional provisions relating to human rights, clearly empowered the court to modify and adapt existing laws so as to bring them into conformity with the Constitution and that, accordingly the words "the court" for "Her Majesty" or "the Governor- General" (post, paras 13-17)."***

Mr. Imanyara urged us to find that the entry of ***nolle prosequi*** interfered with the exercise of judicial function which should be exercised exclusively by the judiciary and therefore violated the principle of

separation of powers.

Mr. Imanyara also relied on the Malaysian case of **SUGUMAR BALAKRISHNAN V PENGARAH IMIGRESEN NEGERI [2000] 1 LRC 301** at page 303 holding 2 earlier referred to, and page 304 holding 4;

"***(4) Once reasons were given by a public decision maker for his decision, they may be examined by the court and if it was found that the reasons disclosed constituted considerations foreign to those stipulated by the empowering statute, the court was obliged to hold that the decision was not in accordance with law. In the instant case reasons were given for the cancellation of the permit. Therefore, the reasons disclosed in an affidavit relied upon by the respondents were open to scrutiny by the court."***

Mr. Imanyara urged us to consider the reasons given by the Attorney General in this court why the ***nolle prosequi*** was entered before the subordinate court and find, like in the Malaysian case, that the Attorney General in exercise of those powers violated the principle of separation of powers.

The Director of Public Prosecutions in reply to the Plaintiff's submissions that the entry of ***nolle prosequi*** by the Attorney General interfered with functions of the judiciary and hence a violation of the principle of separation of powers, argued that although the Attorney General sits in Parliament as an ex-officio member he does not enter a ***nolle prosequi*** as a member of the Cabinet but he does so pursuant to the provisions of the **Constitution**. The learned Director of Public Prosecutions drew a parallel with instances where the Attorney General interacts in matters concerning the Judiciary, for instance, he is a member of the Judicial Service Commission under **Section 68** of the **Constitution**, which body recommends appointment of Judges to the President and also deals with discipline of Judicial Officers. The Director of Public Prosecutions also cited instances where the Attorney General represents the Judiciary or Judicial Officers in proceedings brought against them. He urged us to find that when the Attorney General exercised express powers conferred on him by the same **Constitution** which recognized the three arms of government, that it cannot be a valid argument to say that that exercise of constitutionally enshrined power violated an intrinsic doctrine by the same Constitution. In any event, the Director of Public Prosecutions argued that the Plaintiff had not demonstrated the manner in which the Attorney General interfered with judicial power. The Director of Public Prosecutions dismissed the cases cited by the Plaintiff's Advocate and stated that unlike in the cases cited where the court deals with the constitutionality of executive power, the issue before the court was not the constitutionality of the powers of the Attorney General under **Section 26** of the **Constitution**.

The doctrine of separation of powers came into force between the 17th and 18th centuries through the efforts of philosophical luminaries such as Harrington, Montesquieu and John Locke.

From the onset, the basic intention of the doctrine was to limit and control the existence and exercise of the state power of the three principal organs of government, namely, the Legislature, the Judiciary and the Executive. Under the doctrine, each of these organs has distinct state functions whose exercise must be checked by the other two, for and on behalf of the people. It can also be appropriately referred to as separation of functions. No one organ should trench on the powers of another.

The Legislature enacts laws, the Judiciary interprets and enforces the law and the Executive formulates and implements government policies. Separation of powers can be deduced from the words in "**De L.'ESPIRIT DES LOIS VOL 41. Chapter VI (241 Ed. PL.20)**

"***When the Legislative power is united with the same person or body or Magistrates, there is no liberty because it is said to be feared that the same monarch or senate will make tyrannical laws in order to execute them tyrannically. There is no liberty if the judicial power is not separated from the legislative power and from the executive power. If it were joined with the legislative power, the power over the life and liberty of citizens would be arbitrary because the judge would be legislator. If it were joined to the executive power, the judge would have the strength of an oppressor. All would be lost if the same men or the same body of chief citizen or nobility or the people, exercised these three powers, that of***

making laws, that of making public decisions and that of judging the crimes or the disputes of private persons."

Broadly, separation of powers implies the following basic features:

(1). That the state power is vested and exercised by separate organs. It means that each organ is independent of the other.

(2). That the personnel in these organs are different e.g. Ministers do not to sit in Parliament.

(3). That the functions of these organs are different e.g. Ministers do not to have legislative powers nor the legislature executive powers and neither of these can exercise functions of the judiciary.

