



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT REVISION CASE OF 1983**

**KIMANI .....APPLICANT**

**VERSUS**

**NATHAN KAHARA.....RESPONDENT**

*(Appeal from the Chief Magistrate's Court at Nairobi, A Rauf Esq, in Private Prosecution Case No 7 of 1982)*

**ORDER**

July 12, 1983, **Simpson & Sachdeva JJ** delivered the following Order of Court on Revision.

Sometime in November, 1982, a complaint sworn by two councillors of Nairobi City Council was made to a senior resident magistrate in support of a support to charge Nathan Kahara (who was then the Mayor of Nairobi) with conspiracy to defraud the public contrary to section 317 of the Penal Code, alternatively conspiracy to commit a misdemeanour namely to defraud the public contrary to section 394 of the Penal Code. A charge sheet containing 39 counts was attached. Both the complaint and the magistrate's signature to the charge sheet are undated.

On November 30, 1982 the two complainants through their advocates Mr. Muite applied under section 88 of the Criminal Procedure Code for permission to prosecute Mr. Kahara. Mr. Kahara was neither present nor represented. Permission was granted by Mr. Aswani, a senior resident magistrate.

On December 14, 1982, the accused appeared before the chief magistrate, pleaded not guilty to all the charges and, his advocates having asked for an adjournment to raise a lengthy preliminary point, was released on his own bond for Kshs 1,000,000 with 2 sureties in the same amount. Submissions on the preliminary were eventually made to the chief magistrate on 21st and 25th January, 1983 by Mr. Georgiadis for the accused, Mr. Muite for the complainants and Mr. Chunga, Principal State Counsel, in the capacity of *amicus curiae*.

The chief magistrate gave his ruling on February 9, 1983 dismissing all the charges against the accused and discharging him. Under section 348A of the Criminal Procedure Code only the Attorney General may appeal from an order dismissing a charge. Mr. Muite accordingly requested the High Court to exercise its powers of revision to revise and/or quash the ruling of the chief magistrate and refer the case to the resident magistrate's court with orders for it to commence the trial and hear the case. Since a number of important points of law arose the Attorney General was invited to appear as *amicus curiae*. Mr. Chunga represented him. Mr. Muite with Mr. Mohamed for the complainants and Mr. Georgiadis with Mr. Mwaura for Mr. Kahara who by this time had ceased to exercise the functions of Mayor. The complainants likewise were no longer councillors. Mr. Muite filed a document which he called a Memorandum of Revision for which there is no statutory provision. Since the complainants were not

parties who could have appealed we were not debarred by section \*\*\*\* from entertaining the proceedings and we allowed Mr. Muite to make submissions on the lines indicated in the memorandum.

In his ruling the learned chief magistrate held that permission having been granted by the senior resident magistrate he had no power to exercise an appellate jurisdiction to reverse it. That is, he had no jurisdiction to consider Mr. Georgiadis' submissions that before granting permission Mr. Aswani should have considered the *locus standi* of the complainants in the matter and should have heard the accused.

He accepted Mr. Chunga's submissions that the discretion of the court in granting permission for a private prosecution must be exercised judicially, sparingly and only on extremely good grounds and that the court must find out if the police or the Attorney-General had been informed and with what result particularly in a case such as this of considerable public interest. He agreed with Mr. Chunga that the recent deletion of the words "inquiry into or" from section 88(1) of the Criminal Procedure Code had the effect of enabling a private person to conduct a prosecution to apply for permission only during a trial, a point Mr. Chunga returned to in his submissions before and which we shall consider shortly. Mr. Chunga asked the court to dismiss the charges. He said "The private prosecutor will not be allowed to assume the responsibility conferred on the Attorney- General," and "The Attorney-General will give his consent to any private prosecution when it is necessary".

The learned chief magistrate concluded by holding that the Attorney- General had ultimate and undisputed control over all prosecutions. Accepting Mr. Chunga's submissions he dismissed all the charges against the accused and discharged him.

