

THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

*Jonathan John Mwalili**

I. INTRODUCTION

A reference to the history of Kenya is essential in understanding the various sources of the law. Before Kenya gained her independence and became a Republic on 12 December 1963 and 1964 respectively, it was a British colony, and there was also the ten-mile coastal strip protectorate under the Sultan of Zanzibar. Upon colonization, the English law was applied to Kenya. It included the substance of the common law, the doctrine of equity and the statutes of general application in force in England on 12 August 1897, together with the procedure and practice observed in the courts of justice in England at that date.

The English law that was applied to Kenya could only be applied so far as the circumstances of Kenya and its inhabitants permitted. The reception clause also recognizes the existence of the various customary laws, including Islamic and Hindu law that were in operation before colonization.

With the attainment of independence and on becoming a republic, there came into being the republican constitution which became the supreme law of the land and hence a source of law in Kenya. Judicial precedent is an invaluable source of law. Decisions of the superior courts of records, the High Court and the Court of Appeal, are reported in law reports such as the Kenya Law Reports, the East African Law Reports and the Eastern African Law Reports. There are also English law reports, notably, the All England Law Reports.

* Officer in Charge of Prosecutions, Prosecutions Branch, High Court-Nairobi, Kenya.

II. ORGANIZATION OF PROSECUTION

A. Office of the Attorney-General

The Attorney-General is a constitutional officer, and his office is an office within the public service. He is the principal adviser to the Government of Kenya and is also the chief public prosecutor. His role is not limited to the constitutional functions of advising and controlling criminal prosecutions, but extends to a multitude of other functions such as:

- (1) appearing in court on behalf of the government in civil litigation in which the government is a party;
- (2) acting as a counsel for Parastatals in court;
- (3) drafting bills for presentation in parliament, etc.;
- (4) preparing international agreements, treaties and commercial agreements involving the Government of Kenya and foreign States or bodies;
- (5) supervising the Registrar-General's Department which deals with the registration of companies, trademarks, patents, books and news papers, marriages, births and deaths, and trade unions, welfare societies and chattel mortgages; and
- (6) supervising of the Public Trustee, the Law Reform Commission, the Kenya School of Law, and the Office of the Official Receiver.

The role of the Attorney-General in this context will be limited to the examination of his advice and prosecutions in criminal cases. The Office of the Attorney-General is arranged in a vertical manner with the

107TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

Attorney-General at the apex and the State Counsel at the bottom. See Figure 1.

In addition to being the principal adviser to the government and chief public prosecutor, the Attorney-General is also an ex-officio member of the National Assembly, a cabinet minister in the government and the head of the bar (advocates). He is appointed by the President.

Membership to the National Assembly and the government assists the Attorney-General in making decisions as to whether to prosecute or not in offences that involve public policy.

B. Constitutional Position of the Attorney-General

In deciding whether or not to initiate a prosecution, the Attorney-General is not subject to any person or authority. Although Parliament is supreme in the Kenyan system of government, it cannot, in law, order the Attorney-General to prosecute. This independent exercise is illustrated in the reply to Parliament by a former Attorney-General, Mr. Joseph Kamere, when Parliament sought to have one Stanley Munga Githunguri prosecuted on charges of contravening the provisions of the Exchange Control Act. In his reply the A.G. said:

Kenya as a constitutional government is totally committed to the rule of law. We cannot talk of the rule of law without an efficient machinery to enforce the ordinary laws of the land. The police, the judiciary and my office are the components of that machinery, and if any of those cogs break down, that essential machinery can easily come to a grinding halt. Prosecution is not persecution—what this House has been subjected to is to challenge the decision of the A.G., who decided not to proceed against Mr. Githunguri on the evidence contained in the inquiry file. This House makes laws but does not execute them. The law

is left to persons of integrity, those with patience in their deliberations, to consider whether to prosecute or not to prosecute. The question as to whether to prosecute or not to prosecute is entirely left to the discretion of the A.G. In this country, we believe in the rule of law; we believe in the separation of the judiciary; and we also believe that you cannot be a judge and prosecutor. Prosecution and not prosecution, play one of the most important roles in the administration of criminal justice in any form of a constitutional government.

This statement illustrates the separation of powers of the government into the legislative arm (Parliament) the executive and the judiciary organs of government, which play mutually exclusive roles.

Officers subordinate to the Attorney-General who act in accordance with his general instructions are: the Solicitor-General, the Deputy Public Prosecutor; the Assistant Deputy Public Prosecutor; and all State Counsels, at the State Law Offices Nairobi and in the Provincial and District State Law Offices. Section 26 (4) of the Constitution gives all of them the authority to instruct the Commissioner of Police and officers subordinate to him, to carry out investigations into various offenses and to direct, generally, prosecutions in the country. (See Figure 1.)

The Attorney-General and officers subordinate to him and acting in accordance with his general or special instructions have the constitutional authority to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offense alleged to have been committed by that person. He also has the authority to take over and continue any criminal proceedings that

have been instituted or undertaken by another person or authority) popularly known as private prosecutions). He has the authority to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person (private prosecution) or authority (e.g., the police force).

C. Decision to Prosecute and the Role of a Prosecutor

The decision to prosecute is the most problematic role of a prosecutor. Unlike other areas of the law where it is possible to resort to reported or unreported authorities, there are no such authorities to guide a prosecutor in reaching a decision as whether to mount a prosecution or not. The problem is compounded by the fact that the Attorney-General, as the chief public prosecutor, rarely makes public his reasons for mounting or discontinuing a prosecution. Unlike a court which has the opportunity of determining the credibility of witnesses, the Attorney-General and his officers have to rely on the statements of the witnesses in the investigation files.