This separation does not however mean disunity of state power. Ideal separation of powers entails co-ordination, inter-dependence and co-existence. This is indeed the case in our current **Constitution** where the President is both the head of state and chief executive of government, under **Section 23(1)** of the **Constitution** and is also a Member of Parliament under **Section 30** of the **Constitution**. The members of his cabinet including the Vice-President are members of the National Assembly.

We think that there cannot be strict separation of powers and that there must be interaction between all arms of government and that in that interaction, it cannot be argued that there is of necessity a violation of the principle. The Attorney General was exercising his constitutional power under **Section 26 (3)** of the **Constitution** and was not acting as a Member of the Executive neither can the argument that in the exercise of those powers he was preventing the administration of justice or frustrating or preventing judicial function. We find and hold that the constitutional and statutory power of the Attorney General to enter ***nolle prosequi*** is not a violation of the principle of Separation of Powers or an affront to the powers of the Court.

WHETHER THE ATTORNEY GENERAL ABUSED HIS POWERS

Mr. Imanyara's case was that the Attorney General abused the powers conferred to him by **Section 26** of the **Constitution** when he terminated proceedings that were commenced by another person and not by himself or the law enforcement agencies. Counsel submitted that the Attorney General should not have rushed to terminate the proceedings as he did in this case but should have looked at the whole case and do justice. He relied on the case of **SMYTH V. VUSHEWOKUNZE & ANOTHER [1998] 4 LRC 120** at page 125 where the court held thus:

"***A prosecutor must dedicate himself to the achievement of justice (see R v Banks [1916] 2 KB 621 at 623]. He must pursue that aim impartially. He must conduct the case against the accused person with due regard to the traditional precepts of candour and absolute fairness. Since he represents the state, the community at large and the interests of justice in general, the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner (see R. vs Rickert [1954] (4) \|SA 254 at 216]. Like Caesar's wife, the prosecutor must be above any trace of suspicion. As a 'minister of the truth' he has a special duty to see that the truth emerges in court (see 1954 (4) SA 254 at 261 and State v. Juja 1991 (2) SA 52 at 67). He must produce all relevant evidence to the court and ensure, as best as he can, the veracity in court (see State v Msane 1977 (4) SA 758 at 759 and State v N 1988 (3) SA 450 at 463). He must state the facts dispassionately. If he knows of a point in favour of the accused, he must bring it out (see State v. Van Rensburg 1963 (2) SA 343 at 343 and Phato v. ATTORNEY GENERAL of the Eastern Cape [1994] 3 LRC 506 at 523-524.***"

The matter before the **Smyth Case**, a Zimbabwe case, was whether the Plaintiff would be afforded a fair hearing in the event that the 1st Respondent in the case was allowed to conduct the prosecution in light of unsubstantiated allegations he had made in objection to the Plaintiff's release from remand some of which were found to be false. **Mr. Imanyara** was relying on the ***ratio decidendi*** in the case in which the court observed that under **Section 18(2)** of the Zimbabwean **Constitution**, a prosecutor was required to be absolutely impartial, fair and candid in the conduct of criminal prosecution against an accused

person.

Mr. Imanyara continued to submit that when the Director of Public Prosecutions stood before the trial court he did not tell the court the reasons for the decision to terminate the case but quoted **Section 26** of the **Constitution** and told the court that the Attorney General had power to do as he did.

The Director of Public Prosecutions submitted that even though the Attorney General had wide and unfettered power under **Section 26(3)** of the **Constitution,** the Defendant was conceding that those powers were not absolute and that they must be exercised judiciously, fairly and reasonably and that under **Section 123(8)** of the **Constitution** the High Court had oversight powers over the exercise of those powers. The Director of Public Prosecutions then set out what he considered to be the circumstances under which the High Court can interfere with the exercise of power of the Attorney General under the said **Section 26** of the **Constitution,** that is;

(1). If the Attorney General took irrelevant issues into consideration, or

(2). failed to consider relevant issues, or

(3). was actuated by malice, or

(4). was unreasonable.

The Director of Public Prosecutions submitted that the answer to the question whether the Attorney General acted contrary to the Constitution or the law is negative. He submitted that contrary to the Plaintiff's arguments, the Director of Public Prosecutions gave reasons to the subordinate court for the entry of the ***nolle prosequi*** even though he had no obligation to do so, which we agree is the correct legal position.