Before hearing the submissions of counsel for the complainants and the former accused to whom we shall refer respectively as the applicants and the respondent we invited Mr. Chunga to state the position of the Attorney- General in the matter. He raised two points. In the first place he said the permission was null and void because the magistrate was not trying the case at the time he granted it. Section 88(1) of the Criminal Procedure Code formerly read as follows:

"88(1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the Attorney-General in this behalf shall be entitled to do so without permission."

We shall revert later to the interpretation of the words "trying any case" but it would be convenient at this stage to consider the effect of the deletion of the words "inquiry into or" by the Criminal Procedure (Amendment) Act 1982, (No 13 of 1982). Mr. Chunga submitted and the learned chief magistrate held in his ruling that the effect of this amendment was to remove the power of a magistrate to grant permission before the commencement of a trial. This is not so. He never had that power. The main object of the Criminal (Amendment) Act, 1982, was to replace preliminary inquiries with shorter and more expeditious committal proceedings. The words "inquiry into" referred to preliminary inquiries and their removal does not otherwise affect the meaning of the section.

Mr. Chunga's second point was that the section confers a discretion which has to be exercised judicially and he requested the court to indicate the principles applicable. He submitted that consideration should have been given to the *locus standi* of the applicants who were seeking to prosecute the respondent for offences in which they had suffered no injury. In the absence of personal damages or injury a prosecutor had no *locus standi*. We shall consider this point along with the submissions in respect thereof of Mr. Muite and Mr. Georgiadis.

Mr. Muite invited us to take the opportunity to lay down guidelines on the role of the Attorney-General when he appears in person or by state counsel as *amicus curiae*. We are confident that the Attorney-General knows his role when invited by the court to appear as *amicus curiae* and that there is no need for us to provide guidelines nor would it be proper for us to do so except at his request. We would however add with respect that Mr. Chunga appearing as *amicus curiae* exceeded his functions of advising and assisting the lower court on a matter of public importance when he asked the court to dismiss the charges against the accused.

The main ground of appeal contained in Mr. Muite's submissions was that the learned chief magistrate erred in law in holding expressly or impliedly that the Attorney-General's consent to prosecute or his refusal to prosecute must precede the setting in motion of the machinery of private prosecution or at least that the Attorney-General and/or police must always be involved in the process.

The chief magistrate's decision to dismiss all the charges and discharge the accused was apparently based on his conclusion that the Attorney-General had ultimate and undisputed control over all prosecutions. As a general proposition this is undoubtedly correct but it is necessary to look at the statutory provisions. The powers of the Attorney-General are to be found in section 26 of the constitution which reads as follows:

- “26. (1) There shall be an Attorney-General whose office shall be an office in the public service.  
(2) The Attorney-General shall be the principal legal adviser to the Government of Kenya.  
(3) The Attorney-General shall have power in any case in which he considers it desirable so to do—
- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
  - (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
- (4) The Attorney-General may 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 shall comply with that requirement and shall report to the Attorney General upon the investigation.  
(5) The powers of the Attorney-General under subsections (3) and (4) of this section may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.  
(6) The powers conferred to the Attorney-General by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority: Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.  
(7) For the purposes of this section, any appeal from any judgment in any criminal proceedings before any court, or any question of law reserved for the purpose of any such proceedings to any other court, shall be deemed to be part of those proceedings: Provided that the power conferred on the Attorney-General by subsection (3)(c) of this section shall not be exercised in relation to any criminal proceedings or to any question of law reserved at the instance of such a person.  
(8) In exercise of the functions vested in him by subsections (3) and (4) of this section and by sections 44 and 55 of this Constitution, the Attorney-General shall not be subjected to the direction or control of any other person or authority.”

Under sub-section (3)(b) the Attorney-General can take over and continue criminal proceedings (other than courts-martial) instituted or undertaken by any other person or authority and under para (c) he can discontinue any such proceedings at any stage before judgment. A right by any other person to institute or undertake criminal proceedings can be inferred from these provisions. Section 89 of the Criminal Procedure Code expressly confers the right to institute criminal proceedings on any person by means of complaint to a magistrate and section 88 confers the right to any person to conduct the prosecution subject to the permission of “any magistrate trying the case.”