In some cases a prosecutor, after perusing the file, may get the impression that there is prima facie evidence against the accused, but in the course of a prosecution the witness turns out to be incredible or hostile. The net effect is that no such case is made out to require an accused being put on his defense; for example, cases involving relatives.

Factors influencing the decision to prosecute include:

1. The existence of prima facie evidence. The evidence upon which a court, properly directing itself upon law and evidence, is likely to convict in the absence of an explanation from the accused. (This is a judicial definition.)
2. The attitude of the complainant. All offences are committed against the

State and thus the attitude of complainant should not influence a withdrawal of a case. However, in some cases the complainant's attitude is taken into account in deciding whether a prosecution is warranted. For example, when the accused is a relative of the victim, the item stolen has been recovered, and the parents of the accused pressure the complainant to withdraw the case.

3. Health of accused. Where an accused's health is poor, prosecution may be discontinued, especially in terminal illnesses.
4. Humanitarian factor. It is a cardinal rule that a prosecutor has to be fair and not oppressive. This is a factor that should be borne in mind in considering whether a consideration of a prosecution is merited. For example if a husband and wife are charged and the husband dies in the process, the case against the wife could be withdrawn.
5. Public interest. The A.G. has to assess whether the public interest will be served best by the prosecution. Therefore, the A.G. makes consultation with his cabinet colleagues, especially in political cases.
6. Gravity of the offence, the circumstances surrounding the commission of the offence and its nature determine the gravity; e.g., trespass to land and assaults arising out of vendetta or are intended to settle old scores.
7. Impact on international relations. Where two sovereign states are involved, it is a good practice to consider the impact of such intended prosecution on the relations between the affected States.

D. Withdrawal from Prosecution in Trials before Subordinate Courts

1. Section 87 of the C.P.C

The Attorney-General may, in a trial before a Subordinate Court, but not in the High Court, instruct a police prosecutor to withdraw from the prosecution of any person. If the withdrawal is made before the accused person is called upon to make his defense, then the accused may be discharged but may be re-arrested and charged with the same offense based on the same facts. If the withdrawal is made after the accused has been called upon to make his defense, then he shall be acquitted. This power is delegated, through Legal Notice No. 106/1984, to the Solicitor General, Deputy Public Prosecutor, Assistant Deputy Public Prosecutor; all Principal State Counsels; and Provincial State Counsels in Central, Eastern, Coast, Nyanza, Rift Valley and Western Provinces. Those in the District State Law Offices do not have the delegation, i.e., Machakos, Embu, Meru, Kisii, and Eldoret.

**2. Section 82 (1) of the C.P.C.:
Nolle Prosequi**

The Attorney General may, in any criminal case, whether in the High Court or Subordinate court and at any stage of the case before verdict or judgment (whether judgment has been written or not but before it is pronounced) enter a nolle prosequi. He may do so orally (by stating in Court that he is entering a nolle prosequi under this section) or in writing. There upon the accused shall be at once be discharged in respect of the charge for which the nolle prosequi is entered.

This discharge shall not, however, operate as a bar to subsequent proceedings against him on account of the same facts. This power is delegated under section 82 of the Criminal Procedure Code and Legal Notice No. 106 of 1984 to the Solicitor General, Deputy Public Prosecutor,

Assistant Deputy Public Prosecutor, Principal State Counsels and Provincial State Counsels. For clarity, there are some Provincial State Counsels who are either State Counsels I and State Counsels II. These are allowed to sign the nolle prosequi as Provincial State Counsels and not in their respective designations.

The powers of the Attorney-General of Kenya are the same with those of the Attorney-General of England in this regard. This power was explained by Lord Dilhorne in the case of *Gouriet v. Union of Post Office Workers*, (1977), 3 All England Reports at page 88, when he said:

The Attorney-General has many powers and duties. He may stop any prosecution in indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers, he is not subject to direction by his ministerial colleagues or to the control and supervision of the courts. If the court can review his refusal to consent to a related action, it is an exception to the general rule.

It is, therefore, correct to say that the Attorney-General has the unfettered discretion to bring charges against a person if he considers that any law has been infringed by that person. He also has the prerogative to terminate the charges even without assigning reasons.

Despite this, the High Court of Kenya has ruled that the Attorney-General's discretion to discontinue criminal cases under section 82 (1) of the C.P.C. should not be exercised arbitrarily, oppressively, contrary to public policy. The High Court

has an inherent power and duty to secure fair treatment for all persons who are brought before courts and to prevent an abuse of the process of the court. To this limited extent, therefore, the powers of the Attorney-General to enter a nolle prosequi are subject to the control of the court.

E. Power to Appoint Public Prosecutors, Section 85 of the C.P.C.

- (1) The Attorney-General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.
- (2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any cases.
- (3) Every public prosecutor shall be subject to the express directions of the Attorney-General.

F. Qualification of Prosecutors

1. Prosecution counsels in the office of the Attorney-General are qualified advocates of the High Court who have had legal training. However, due to the shortage of lawyers, the Attorney-General is empowered under section 85 of the C.P.C. to appoint public prosecutors. Pursuant to this statutory power, the Attorney-General has appointed police prosecutors who act as advocates, although they are not lawyers by training.