The Director of Public Prosecutions asked the court to take judicial notice of the fact that 13th May 2005 was a Friday and that 16th May 2005 was a Monday. He submitted that after the Plaintiff made his report to the Police on 10th May 2005, as he stated in his complaint on oath, he was asked to go back to the police on 13th to pick up the P3 form. On 13th, the Plaintiff alleges that some undisclosed Police officers informed him that no action would be taken by the Police because the matter involved the First Lady. The Director of Public Prosecutions submitted that instead of the Plaintiff writing to the Attorney General to complain about it for the Attorney General's action under **Section 26(4**) of the **Constitution**, the Plaintiff went straight to court on Monday, 16th May 2005. The Director of Public Prosecutions submitted that the Attorney General took those events into account and that those were relevant considerations. The Director of Public Prosecutions submitted that just like the former Director of Public Prosecutions informed the lower court, the matter in question required the express directions of the Attorney General considering the peculiarity and status in society of the person against whom the complaint was made. He submitted further that for the same reason the Plaintiff ought to have sought recourse with the Attorney General for his personal consideration and direction before going to court. The learned Director of Public Prosecutions submitted that it was very important for the Attorney General to consider the matter personally because part of his function under the Constitution was to take two factors into consideration:

(1). The issue of whether there was a prima facie case;

(2). The issue whether it was in the public interest to initiate criminal proceedings.

The public interest included consequences on the State security and national interest and that it was the Attorney General and not the Police who was the custodian of public interest. The Director of Public Prosecutions submitted that the Attorney General took those issues into consideration, that they were both legitimate and valid and that in deciding to enter the ***nolle prosequi*** the Attorney General did not abuse his powers. The Director of Public Prosecutions relied on the case of **AMWONA V. KBL**, (supra), at

page 19-20 which we have quoted hereinabove to propagate that upon reporting to the Police and obtaining no response an aggrieved party should report or write to the Attorney General who has power under **Section 26(4)** of the **Constitution** to require the Commissioner of Police to investigate the matter and that where those channels are exhausted and no action is taken then such a person is entitled to seek permission under **Section 88(1)** of the **Criminal Procedure Code** to institute a private prosecution.

As we have repeatedly stated in this judgment, the Attorney General was not obliged to give any reasons for the entry of the ***nolle prosequi*** to the subordinate court before entering the same, as that was superfluous since in any event the subordinate court lacked jurisdiction to question the Attorney General's action. A party aggrieved by the entry of ***nolle prosequi*** had recourse only in the High Court either by filing a constitutional reference or originating summons to challenge the Attorney General's action. As ably put by the Director of Public Prosecutions, the High Court will then require the Attorney General to give reasons for the exercise of his power under **Section 82** of the **Criminal Procedure Code** to enable it determine whether there was any abuse of power and whether therefore, the decision was *mala fides*.

The Director of Public Prosecutions has outlined matters that the Attorney General considered and which led to the decision to terminate the proceedings in the lower court. We have considered them afresh. We noted that the Plaintiff reported the complaint to the Police on 10th May 2005. He was asked to go for a P3 form on 13th May 2005. On 13th May 2005 the Plaintiff reckons that some Police Officer whom he did not name informed him that Police would take no action because the matter involved the First Lady. The Plaintiff reckons that upon receiving that information, which he considered along with the Press Release from the Presidential Press Service contained at paragraph 11 of his 'complaint on oath' and annexed therewith, he believed that no action would be taken and he therefore filed his application for permission to privately prosecute the matter before the subordinate court. Two issues arise here derived from the Counsel's submissions. One, was the Plaintiff obliged to report or write to the Attorney General as **Emukule J**. suggested in the **AMONWA CASE**, (supra). The answer to this question we think will determine the second issue which arises from the submissions made before us which is, given the circumstances and facts of the case in terms of the period of time between the time the Plaintiff reported to the Police and the time he filed his application in court, was the Attorney General's decision to enter ***nolle prosequi*** rushed?

Under **Section 26** of the **Constitution** the Attorney General is the "Principal Legal Advisor to the Government of Kenya" and is the Republic's custodian of the Constitutional and legal authority for the conduct of criminal prosecutions and in the conduct of that duty he may exercise all powers as his discretion dictates that is;

a) institute and undertake criminal proceedings against any person;

b) Take over and continue such criminal proceedings that have been constituted or undertaken by another person or authority;

c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

It cannot be an abuse of power for the Attorney General to exercise his powers under **Section 26(3)** of the **Constitution** to take over and terminate proceedings instituted or undertaken by another person. In this case, there is no dispute that the Plaintiff did not report or write to the Attorney General concerning this matter. We do not advocate that parties who feel that the Police or other authorized authority are guilty of culpable inertia or partiality must report or write to the Attorney General before filing an application for permission to conduct private prosecute. While parties should be free to report or write to the Attorney General if they felt it was appropriate to do so, we think that upon making their reports to the Police, the Police should be given time to conduct their investigations, gather evidence and if necessary exhibits and compile their investigation file and should be allowed time and space to consult superior officers within the investigative and prosecution machinery and give their report before it can be said that bias or inertia has been demonstrated. A time frame cannot be given for this process since what is

reasonable time for one case may not be reasonable for another.

