

## Private prosecutions in Zanzibar

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### Abstract

In this article, the author deals with the question of private prosecutions in Zanzibar. The following issues are discussed: locus standi to institute a private prosecution; appeals in cases of private prosecution; the need for the private prosecutor to have a prima facie case before instituting a private prosecution; whether the DPP has to decline to prosecute before a private prosecution is instituted; the costs for conducting a private prosecution; the costs in the event of a successful or unsuccessful private prosecution; and the DPP's intervention in private prosecutions.

### I. Introduction

In Zanzibar, private prosecutions are governed by several laws.<sup>1</sup> These are the constitution,<sup>2</sup> the Criminal Procedure Act,<sup>3</sup> the Office of the Director of Public Prosecutions Act, and the Prosecutions Act.<sup>4</sup> Research shows that there is no reported or unreported case of a private prosecution in Zanzibar.<sup>5</sup> The laws on private prosecutions in Zanzibar raise interesting issues that in practice are likely to provide challenges for the Director of Public Prosecutions (DPP) and the courts. These issues are discussed in this article and proposals are made on how some of the challenges could be dealt with should they arise in practice. In the light of the fact that some of the issues which are yet to be dealt with in practice in Zanzibar have been dealt with in other countries or jurisdictions, this article is enriched by referring to legislation or jurisprudence from these jurisdictions, inter alia, to suggest ways through which the private prosecution regime in Zanzibar could be strengthened.

In this article, the author deals with the following issues relating to private prosecutions in Zanzibar: locus standi to institute a private prosecution; appeals in cases of private prosecution; the need for the private prosecutor to have a *prima facie* case before instituting a private prosecution; whether the DPP has to decline to prosecute before a

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<sup>1</sup> Article 2(1) of the Constitution of the United Republic of Tanzania provides that 'The territory of the United Republic consists of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.' The Constitution of Zanzibar also draws a distinction between Tanzania Zanzibar and Mainland Tanzania. See Articles 69(1)(d), 101(1)(a) and 101(3).

<sup>2</sup> The Constitution of Zanzibar, 1984.

<sup>3</sup> The Criminal Procedure Act, Act No.7 of 2004.

<sup>4</sup> Office of the Director of Public Prosecutions Act, Act No. 2 of 2010.

<sup>5</sup> In an email dated 21 February 2017 (on file with the author), The Office of the Registrar, High Court Zanzibar, informed the author that no private prosecution case had ever been instituted in Zanzibar since the enactment of the 2004 Criminal Procedure Act.

private prosecution is instituted; the cost of conducting a private prosecution; the costs in the event of a successful or unsuccessful private prosecution; and the DPP's intervention in private prosecutions.

Many of these issues are also dealt with in the laws relating to private prosecutions in Mainland Tanzania<sup>6</sup> and the author compares and contrasts the relevant Zanzibar and Mainland Tanzania legislation on private prosecutions. Case law from the Court of Appeal of Tanzania, whose jurisdiction also extends to Zanzibar,<sup>7</sup> and in some instances case law from the High Court of Mainland Tanzania, is discussed or referred to in order to strengthen some of the arguments put forward in this article. The issues of *locus standi* and the right to institute a private prosecution will be discussed first.

## II. Locus standi and the right to institute a private prosecution

As mentioned above, private prosecutions are provided for in the constitution of Zanzibar, the Criminal Procedure Act and the Prosecutions Act. Article 56A(3) of the constitution provides that the DPP may take over a private prosecution.<sup>8</sup> However, it does not provide for the right of a person to institute a private prosecution. The constitution is also silent on the question of whether or not a private prosecution may only be instituted by a victim of crime. It is also silent on the question of whether juristic persons, such as companies, may institute private prosecutions. Article 56A(10)(d) of the constitution provides that '[t]he House of Representatives may enact laws regarding...procedure of commencing or instituting a criminal case by a private individual or government and non-government institutions.'

On the basis of Article 56A(10)(d) of the constitution, it could be argued that there is a possibility for juristic persons to be able to institute private prosecutions – if the House of Representatives enacts such legislation. This means that, unlike in some jurisdictions where the right to institute a private prosecution is based on common law,<sup>9</sup> in Zanzibar it has to be conferred by statute.

There are two pieces of legislation which provide for private prosecutions in Zanzibar: the Criminal Procedure Act and the Prosecutions Act. Section 102(1) of the Criminal Procedure Act provides that "[t]he Director Public Prosecutions may on application or *suo motto* permit the prosecution or an appeal of any case to be conducted by a private person." The application "to conduct a private prosecution must be supported by an affidavit of the applicant and attached with a brief of evidence which may establish a *prima facie*

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<sup>6</sup> Apart from the fact that this term is used in the Constitutions of both Zanzibar and Mainland Tanzania, it is also used in some pieces of legislation discussed in this article. See for example, sections 327, 340, 390(1)(a) of the Criminal Procedure Act; section 2 of the National Prosecutions Service Act, 2008

<sup>7</sup> Article 117 of the Constitution of the United Republic of Tanzania.