2. Police Prosecutors

Unlike private prosecutions, the right of the police to prosecute is by virtue of delegated power from the A.G. under section 85 of the C.P.C. It is significant to note that under section 14 of the Police Act,

prosecution is not mentioned as one of the functions of the police force, which confirms the fact that the prosecutorial powers vested in them are derived from a delegated power. Most prosecutions in this country are conducted by police in the Magistrate's Courts and, as prosecutors, they fall under the direct control of the Office of the Attorney-General. However, when they are performing normal police duties, they fall under the direct control of the Commissioner of Police. (See Figure 2.)

To qualify to be prosecutors, they must be at the rank of Police Inspectors. They undergo a training for four months before joining the prosecutions branch. In terms of the organization, the Police Prosecution branch falls under the Department of Criminal Investigation (popularly known as CID). At one time the entire CID was under the control of the A.G., coincidentally resembling the U.S. set-up. The CID is charged with the responsibility of investigating all serious criminal cases, while the rest are dealt with by regular police. The A.G. supervises police prosecutions either in person or through his subordinate officers. This supervision is achieved by the requirement of statutory consent of the A.G. in respect of certain offences including sedition, incest by males and females, oral threats to kill, corruption in office and the prosecution of foreigners. The police prosecutors are not legally trained. They prosecute before magistrates while State Counsels appear both before the magistrates and the judges of the High Court on prosecution and on appeals. The structure of the courts is shown in Figure 3.

III. STATUS OF THE PUBLIC PROSECUTOR

The powers, authorities and functions relating to the prosecution in Kenya are vested in the Attorney General. These powers may be and are delegated by him.

107TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

While prosecuting, therefore, a policeman is acting as the representative of the A.G., and not as the representative of the Commissioner of Police. In his capacity as a prosecutor, a policeman is subject only to the directions and instructions of the A.G. The police prosecutor finds that he is, so to speak, wearing two hats. Sometimes it is hard to reconcile the two. If the police prosecutor has any difficulty in this regard, he should remember that his duty as a prosecutor is to the court.

A. The Task

The prosecutor should remember that it is not his job to secure a conviction at all costs. As Sir Horace Awory, one of England's greatest criminal judges said in *R vs. Banks*, 2KB 621:

Counsel for the prosecution throughout a case should not struggle for a verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting the administration of justice.

The prosecutor's job is to see that all the relevant facts, including those favorable to an accused, are placed before the court and to present those facts in an ethical, fair, dispassionate, firm and clear manner. Prosecutors must refrain from all actions which could lead to the conviction of innocent persons. However, this objective attitude must not detract from the fact that as a prosecutor he is acting on behalf of an aggrieved party, the State. It is as much a miscarriage of justice for guilty persons to be acquitted as for the innocent to be convicted.

Consequently the air of detachment that the prosecutor should display does not mean that he must not present his case vigorously. Ideally whatever the results at the end of the case, the prosecutor should be able to say that he has done his best.

In the words of a former Attorney-General, Justice M.G. Muli:

As prosecuting counsels we never lose or win cases. We only have a burden upon ourselves to prove a case beyond reasonable doubt in criminal cases and on balance of probabilities in civil cases. In this regard, we must place before this court all facts concerning the case and must be fair, honest, frank, courteous and respectful when doing so. In our system, the constitution allows for a conviction and an acquittal, so we should not therefore strain after a conviction, we must always seek to see that justice is not only seen to be done but that it is done.

In *Bukenya and others v. Uganda*, it was held that the prosecution must make available all witnesses necessary to establish the truth even if their evidence is inconsistent and that under certain circumstances the court, on its volition, has a duty to call witnesses whose evidence appears essential to the just decision of the case.

The role of the prosecutor is that of an agent of justice and as an advocate in court represents the public, including the complainant who is the victim of the some crime of which the public is interested in knowing the truth through fair prosecution in court. The reason why the role of the prosecutor is different from that of an ordinary advocate was summed up by the U.S. Supreme Court in *Berger v. United States*, 55 s. ct. 629 (1935):

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.

If the accused is acquitted, the prosecutor should not feel that he has “lost the case” for the State does not “lose” if one of its citizens is acquitted on a criminal charge. The prosecutor should be able to say that the accused was acquitted only because the evidence was insufficient to support a conviction. He should never have to say that although the evidence was otherwise satisfactory he failed to conduct his case properly.

It is as well too to remember the salutary words of a great South African judge, Curlewis J. A., in the case of *R. v. Hepworth*, 1928 AD 265 at 277:

A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides.

The prosecutor stands between the police and the citizen and is expected to make sure that a prima facie case is made out in respect of each charge before the accused is put to the expense and inconvenience of being brought to court and called upon to plead.

B. Presentation of the State Case

The prosecutor must understand all the facts of his case and be able to present them in a clear and logical sequence so that the

court is able to follow the evidence with the minimum of mental effort. From the magistrate’s point of view, it is relatively easy to try a case which is presented in a logical sequence and in such a way that the relevance of each piece of evidence is readily apparent.

A properly presented case enables the magistrate to concentrate on his prime duty of judging the innocence or the guilt of the accused. It should not be necessary for the magistrate to have to shoulder the additional burden of trying to follow a badly presented case.

It is a waste of every one’s time to produce unrelated and unexplained facts and exhibits before the court and expect the magistrate to be able to understand what they are all about. In addition, it is unfair to the accused who should also be able to follow the evidence with the minimum of difficulty.