We have considered the circumstances of this case. The Police received the complaint on 10th. Part of the evidence they needed to establish a bona fide complaint of assault was a P3 form. The Plaintiff was told to get one on 13th May 2005 so as to have it filed by a Police surgeon. A statement would of course be required from the Police doctor together with those from the Plaintiff himself and any other eye-witnesses or other relevant witnesses. No statements were annexed to this Originating Summons and neither is there any P3 form. It matters not in our view that the Nairobi Provincial Police Officer was present at the time the alleged offence was committed. The fact that he was present makes him a potential key witness and thus a statement ought to have been taken from him. In the circumstances, when the Director of Public Prosecutions informed the subordinate court that no investigation file had been received by the Attorney General, that was a true factual situation and was no exaggeration. We find and hold that even though the Plaintiff was not obliged to make a report or write to the Attorney General, that both the Police and the Attorney General were not allowed a reasonable time to investigate the complaint and to carefully assess it in order to determine whether or not to institute public prosecution proceedings against the accused person. We also find and hold that the Attorney General was entitled to take into consideration the failure by the Plaintiff to await investigations to be undertaken by the Police and the speedy manner in which the Plaintiff rushed to court, as part of the facts and circumstances relevant to the exercise of his power under **Section 82** of the **Criminal procedure Code**. In fact, **section 82** of the **Criminal procedure Code** falls under the title "**Control by Republic in Criminal proceedings**".

The other relevant factors included the question of public interest. The question of whether to prosecute and when to prosecute are all weighty issues, which the Attorney General must consider and determine in exercise of his powers under **Section 26** of the **Constitution**. We quote from two articles by **Dr. Dickens** and **Elwyn Jones** as quoted in **GREGORY'S CASE** (supra) at page 560:-

"***Dr. Dickens writes (1973) ICLQ at p.11***

It is recognized that one reason… for the selection of offences as requiring the consent of the Director [of Public Prosecutions] is to protect members of the public from oppressive prosecution, but the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that proceedings should be taken in a particular case."

Now this rationalization of the role of the State Law Office in the management of the conduct of prosecutions is accomplished in the following passage from the article by Sir, Elwyn Jones ([1969] CLJ at page 49):

"***The decision when to prosecute, as you may imagine, is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is though desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him to present himself as a martyr. Or perhaps he is too ill to stand his trial without great risk to his health or even to his life. All these factors enter into the consideration."***

No doubt, this case generated public interest involving as it did a complaint against the First Lady of the Republic. The fact that the complaint was against the First Lady is a relevant factor for the Attorney General to take into consideration. The decision whether or not to prosecute, and if so when, were all weighty issues which needed the personal consideration of the Attorney General. We quote from the **FLORICULTURE CASE** (supra), page 26 and 27 thus: -

"***Sufficiency of evidence is determined by getting right answers to and being satisfied with them on, the questions (1) what are the elements of the crime alleged? (2) What are the facts necessary to establish each of the constituent elements of the crime? (3) Who are the witnesses? (4) Are those witnesses readily available and credible? (5) Is their evidence capable of being reasonably believed? (6) Is the court likely to believe that evidence?***

After considering the nature of the crime and the evidence, there may be present important non-evidential questions. These questions will normally revolve around the public interest considerations. In every case, the overriding consideration is the public interest, and not the private one, which must be served by a criminal prosecution undertaken or maintained. It is true, that it is generally in the public interest to suppress crime and punish offenders. But where circumstances make the harm done to the public interest by instituting or maintaining criminal proceedings greater than any harm likely to flow from non-prosecution, and outweigh the desirability of a prosecution, then the criminal process had better not be undertaken. Competing values within a complex society such as ours, must be considered and reconciled and bear in mind for purposes of the public interest are the consequences of a prosecution (1) on the internal and external security of the State; (2) on the international relations with foreign states or key international institutions and organizations; (3) giving rise to the risk of escalating disastrous repercussions, and resultant civil disobedience unfavourable to law and order; (4) enabling the offender to portray himself as a martyr in the course of a trial and thus swaying public sympathy towards an unlawful cause which the prosecution is seeking to suppress; (5) on economic factors affecting the community.