<sup>8</sup> For a brief discussion of the insertion of Article 56A in the Constitution, see Chris Maina Peter, *Recent Developments in Zanzibar: From Miafaka to Maridhiano and Government of National Unity*, in ZANZIBAR: THE DEVELOPMENT OF THE CONSTITUTION (Chris Peter Maina & ImmiSikandeds., 2011), at 202.

<sup>9</sup> This is the case, for example, in Vanuatu. See, *Jessop v. Public Prosecutor* [2010] VUSC 134; Civil Case 114 of 2009 (2 July 2010), para 16; and in the United Kingdom, see *Virgin Media Ltd, R (on the application of) v. Zinga* [2014] 1 WLR 2228, *Gujra, R (on the application of) v. Crown Prosecution Service* [2013] 1 Cr App R 12, [2012] 3 WLR 1227, [2013] 1 All ER 612.

case.”<sup>10</sup> Section 15(1) of the Prosecutions Act provides that the DPP “may, on application or *suo motto* permit prosecution of any case or appeal to be conducted by a private person.” Section 15(2) provides that the “application to conduct private prosecution shall be supported by an affidavit of an applicant and attached with a summary of evidence to be relied upon during the trial.”

The Criminal Procedure Act and the Prosecutions Act, like the constitution, do not provide for the right to institute a private prosecution. They are very clear that a private prosecution may be instituted in one of two circumstances: if the DPP approves the application for the institution of a private prosecution; or if the DPP, of his own volition, allows a person to institute a private prosecution. These pieces of legislation are silent on two questions: first, whether a private prosecution may only be instituted by a victim of crime; and secondly, whether a juristic person may also institute a private prosecution. To answer these questions one may have to look at the definition of a private prosecutor in these pieces of legislation.

The general interpretation section of the Criminal Procedure Act, section 3, does not define a private prosecutor or a private prosecution. A private prosecutor is defined in section 320 of the Criminal Procedure Act which deals with the issue of costs in the event of a successful or unsuccessful private prosecution. Section 320(4) of the Criminal Procedure Act defines a private prosecutor, for the purpose of section 320, to mean “any prosecutor other than a public prosecutor

There are two possible ways to approach this definition. One, it could be argued that this definition is only applicable to section 320 because it is clear that sub-section 4 states that “in this section ‘private prosecutor’ means any prosecutor other than a public prosecutor.” If the legislators wanted that definition to be applicable to the whole act, nothing would have prevented them from stating expressly that “in this Act” private prosecutor means any prosecutor other than a public prosecutor. This is the same approach that was adopted in section 3 of the Act to define words used in the act. The legislators adopted three approaches on the issue of interpreting words used in the Act. The first one is that some interpretations are limited to specific sections, for example, the definition of a private prosecutor under section 320(4), the definition of ‘Higher Court’ under section 13,<sup>11</sup> the definition of a ‘child’ under section 37(2)<sup>12</sup> and the definition of ‘thing’ under section 136(2).<sup>13</sup>

The second approach is that some definitions are applicable to some parts of the Act, for example, the definitions of ‘appellate court’ and ‘appellant’ under section 349 of the Act.

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<sup>10</sup> Section 102(4).

<sup>11</sup> The proviso to section 13(6) provides that ‘For the purpose of this section the word “Higher Court” means the Court Superior in Jurisdiction immediately after the Court which entered the conviction.’

<sup>12</sup> Section 37(2) provides that ‘In this section “child” means a person who has not attained the age of sixteen years.’

<sup>13</sup> Section 136(2) provides that ‘In this section “thing” includes: (a) computer system or part of a computer system; and (b) a computer data storage medium.’

The third and final approach is that a definition applies to the word wherever it is used in the act “unless the context otherwise requires,” under section 3 of the Act.