It is also the duty of the prosecutor to ensure that a correct charge is filed against the accused person. Section 214 of the Criminal Procedure Code empowers the court to amend or substitute a charge if the original charge is shown to be defective.

The ease with which a prosecutor is able to present and prosecute his case is directly proportional to the amount of preparatory work he carries out. He must read the file carefully, he must know or find out the relevant laws; and he must plan the presentation of his case with care and common sense.

The magistrate’s burden is greatly increased when the prosecutor is inexperienced. As pointed out by the Supreme Court in *S. v. Manger*, 1985 (1) ZLR 272:

It is not part of the magistrate’s job to assist an inexperienced prosecutor. The ways in which a magistrate may assist a prosecutor are strictly limited and no prosecutor should ever appear in court feeling that if things go wrong during the trial the magistrate will help him.

107TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

The prosecutor does not go into court just to lead in evidence of the facts contained in his file. His job is more exacting than that. He has to lead the evidence, judge its veracity and effect on the court, form an opinion concerning what facts seem to be common cause and what facts are in dispute and be prepared to argue the merits of his case, either on a point of law or on the facts. To do this, he must take a sustained and intelligent interest in all the evidence given.

Prosecuting is hard work and the prosecutor must be on his toes all the time. The successful prosecutor is always learning something new.

C. Legal Ethics

Public prosecutors, whether admitted as legal practitioners or not, are bound by the ethics of the legal profession. Members of the legal profession are bound by strict rules, which are administered by the law society. These rules are intended primarily to protect the public, particularly the clients of the legal practitioners, but are also intended to maintain an acceptable level of conduct within the profession itself. The rules, thus, regulate dealings between lawyers and the conduct of lawyers in their dealings with the courts. Public prosecutors do not have clients, as such, but they deal with members of the public in the form of the accused and the witnesses and with defense lawyers. A major part of their task involves dealing with the courts.

The public nature of a prosecutor's task makes it essential that his conduct in the performance of that task be above reproach.

"Ethics" involves a consideration of moral questions. Conduct which is ethical is morally correct and honourable. As mentioned above, the prosecutor's task is not to win at all costs. It would be easy to win cases if one was dishonest or devious. In a civilized country which adheres to the

rule of law, such conduct is completely unacceptable, being as it is immoral and thus unethical.

Prosecutors are bound by ethical rules at all stages of their task, not merely when presenting a case in court. Ethical considerations arise before and after the start of court proceedings and even when a prosecutor is off duty.

IV. PRIVATE PROSECUTIONS

A. The Attorney General in Kenya is the Director of Public Prosecutions. The authority is given to him by the Constitution of Kenya in section 26 (3) thereof to institute and undertake criminal proceeding against any person in Kenya and before any court (except a court-martial) and in respect of any offense. A prosecution is the process of institution and undertaking criminal proceedings against any person in a court of law. The Attorney General is, therefore, responsible for all public prosecutions in the country. Every public prosecutor shall be subject to his directions.

B. There may be certain instances where a private person may wish to institute criminal proceedings against another. First and foremost, there is no constitutional provision for this, i.e., the Constitution of Kenya has not, as it has done in the case of the Attorney General, expressly authorized a private person to institute and undertake criminal proceedings. However, the Criminal Procedure Code, which is subordinate to the Constitution, has under section 88 thereof, permitted a private person to conduct a criminal prosecution against another with permission of the court. This section reads:

- (i) A Magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public

prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission.

- (ii) Any such person or officer shall have the same power of withdrawing from the prosecution as provided by section 87, and the provisions of that section shall apply to withdrawal by that person or office.
- (iii) Any person conducting the prosecution may do so personally or by an Advocate.

In private prosecutions, the A.G. is in law entitled to take over a private prosecution from the private prosecutor. After he has taken over the private prosecution, the said prosecution becomes a public prosecution after which he may terminate the proceedings as was the case in *Republic Through Herman M. Asava & Another v. Peter F. Kibisu*, in which the accused was charged with assault, confinement and malicious damage to property.

In addition to this, the High Court of Kenya has given the following guidelines on how a private prosecution may be undertaken. This was done by the then Chief Justice A.A. Simpson and the late Justice S. K. Sachdev when they stated on 12 July 1983 in H. Ct. Cr. Revision No. of 1983 *Richard Kimani & S. M. Maina v. Nathan Kahara* as follows:

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 useful constitutional safeguard against capricious, corrupt or biased failure or refusal of police forces and the Office of the Director of Public Prosecutions to prosecute offenders against the criminal law...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.

The magistrate should ask himself, How is the complainant involved? What is his locus standi? Has he personally suffered injury or damage or is he motivated by malice, or political consideration?

C. It is a fundamental principle of law that private rights can be asserted by individuals and public rights can only be asserted by the Attorney-General as representing the public. Even if it be true that every citizen has sufficient interests in seeing that the law is enforced, it does not follow that every citizen has an interest in an offense which has caused him no damage or injury. The Attorney-General has made his position clear. He will not allow private prosecutions, which are motivated by personal vendetta or political considerations, to proceed. The guidelines laid down in 1983 by the High Court as stated above must be followed. To allow the mushrooming of private prosecutions is to open doors to abuses of the criminal process by individuals. Experience has taught us that it is difficult to close such doors once they have been opened wide.

V. INSTITUTION OF PROCEEDINGS

A. Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

107TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

B. A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

C. A complaint may be made orally or in writing, but if made orally, shall be reduced to writing by the magistrate, and in either case, shall be signed by the complainant and the magistrate.