Thus before the Attorney-General can control a private prosecution he must take it over. Having taken it over he may either continue it or discontinue it by entering a *nolle prosequi* as provided by section 87 of the Criminal Procedure Code. Nowhere can it be inferred from the foregoing provisions that the consent of the Attorney-General is required before a private prosecution can be instituted or conducted.

Mr. Chunga referred us to para 626 of Vol. 10 of *Halsbury's Laws of England* (3rd Edition) which reads as follows:-

**“626. Crimes against the state**

It is the duty of the Attorney-General to institute prosecutions for crimes which have a tendency to disturb the peace of the state or to endanger the government; and no information at the suit of any one but the Attorney-General will be granted by the Queen's Bench Division of the High Court of Justice of such an offence.”

The offences with which the accused was charged however allege fraud against the public, not crimes against the state. It may be noted that no provision is made in the Criminal Procedure Code for private prosecution in the High Court or for an appeal by a private prosecutor. It may be useful to compare our legislative provisions with respect to private prosecutions with the English Common Law.

In *Gouriet v Union of Post Office Workers* [1978] AC 435 Lord Wilberforce (at p.477) briefly considered the right of private prosecution in England.

“The individual, in such situations, who wishes to see the law enforced has a remedy of his own;” he said, “he can bring a private prosecution. This historical right which goes right back to the earliest 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.”

With respect to section 88 of the Criminal Procedure Code Forbes Ag. P said in *Riddleschager v Robson* (1959) EA 841 at p. 845

“On the basis of those cases the Crown is the prosecutor in law; but the Crown must, of course, act through someone. Normally the Crown acts through a “public prosecutor” as defined in section 2 of the code – see section 86 of the Code. But special provision is made in section 88 to enable the Crown to act through a complainant in cases in which a public prosecutor does not wish to act. In such case the consent of the magistrate must be obtained before the complainant can “conduct” the prosecution .”

It is of course necessary now to substitute “Republic” for “Crown” when reading that passage.

In Kenya also the right of private prosecution is essential to counteract attempts by wealthy and influential people to stifle prosecutions when offences by them are alleged in reports to the police . The most frequent offences which become the subject of the private prosecutions are assault and trespass. There are in addition offences of a minor nature in which the police quite properly take the view that it is not in the public interest to prosecute.

The right of private prosecution is a constitutional safeguard. In the words of Lord Diplock in the *Gouriet* case (*supra*) at p 498:

“It is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of [Police forces and the office of Director of Public Prosecutions] to prosecute offenders against the criminal law.”

The learned chief magistrate in our view erred in complying with the request of Mr. Chunga to dismiss the charges and discharge the applicant on the ground that the Attorney-General has ultimate and undisputed control over all prosecutions without considering how much such control is exercised.

Three questions now fall to be considered.

1. How should the words “trying the case” be interpreted? When does a magistrate start trying a case?
2. In considering whether or not to grant permission has he a discretion which should be exercised judicially?
3. If he has such a discretion on what principles should it be exercised?

### **1. “Trying the case”**

Mr. Chunga said that a trial presupposes a full hearing. In the context of section 88, however, “trying” we think must include taking a plea. It is we think clear that the trial of a 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 a magistrate can properly be described as “trying the 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 the case. Such permission is premature and as both Mr. Chunga and Mr. Georgiadis submitted, it is null and void. Hence the magistrate before whom the trial commences is at liberty to disregard it and make his own decision to grant or refuse permission.

The application in the present case appears to have been made at the time when the complaint was before the magistrate. Whether or not this is so the record shows that on November 30, 1982, Mr. Muite applied for permission to prosecute and asked for mention on December 6. Permission was granted and it was not until December 14, that the accused appeared before the court and the charges were read and explained to him. Thus when permission was given to Mr. Muite to conduct the prosecution the accused was not before the court, Mr. Aswani was not therefore trying the case and he had no jurisdiction to grant or refuse permission. The chief magistrate before whom the trial started was therefore free to make his own decision to grant or refuse permission. He was not being asked to exercise an appellate jurisdiction to reverse a decision of a senior resident magistrate. Having held as he did that he had no jurisdiction to interfere with the decision of Mr. Aswani to grant permission there was no basis for his decision to dismiss all the charges and discharge the accused.