The challenge with limiting the definition of ‘private prosecutor’ under section 320 to private prosecutions under that section is that it would mean that a private prosecutor under section 102 would remain undefined, yet the costs being referred to under section 320 can only arise after a private prosecution has been instituted on the basis of section 102. In order to avoid such an absurdity, it is argued that the definition of a private prosecutor under section 320 should apply to the whole act. It should be recalled that the Tanzanian Court of Appeal has held in many decisions that legislation should be interpreted to avoid an absurdity which was not intended by the legislators.<sup>14</sup>

Referring to the jurisprudence from the Court of Appeal of Eastern Africa and from the United Kingdom, the Tanzanian Court Appeal held that:

A cardinal rule of interpretation is that one must, whenever one can, place such interpretation on a statute as will not lead to an absurdity...[I]n effect...the literal rule of statutory construction has been replaced by the purposive approach...[T]he Courts should adopt such a construction as will promote the general legislative purpose underlying the statute...[W]henever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it, by reading words in, if necessary, so as to do what parliament would have done had they had the situation in mind.<sup>15</sup>

The Prosecutions Act does not define a private prosecutor or a private prosecution. However, section 3 defines a public prosecutor to mean:

Any person appointed by the Director [of Public Prosecutions] whether formally or by written direction to conduct prosecution whether generally, within specified jurisdiction, for specific category of cases or for one specific case and shall include a person appointed to conduct private prosecution.

The problem with this definition is that it is not in sync with section 15(1) of the Prosecutions Act which provides that the DPP may “permit,” as opposed to appointing, a person to conduct a private prosecution. One gets the impression that what is being referred to under section 3 of the Prosecutions Act is a case where the example, to conduct a prosecution on behalf of the state. This practice is known in some African countries such as South Africa,<sup>16</sup> Kenya<sup>17</sup> and Zimbabwe.<sup>18</sup> It is also known in Mainland Tanzania.<sup>19</sup> Referring

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<sup>14</sup> Attorney General v. Maalim Kadau and 16 Others 1997 TLR 69 (CA) (interpreting Court of Appeal’s Rules); Joseph Warioba v. Stephen Wassira and Another 1997 TLR 272 (CA), Attorney-General and two Others v. AmanWalid Kabourou 1996 TLR 156 (CA) (interpreting the Elections Act); Attorney General v. Lohay Akonaay and Joseph Lohay 1995 TLR 80 (CA) (interpreting the Regulation of Land Tenure (Established Villages) Act 1992).

<sup>15</sup> Calico Textile Industries Ltd and Another v Tanzania Development Finance Co. Ltd 1996 TLR 257 (CA) at 267.

<sup>16</sup> Section 38(1) of the National Prosecuting Authority Act No. 32 of 1998 provides that ‘cases.—(1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National

to this as a private prosecution is misleading in the light of the fact that the prosecutor in such a case is paid by the DPP and remains under the control of the DPP and therefore a public prosecutor.

Emerging from the above discussion are the following issues: in Zanzibar a private prosecution may be instituted by both natural and juristic persons and that for a person to institute a private prosecution, he/she does not have to be a victim of crime. The position appears to be the same in Mainland Tanzania. Section 99(1) of the Criminal Procedure Act of the United Republic of Tanzania provides that:

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 President in this behalf shall be entitled to conduct the prosecution without such permission.

Unlike in Zanzibar, in Mainland Tanzania, it is not the DPP who authorises a person to institute a private prosecution. It is the magistrate. Case law shows that even if the DPP is opposed to the institution of a private prosecution, a magistrate may authorise such private prosecution to go ahead.<sup>20</sup> In *Edmund Mjengwa and six others v. John Mgaya and four others*,<sup>21</sup> the Court of Appeal held that the magistrate has the discretion to decide whether or not to permit a person to conduct a private prosecution.<sup>22</sup> However, the court added that such discretion should be exercised judicially to avoid victimising innocent people.<sup>23</sup> Section 99 of the Criminal Procedure Act does not answer the following questions: whether a person has a right to institute a private prosecution; whether only victims of crime may institute private prosecutions; and whether only natural persons may institute private prosecutions. The answers to the above questions could be found in case law.

The issue of whether a person has a right to institute a private prosecution was dealt with by the Court of Appeal in the case of *Edmund Mjengwa and six others v. John Mgaya and four others*.<sup>24</sup> The accused in this case had allegedly stolen money which they had

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Director, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.’

<sup>17</sup> Section 30(1) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 provides that ‘(1) The Director may from time to time, and as need may arise, engage the services of a qualified private legal practitioner to assist in the discharge of his mandate.’

<sup>18</sup> Section 27(1) of the National Prosecuting Authority Act No. 5 of 2014 provides that ‘The Prosecutor-General may, in consultation with the Minister, engage under agreement in writing any person having suitable qualifications and experience to perform services for the Authority in specific cases.’

<sup>19</sup> Section 22 of the National Prosecutions Service Act, Act No. 27 of 2008 provides that ‘(1) The Director may appoint a person to be a public prosecutor from other departments of the Government, local government authority or private practice to prosecute a specified case or cases on his behalf. (2) A person appointed as public prosecutor shall be required to comply with directives, instructions and guidelines issued by the Director.’ Section 2 of the Criminal Procedure Act, 1985 defines a public prosecutor to mean ‘any person appointed under section 22(1) of the National Prosecutions Services Act, 2008 and includes the Director of Public Prosecutions, the Attorney General, the Deputy Attorney General, a Parliamentary Draftsman, a State Attorney and any other person acting in criminal proceedings under the directions of the Director of Public Prosecutions.’