D. The magistrate, upon receiving any complaint, or where an accused person who has been arrested without a warrant is brought before him, shall draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged unless the charge is signed and presented by a police officer.

E. Where the magistrate is of the opinion that a complaint or formal charge made or presented does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for such an order.

VI. PROVISIONS AS TO BAIL

When a person, other than a person accused of murder, treason, robbery with violence or attempted robbery with violence, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.

Provided that, the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance.

The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

The High Court may, in any case whether or not an accused person has been committed for trial, direct that the person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

VII. PLEA BARGAINING

Plea bargaining is a new concept in the English criminal law. Due to its adversarial set-up, the parties or their advocates have no say in matters of sentence which are peculiarly within the province of the trial court. The court has complete discretion as regards which sentence should be passed, and the prosecution is not permitted to state that an offence is serious as this is a matter for the court to decide. It is strange, therefore, to find the existence of plea bargaining in our criminal law which is not only adversarial in set-up in trials, but also does not allow the parties or their advocates to enter into bargains with the court.

Plea bargaining is primarily arrived at getting a lenient sentence for an accused person. This is achieved as a result of negotiations between the prosecution and the defense whereby the prosecutor, depending on the nature and circumstances of the offence, may reduce a charge of murder to one of manslaughter or may decide to prefer a charge of simple robbery instead of robbery with violence which carries a death sentence. This could be done in return for a plea of guilty by the accused to the lesser offences.

In murder cases a judge is not bound to take a plea of guilty to manslaughter even if counsel for both sides have agreed to this course of action.

In some cases, the prosecution may drop all the charges against an accused person in consideration of an accused becoming a witness in a more serious and complicated case.

Plea bargaining has its advantages and disadvantages. Successful bargained pleas do assist in reducing the backlog of cases in court. This increases the chances of serious crimes ending up as minor convictions which in turn may distort crime statistics, which are vital in the study of criminology. As a result of plea bargaining, the trial of an accused comes to a speedy end as opposed to a charge hanging over his head with uncertainty about the outcome of the trial. If the trial is likely to attract adverse press publicity, a plea of guilty will put an end to this publicity.

VIII. SENTENCING

After the court has convicted an accused, it proceeds to sentence. Defining what sentence is a difficult exercise. It has been defined as any order of the court made as a consequence of conviction, the aim of which is to protect the innocent citizens of society from the harmful acts of the criminals.

Before sentencing, a prosecuting officer is entitled as of right to inform the court whether the accused is a first offender or not. It was held in *Shiani v. Republic* that it is improper for the prosecuting officer to inform the court that an offence is serious. Under Kenya's adversarial legal system, this is a matter for the court to decide and to make findings since role of the prosecution is to present facts.

VIII. INVESTIGATING AGENCIES

Before a prosecution is mounted, there has to be an investigation into the offence allegedly committed. The investigation will show the origins, the cause, the motives, the offenders and the surrounding circumstances of the offence.

Some investigation may reveal insufficiency of evidence to warrant a prosecution in court in which event the matter is close. Other investigations may reveal sufficient evidence to warrant a

prosecution, yet a prosecution may not be mounted.

There are a number of agencies involved in the investigation of crime as shown here under:

A. The Police

1. Section 14 of the Police Act gives the function of the Kenya Police Force. The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged. It shall also be the duty of the Force, provided in Section 16 of the Police Act, to regulate and control traffic and to keep order on and prevent obstructions in public places, and to prevent unnecessary obstructions on the occasions of assemblies, meetings and processions on public roads and streets, or in the neighborhood of places of worship during the time of worship therein.

2. In the discharge of its functions, every police officer shall promptly obey all *lawful orders* in respect of the execution of his office which he may from time to time receive from his superiors in the Force. He shall promptly obey and execute all orders and warrants lawfully issued to him. He shall promptly collect and communicate intelligence affecting law and order and promptly take all steps necessary to detect offenders and bring them to justice and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists. Upon his enlistment to the Force, every police officer swears that he will discharge all the duties of a police officer according to the law, without fear, favour, affection or ill-will. The duty of investigation is entrusted by the Commissioner of Police to the Director of Criminal Investigations Department covering the whole country. See Figure 4.

107TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

3. The Attorney-General, as the Director of public prosecutions in Kenya, has the constitutional role to instruct the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offense or suspected offense [see section 26 (4) of the Constitution]. Upon being so instructed the Commissioner of Police shall comply with that requirement and shall report to the Attorney-General upon completion of the investigation. The power of the Attorney-General may be exercised by him in person or by officers subordinate to him and acting in accordance with his general or special instructions, The exercise of this function the Attorney-General shall not be subject to the direction or control of any other person or authority.

4. The public is policed by the police, but the police do police themselves. Nevertheless, they are subject to laws of the land. Where a police officer is alleged to have committed an offence, he is investigated by fellow police officers. As a matter of police practice, the investigation file has to be sent to the Director of the Criminal Investigations Department and thereafter to the office of the Attorney-General, who then decides whether a prosecution should be proceeded or not. It is important to note that the CID section of the police force is charged with the investigation of serious crimes like fraud, murder and corruption. It also offers advice and technical guidance in matters of crime investigation to the police stations. Apart from CID, there are other specialized sections within the police force like Anti-Stock theft, traffic and intelligence charged with duties from which their titles are derived.

B. The Courts

The investigative role of the court including the High Court as a trial court is very limited due to the adversarial set-up of Kenya's legal system. Under this system

the role of the court is that of impartial arbiters ensuring the observance of the trial rules and thereafter the delivery of judgements.

