

## Open ended Prosecutorial discretion in the fight against corruption in 3<sup>rd</sup> world Kenya case study

In many jurisdictions, the powers to prosecute for criminal offences are reserved for the State. Part of the power is the power to decide to prosecute or not to prosecute. This is what I will refer to as the prosecutorial discretion.

It is generally agreed that the purpose of discretion public authorities is to promote public interest. Discretion should not be used to defeat the very public interest it was intended to promote. It is therefore important to draw a line between abuse of discretion and proper exercise of the same.

In hedging discretion, I will adopt the words of Lord Halsbury in Sharp vs Wakefield<sup>1</sup> where the His Lordship stated,

“when it is said that something has to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice , not according to the private opinion, that as in Rookie’s case, according to the law and not humor. It is to be done not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to discharge his office ought to confine himself”.

So where a statute or a constitution confers a person or an authority with prosecutorial discretion, it must be assumed that the discretion is to be exercised within the limits described by Lord Halsbury in Sharp vs Wakefield. More importantly, the discretion must be used to promote the public interest and not to defeat it.

In developing countries, corruption is undoubtedly a serious obstacle to development. It is a major cause of poverty, starvation, undue mortality, and a host of other ills. Grand corruption and economic crimes has seen developing countries wallow in poverty as the ruling elite stash billions of stolen dollars in foreign accounts. It is no wonder that zero tolerance to corruption is normally a published government policy and the selling point of political parties. In such circumstances, one would expect the letter of the law conferring prosecutorial discretion in corruption offences to be narrowed down to absolute certainty. I suppose the law should provide for prompt and effective prosecution in every event of evidence of corruption.

Where there is sufficient evidence of corruption offence, the public interest will be promoted by exercising the prosecutorial discretion in favor of prosecuting the suspect. In the absence of a compelling and legitimate reason against prosecuting, declining to prosecute would be frustrating the public interest. Indeed, declining to prosecute may very well amount to criminal offence of obstructing the course of justice.

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<sup>1</sup> (1891)AC.173

Surprisingly, this is not the case. Take the case of Kenya. Section: 26 of the Constitution of Kenya give the Attorney General a monopoly of the powers to prosecute in all criminal offences including corruption and economic crimes. To quote section: 26(3) of the constitution,

*“The Attorney General shall have power in any case which he considers desirable to”*

- (a) *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) *take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority and;*
- (c) *discontinue at any stage before judgment is delivered any such criminal proceedings that have been instituted or undertaken by another person or authority.*

The entire provision does not place any obvious limits on the prosecutorial discretion of the Attorney General particularly the discretion not to prosecute. This means that the decision to or not to enforce the laws of the land is not expressly regulated in the constitution. Being the supreme law of the land no statute can attempt to limit a constitutional discretion. Such statutory limitation would be inconsistent with the constitution and a nullity. Taken literally, it means that the Attorney General is vested with absolute discretion in deciding whether or not to enforce the laws of the land.

The unregulated discretion is also unaccountable. Section: 26(8) of the constitution provides,

*“In the exercise of the functions vested in him by sections (3) and (4) of this section, and by sections 44 and 45, the Attorney General shall not be subject to the direction or control of any other person or authority”*

And the discretion is monopolistic too. Section: 26(6) of the constitution provides,

*“The powers conferred on the Attorney General by paragraphs (b) and (C) of subsection (3) shall be vested in him to the exclusion of any other person or authority”.*

The Highest Court in Kenya in **Gregory & Another vs Republic thro’ Nottingham & 2 others**<sup>2</sup> correctly interpreted this provision to mean that the Attorney General is the sole custodian of the states prosecutorial powers. And in **Mohanlal Karamshi Shah vs Ambalal Chholtabhai Patel & 5 others**<sup>3</sup> held that even in private prosecutions under Section: 82 of the Criminal Procedure

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<sup>2</sup> 1 KLR (2004) pg 573

<sup>3</sup> (1954 )21 EACA 236

Code Cap.75, the prosecutor is in law the Crown at the instance of the private prosecutor. Consequently, the Attorney General retains control in such private prosecutions.

The upshot is that the Attorney General in Kenya enjoys an exclusive, unregulated, and unaccountable discretion to enforce or not enforce criminal law of the land. It is difficult to see how a country can claim rule of law when enforcement of the law is apparently abandoned to personal whims of a single individual.