### **2. Discretion**

It was not disputed and we agree that in deciding whether or not to grant permission to conduct a private prosecution the magistrate trying the case has a discretion which should be exercised judicially. Although he had before him the sworn complaint of the two councillors and the charge sheet there is nothing in the record of the present case to indicate either that the learned senior resident magistrate appreciated that he had this discretion or that he made the decision in the proper exercise of his discretion.

### **3. Principles to be applied**

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

An example of the exercise of discretion is to be found in the case of *Riddleschager v Robson (supra)* in which the resident magistrate granted permission to a private individual to conduct a prosecution in default of the Attorney-General doing so. Forbes Ag P said (at p. 843) –

“The learned resident magistrate in a written ruling noted that the Attorney-General had previously declined to institute the proceedings, but expressed the hope that the Attorney-General would see fit to undertake the conduct of them. In default of the Attorney-General doing so the learned

magistrate ruled that the appellant should have the conduct of the prosecution and the appellant did, in fact, through his counsel, conduct the prosecution.”

The magistrate should also ask himself. How is the complainant involved? What is his *locus standi*? Has he personally suffered injury or danger or is he motivated by malice or political consideration? In the present case it is alleged that the public has been defrauded. No case either in England or Kenya was brought to our notice in which a private prosecutor has prosecuted on behalf of the public interest. To prosecute on behalf of the public is to usurp the functions of the Attorney-General. Mr. Georgiadis drew an analogy between private prosecution and prerogative orders. An applicant for a prerogative order such as *certiorari* or *mandamus* must show a sufficient interest in making the application. As Mr. Georgiadis submitted *a fortiori* is this necessary in a private prosecution where the liberty of the subject is involved. Lord Denning tried to stretch the meaning of “sufficient interest”:

“Every responsible citizen “he writes in his book ‘*The Discipline of Law*’ at p. 122 “has an interest in seeing the law is enforced; and that is sufficient interest in itself to warrant his applying for *certiorari* or *mandamus* to see that it is enforced”

The House of Lords thought Lord Denning went too far. In the *Gouriet* case (*supra*) at p. 477 Lord Wilberforce said :

“It can properly be said to be a fundamental principle of English Law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public!”

Prerogative remedies such as *certiorari*, *mandamus* and prohibition are of course not available against private individuals but only against government departments or any person or body set up by statutory authority affecting the rights of individuals.

Even if it be true that every citizen has sufficient interest in seeing that the law is enforced it does not follow that every citizen has a sufficient interest in conducting the prosecution of another citizen for an offence which has caused him no damage or injury.

The complainants were at the material time councillors of the City of Nairobi. The land belonged to the City Council of Nairobi. Being councillors did they have a sufficient interest? Have they personally suffered some damage or injury? These are matters which should be considered in the present case.

We have found that the permission which Mr. Aswani purported to grant was null and void and that the chief magistrate erred in dismissing the charges and discharging the accused at the request of Mr. Chunga on the ground that the Attorney-General has ultimate and undisputed control over all prosecutions. His order must be set aside.

There remains the complaint by which the proceedings were instituted and the formal charges signed by the senior resident magistrate to which the respondent has pleaded not guilty. It is not for this court to grant or refuse permission. The applicants are at liberty if they think fit to apply now to the magistrate trying the case for permission to conduct the prosecution. The accused should be present. In considering whether or not to grant permission the magistrate should bear in mind our views on the exercise of his discretion.

It is understood that since the charges were dismissed by the chief magistrate investigations into the matters alleged in the charges have been instigated by the Attorney-General but we are not aware of the result of these investigations. In the event of permission being granted the Attorney-General of course has the power to take over the prosecution and either continue it or enter a *nolle prosequi*.

**Dated and delivered at Nairobi this 12th day of July , 1983.**

**A.H SIMPSON**

**S.K SACHDEVA**

**JUDGE**

**JUDGE**