The non-evidential public interest considerations will include the question of the importance of the prosecution. It is in the public interest to concern the courts with acts or omission which are of sufficient importance. This is handled by looking at the seriousness or relative triviality of the alleged wrong, and the consequences and attendant circumstances surrounding the commission of the offence, as well as the likely punishment for the offence. It is not in the public interest to go through the whole process of the criminal law if at the end of the day, perhaps because of extenuating circumstances present in the case, or because the offender had already suffered enough, or he is too ill to stand his trial, so that only a nominal penalty is likely to be imposed. If no real outcome is likely to be achieved by a criminal process, it is a waste of public time, money and resources, to prosecute, besides creating unnecessary social tension in the community."

The Attorney General as we have stated, was not given any chance at all to receive the complaint and to carefully weigh it before the Plaintiff filed his application under **Section 88(1)** of the **Criminal Procedure Code**.

We find and hold that the Plaintiff in this case has failed to show that the Attorney General abused his powers under **Section 26(3)** of the **Constitution**. We have considered all the circumstances surrounding the entry of the ***nolle prosequi*** in this case and are satisfied that the exercise of the Attorney General's powers was not against public expectation or interest or contrary to public policy, was neither motivated by ill-motive, bad faith or *mala fides* nor capricious, oppressive or an abuse of powers as conferred on him by the constitution.

WHETHER THE AVAILABILITY OF AN ALTERNATIVE REMEDY IS A BAR TO A PARTY ALLEGING CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS.

On the question of the Plaintiff having an alternative remedy as contended by the Defendant, **Mr. Imanyara** argued that availability of an alternative remedy is not a bar to the Plaintiff seeking a constitutional remedy**.** He relied on the case of **DIRECTOR OF PUBLIC PROSECUTIONS V. LEBONA [1988] 4 LRC 524** at page 526 where the Lesotho court held as follows: -

"***(2) to withhold a remedy under S.22(2) of the Constitution by invoking the discretion granted by the proviso to that subsection, on the ground that other adequate means of redress were available, would have made a mockery of the intention underlying the Constitutional guarantee of a fair hearing within a reasonable time."***

In our own jurisdiction, the court of Appeal, **Omolo, Tunoi** and **O'Kubasu, JJA** in the case between **RASHID ODHIAMBO ALOGGOH & 245 OTHERS AND HACO INDUSTRIES LIMITED** while interpreting the provisions of **Section 84(1)** of the **Constitution** observed: -

"***The Appellants came to the Constitutional court under Section 84(1) and (6) of the Constitution.***

Section 84(1) provides as follows: -

Subject to sub section (6) if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress"

So there it is, in the plainest language possible; the availability of other lawfully causes of action is no bar to a party who alleges a contravention of his rights under the Constitution. That was the position taken by EDDO, J in the case of RAMLOGAN VS. THE MAYOR OF SAN FERNANDO (1986) LRC (Const), 377 a case from Trinidad and Tobago where the learned judge held at page 378 paragraph (4) of "HELD":

"***The present proceedings were properly instituted, as being well within the ambit of the provisions in the Constitution for protection of rights to property. While the Plaintiff might be able to pursue a claim for judicial review or in private law by an action for trespass, she was nevertheless entitled to invoke the fundamental rights provisions of the Constitution, under section 14(1) of the Constitution, without prejudice to any other action lawfully available to her…."***

We think that the Court of Appeal is very clear on the legal position regarding the availability of alternative remedies. It is not a bar to a party who alleges a contravention of his rights under the **Constitution** and that therefore such a party should be entitled to invoke the fundamental rights and provisions of the **Constitution** without prejudice to any other lawful action available to them. We say no more.

CONCLUSION

We find that the termination of the intended private prosecution before the Chief Magistrate's court by the Attorney General under **Section 26(3)** of the **Constitution** and **Section 82(1)** of the **Criminal Procedure Code** was neither unlawful nor unacceptable interference with the functions of the Judiciary by the executive arm of the government nor a violation of the principles of separation of powers nor an abuse of the powers conferred upon the Attorney General or the **Constitution** under **Section 26.**

From our assessment of the facts, submissions and authorities as demonstrated above, we find that the Plaintiff's Originating Summons should be dismissed and that all the declarations and the consequential orders sought must fail and we so order. In view of the peculiar circumstances leading to this application, we order that the respective parties should bear their own costs.

Lastly, we commend Counsels for their excellent preparation, their disciplined mode of presentation and their courtesy towards one another and towards the court.

Dated and delivered at Nairobi this 17th day of November 2006.

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J. LESIIT

JUDGE

……..……

R. V. WENDOH

JUDGE

……..……

M. J. A. EMUKULE

JUDGE