Back to corruption in Kenya, a question arises whether parliament intend to leave prosecution of corruption to the whims of the Attorney General. As part of the declared war on corruption, Kenya has enacted an Act of parliament dealing exclusively with corruption. This is the Anti-Corruption and Economic Crimes Act No.3 of 2003. The spirit and the purpose of the Act is specifically set out in the preamble of the Act to be,

*“An act of parliament to provide for the prevention, investigation, and punishment of corruption, economic crimes, and related offences and for the matters incidental thereto and connected therewith.”*

That parliament intended corruption to attract the prescribed penalty with absolute certainty is clear from the following provisions of the Act.

Section 45(1) (a) *“A person is guilty of an offence if the person fraudulently or otherwise unlawfully acquires public property or a public service or benefit.”*

Section 45(2)(i) *“An officer or person whose functions concern the administration, custody, management, receipt or use of any part of public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for sub-standard or defective goods”.*

Section 48(1)(a) *“A person convicted of an offence under this part shall be liable to a fine not exceeding one million shillings, or for a term not exceeding 10 years or to both”*

The words used are “is guilty” and “Shall be liable”. Punishment shall follow the event. As we will note later, the Act has a gravely mistaken assumption that the Attorney General will prosecute where evidence suffices and that courts will convict.

Nevertheless, it is not outrageous to propose that the wording of the above provisions of the Anti-corruption Act of Kenya leave no discretion where an offence has been committed. As earlier noted, some jurisdictions practice compulsory prosecution whenever there is sufficient evidence of a felony. Statutory provisions expressly prescribe compulsory prosecution. For instance, Section 152 (2) of the German Code of Criminal Procedure provides that:

“Except as otherwise provided by law the public prosecution office shall be obliged to take action in the case of all criminal offences which may be prosecuted, provided there is sufficient factual indications.”<sup>4</sup>

Under German law, the prosecutor is duty bound to prosecute as long as there is sufficient evidence to justify the prosecution. He has little or no choice in the matter. Apparently, a public prosecutor commits an offence for failing to prosecute when the criteria to prosecute is satisfied.

Even in the common law regime where prosecutors have a wide discretion, the House of Lords in Padfield vs. Minister of Agriculture Fisheries & Food<sup>5</sup> reduced the difference between statutory discretion and a statutory duty to a vanishing point. In deciding that the apparent discretion of the Minister amounted to a duty, the court stated,

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and the objects of the Act; the policy and the objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court.”

The English court proceeded to issue a mandamus compelling the Minister to consider the case afresh.

Transplant these words into section 26 of the Kenyan constitution into the corruption prevailing in Kenya. Any court would rule that the framers of section: 26 intended the prosecutorial discretion to be used in line with the stated government policy of zero tolerance to evils like corruption. Further, to achieve the objects of the Act as stated in the preamble as investigating, preventing, and punishing corruption.

Commenting on similar provisions in other jurisdictions, James Vorenberg in his article Narrowing the discretion of criminal Justice officials:<sup>6</sup> says that such an enormous breadth of prosecutorial discretion does not serve any valid purpose and that it is in fact power resulting from default rather than a conscious legislative judgment.

Another scholar, Jonathan Rogers observes that something must be seriously wrong when a code for prosecutors does not incorporate the full tenor and effect of the principle of rule of law; Restructuring the exercise for prosecutorial discretion in England:<sup>7</sup> The Scholar would be shocked to find that in the first place, Kenya does not have any set legal standards or principles to guide exercise of prosecutorial discretion. The guidelines published by the Attorney General for public prosecutors are mere internal administrative directions. They

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<sup>4</sup> J.Langbein, Comparative Criminal Procedure: Germany (St: Paul: West Pub. Co., 1977), 91.

<sup>5</sup> (1968) A.C 997

<sup>6</sup> Duke Law Journal:Vol 1976, No.4.(Sep.1976),pp.651-697.p680

<sup>7</sup> Oxford Journal of Legal Studies vol. 26., No.4(2006) pp775-803

are without force of law, or even by law. They cannot be cited in any court of law in Kenya.

I wind up by demonstrating the effect of the exclusive, unregulated, and unaccountable prosecutorial discretion in Kenya.

That corruption and economic crimes are endemic in Kenya is not a secret. Currently Kenya ranks no. 10 as the most corrupt country<sup>8</sup>. The government has on numerous occasions declared zero tolerance to corruption. Numerous authorities guzzling public funds have been established to fight corruption. The public at large has given up on the runaway corruption. The Kenya Anti-Corruption Commission (the authority statutory mandated to investigate corruption) has on numerous incidents of grand investigated, gathered evidence and forwarded complete files to the Attorney General for prosecution.

Ultimately, amid grim poverty caused by corruption and public outcry against corruption, the exclusive, unregulated, and unaccountable prosecutorial discretion carries the day with a silent decision not to prosecute. Legitimately, and indeed constitutionally!

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<sup>8</sup> See the Transparency International corruption index for year 2008