1. Power to Summon Witnesses

Section 150 of the Evidence Act provides that the courts may summon as a witness any person whose evidence appears essential to a just decision of the case. The fact that the law permits the court to call witnesses on its own volition is an indication that investigations are a continuous process which end with the final determination of the trial. It also shows that investigation is not the exclusive province of the police or the Office of the Attorney-General. The difficulty faced by the court in this enforced role was expressed by the former Court of Appeal for East Africa in the case of *Muriu and others v. R.* in the following words:

It has been said that a judge must not descend into the arena so that his judgement becomes warped by the dust of conflict. Conversely a judge cannot sit in splendid isolation above the conflict and not intervene even when he detects a lacuna or ambiguity in the evidence.

2. Committal Proceedings

The investigatory role of the courts is clearly discernible in offences that are triable only by the High Court. These offences include murder and treason, which are preceded by the holding of committal proceeding before proceeding to trial. The role of the Magistrate's Court in the committal proceedings is to ensure that only those cases where prima facie evidence is disclosed that proceed for trial, thereby excluding frivolous prosecutions. Once the committal bundles have been filed in court, the committal magistrate after perusing the bundles may make the following orders:

- (1) Commit the accused to stand trial in the High Court.
- (2) Commit the accused to stand trial in the magistrates court competent to try the offence. This will apply if it is a lesser offence like manslaughter (which is triable by a Senior, Principal or Chief Magistrate's Court).
- (3) Discharge an accused.
- (4) After discharging an accused, order that an inquest be held if the deceased died in prison or police custody.

The role of the High Court in committal proceedings is very limited because it is the court that tries persons who have been committed for trial to itself.

3. Inquests

Closely related to the holding of committal proceedings by the Magistrate's Courts is the conducting of inquests into sudden or unnatural deaths in compliance with sections 387 and 388 of the C.P.C. The purpose of holding an inquest is to determine the cause of death and the surrounding circumstances where foul play is suspected or where a person has died in police or prison custody. At the conclusion of the inquest, the court may order for the arrest and charging of a suspect if the evidence discloses the commission of an offence by the suspect. If at the termination of the inquest the magistrate finds that an offence has been committed by some person or persons unknown, the magistrate is required by the law to send a copy of his ruling to the Attorney-General who may direct further investigations.

C. The Office of the Attorney-General

1. The role of the Attorney-General in the investigative process is indirectly tied up with his prosecutorial powers as the chief prosecutor. In a number of offences,

the statutory consent of the Attorney-General is required before a prosecution can be mounted. These offences include murder, sedition, incest, false claims, abuse of office and the prevention of corruption. Where a prosecution proceeds without the sanction of the Attorney-General, the proceedings are null and void.

2. The fact that a prosecution of an offence requires the consent of the Attorney-General, does not stop the police from arresting and charging a suspect in court. However a trial does not begin until the consent is filed in court. Where a prosecution requires the consent of the Attorney-General, the investigating agency has to send the investigation file to the office of the Attorney-General who, after perusal of the same, may direct further investigation, grant consent or direct a withdrawal of the charge against the accused. The purpose of requiring the consent is to ensure that there is prima facie evidence to warrant a prosecution and also that the charge is properly drawn out since such charges are technical and, therefore, need technical expertise.

3. The Attorney-General's role in the committal proceedings in murder cases has been considered. Apart from offences requiring the Attorney-General's consent to prosecute, there are other cases of public importance and interest that have to be referred to him for directions. The Attorney-General may also direct that an inquest be held by a magistrate. In some cases, the Office of the Attorney-General may simply advise the police to forward the file to the magistrate, who will decide whether or not to hold a public inquest.

4. The investigative role of the Attorney-General ensures that only cases where prima facie evidence is disclosed go for trial, and it also ensures that trials, are brought to a speedy end by ensuring that investigations are completed before a trial commences; for courts are not supposed to be used as commissions of inquiry.

X. CONCLUSION

The criminal justice system starts as soon as a crime is reported to the police and investigations start. A crime may be reported by the complainant or a member of the public or it may have been committed in the presence of law enforcement officers. The Attorney-General is also empowered under section 26 of the Constitution to require the Commissioner of Police to investigate a matter where he thinks a criminal offense may have been committed. Where investigations have taken place and there is enough evidence to sustain a criminal charge in court, then prosecution will normally follow. Under the constitution, the Attorney-General is in charge of criminal prosecutions. It is important to emphasize that the decision of whether or not to prosecute cannot depend on and be entrusted to public opinion. This would be tantamount to accepting mob justice or instant justice. The decision depends primarily on the investigation report carried out by the investigation agencies and whether that report contains enough evidence to establish a prima facie criminal case against a particular person. Hence is the extreme importance of thorough investigations being carried out by the police and other investigation agencies in any criminal justice system. It is vital that the police and other investigation agencies carry out proper investigation into all reported criminal cases. It is necessary to mention that failure by other criminal justice agencies to work effectively and efficiently will greatly affect the role and function of the prosecution.

Figure 1

**THE STRUCTURE OF THE PUBLIC PROSECUTIONS
ATTORNEY-GENERALS CHAMBERS**

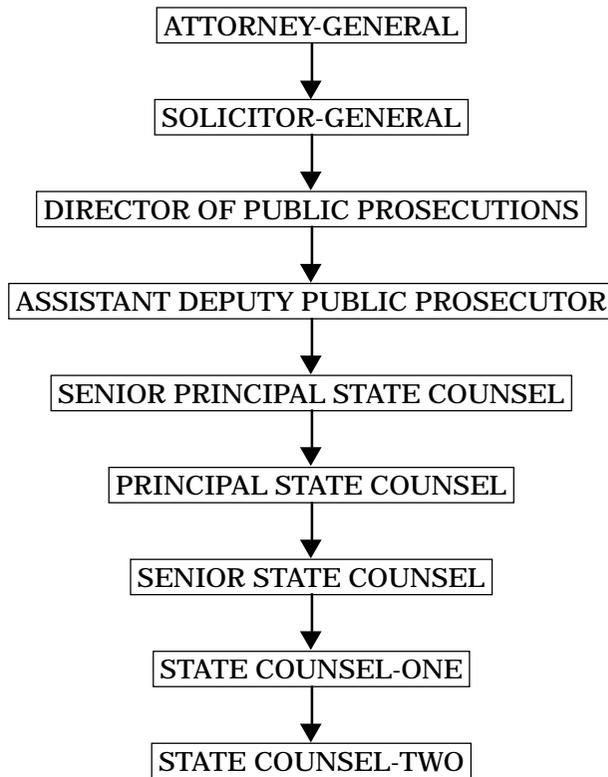


Figure 2

THE STRUCTURE AND ORGANIZATION OF THE KENYA POLICE FORCE

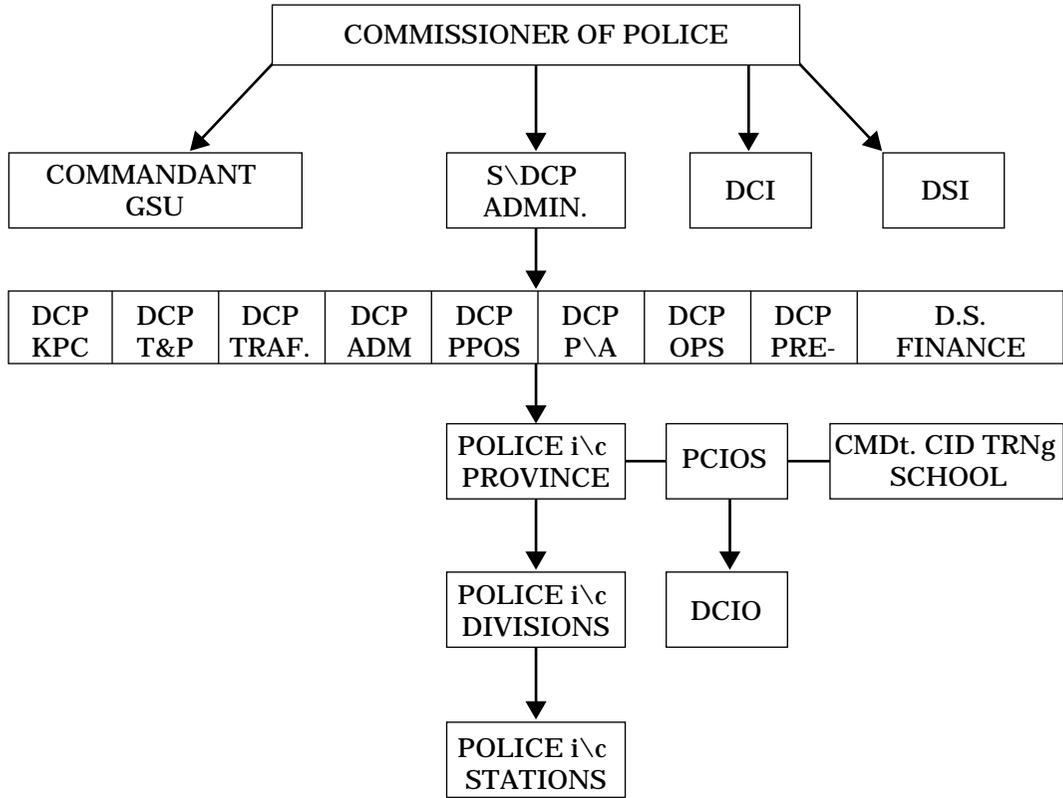


Figure 3

THE STRUCTURE AND ORGANIZATION OF THE CRIMINAL COURTS

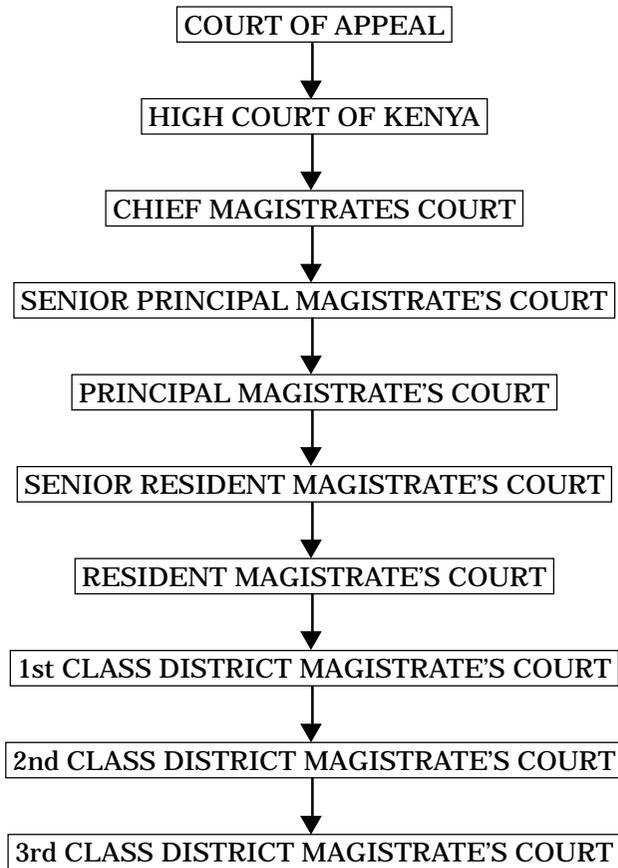


Figure 4
THE STRUCTURE AND ORGANIZATION OF THE CRIMINAL INVESTIGATION DEPARTMENT

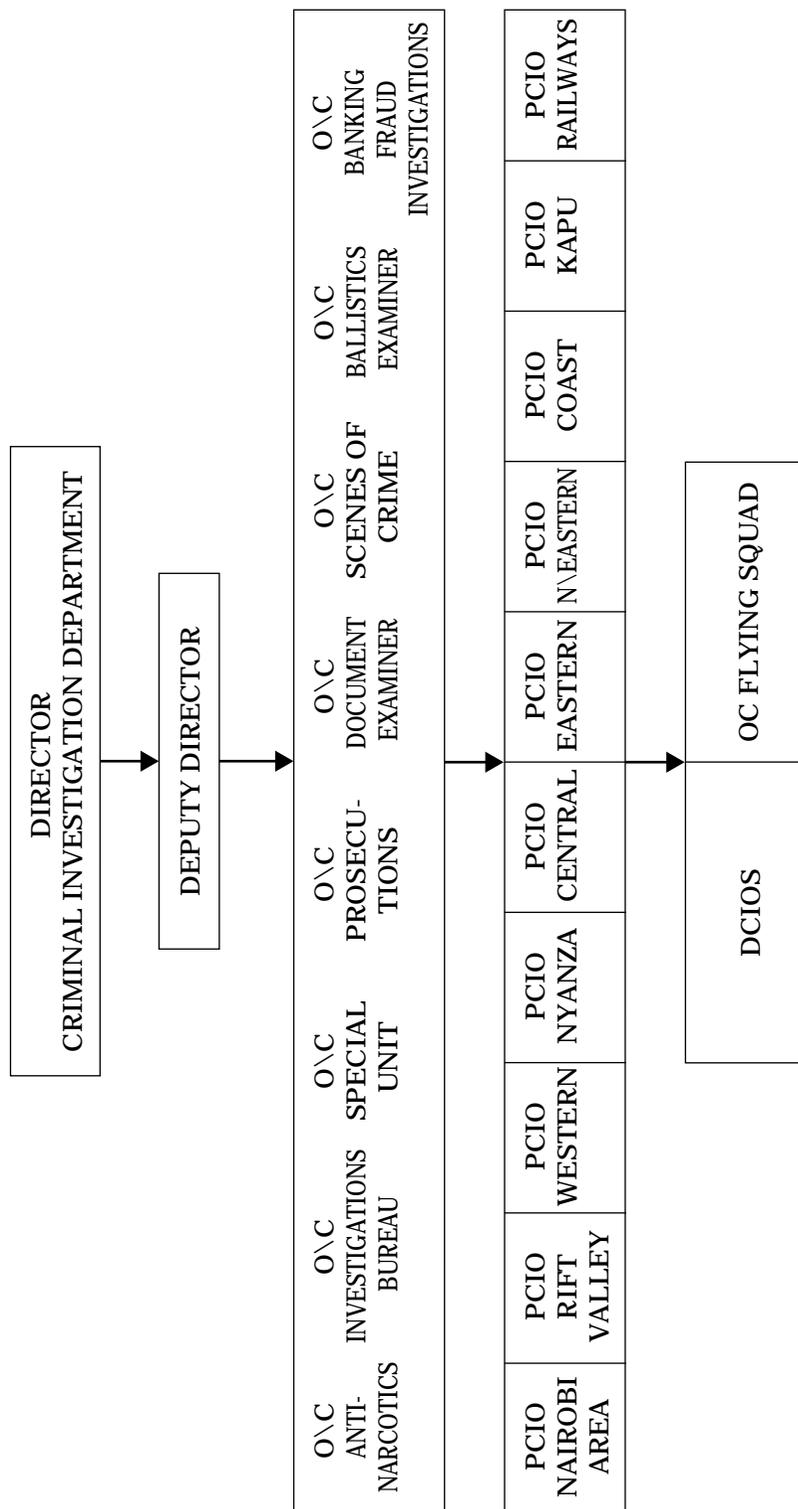


Table 1

ESTABLISHMENT AND STRENGTH—NAIROBI AREA

A. Judiciary

Nairobi Law Courts

Chief Magistrates	3
Senior Principal Magistrates	1
Principal Magistrates	2
Senior Resident Magistrates	7
Resident Magistrates	7
District Magistrate-1st Class	1
Total:	21

Makadara Law Courts

Principal Magistrates	1
Senior Resident Magistrates	3
Resident Magistrates	4
Total:	8

Kibera Law Courts

Principal Magistrates	1
Senior Resident Magistrates	3
Resident Magistrates	3
Total:	7

B. Prosecutors

	ACP	SSP	SP	C\I	I\P	NCO
Establishment	1	1	2	4	35	5
Strength		1	1	2	35	1