<sup>20</sup> *EphantaLema v. The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

<sup>21</sup> *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200.

<sup>22</sup> *Id.*, at 206.

<sup>23</sup> *Id.*, at 211.

<sup>24</sup> *Id.*, at 200.

received on behalf of an education trust.<sup>25</sup> The facts are silent on whether the private prosecutors were members of the trust or just concerned members of the public. The accused's lawyer argued "that an individual has a right to institute private prosecution" but "contended that this right is not unlimited" and that an individual should be permitted to institute a private prosecution "only in exceptional and deserving circumstances."<sup>26</sup> The private prosecutors' lawyer, without elaborating, argued that "the right to private prosecution under the provisions of section 99(1) of the Act is in accordance with the individual's constitutional right."<sup>27</sup> He did not explain which constitutional right was applicable to the right to institute a private prosecution.

Without disputing the above submissions that a person has a right to institute a private prosecution, the Court held that:

It is common ground that private prosecution does not usurp the power of the Director of Public Prosecutions. Under the provisions of section 90(1)(b) and (c), the Director of Public Prosecutions is empowered to take over and continue or discontinue any such criminal proceedings that have been instituted. As stated by Lord Wilberforce in the case of *Gourie v. Union Post Office Workers...* "the individual's right to prosecute remains a valuable constitutional safeguard against inertia or partiality on the part of the authority."<sup>28</sup>

In light of the above holding, it is argued that in Mainland Tanzania a person has a right to institute a private prosecution. This right was expressly stated by the Court of Appeal when it read section 99 of the Criminal Procedure Act in light of English case law. This brings us to the second question that is not expressly answered by section 99 of the Criminal Procedure Act: does a person have to be a victim of crime to institute a private prosecution?

Section 99 does not state that for a person to institute a private prosecution he has to be a victim of crime. According to the Court of Appeal in *Edmund Mjengwa and six others v. John Mgaya and four others*,<sup>29</sup> section 99 has to be read in tandem with section 128(2) of the Criminal Procedure Act which provides that: "[a]ny person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint of the offence to a magistrate having competent jurisdiction." The court referred to section 99 of the Criminal Procedure Act and held that "the operative words are any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person."<sup>30</sup> It is argued that there is no requirement that a private prosecutor has to be a victim of crime. The court in fact appears to suggest that a private prosecution may be conducted in the public interest when it held that the private prosecutor "as well as members of the public...may well have a genuine concern for the proper utilization of money and other resources mobilized for the purpose of constructing schools"

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<sup>25</sup> *Id.*, at 211.

<sup>26</sup> *Id.*, at 206 – 207.

<sup>27</sup> *Id.*, at 207.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 206.

<sup>30</sup> *Id.*

but could only be permitted to institute a private prosecution if they had a prima facie case against the accused.<sup>31</sup>

The third question which is not answered by section 99 of the Criminal Procedure Act is whether a private prosecution may only be instituted by natural persons. The few known cases of private prosecutions in Mainland Tanzania, which are referred to in this article, were instituted by natural persons. In terms of section 99 of the Criminal Procedure Act, the magistrate may permit “any person” to lay a complaint. The challenge is that the Criminal Procedure Act does not define the word ‘person.’

Section 4 of the Interpretation of Laws Act<sup>32</sup> defines ‘person’ to mean “any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated.”

It could be argued that on the basis of section 4 of the Interpretation of Laws Act, a person under sections 99 and 128 of the Criminal Procedure Act includes a juristic person. However, it could also be argued that in all cases where the word ‘person’ in the Criminal Procedure Act referred to the context is only applicable to natural persons and in the few instances where the legislators wanted the law to apply to juristic persons, this was expressly mentioned, for example, in sections 105, 106, 109, 111 and 135(c)(ii). This issue would have to be settled by legislators or courts when the right time comes. Either way, one of the two approaches could be adopted. One, by allowing all natural and juristic persons to institute private prosecutions as is the case in some countries such as Kenya<sup>33</sup> and Zimbabwe<sup>34</sup> or by generally allowing only natural persons to institute private prosecutions and juristic persons in exceptional circumstances as is the case in South Africa.<sup>35</sup>

### ***A. Appeals in a case of private prosecution***

Related to the right to institute a private prosecution is the right of the private prosecutor to appeal against a court’s decision. Section 102(5) of the Zanzibar Criminal Procedure Act provides that: “[n]o appeal against the decision of the Director of Public Prosecutions to refuse private person to conduct an appeal of a case originally conducted by the Director of Public Prosecutions shall be entertained.” Section 15(5) of the Prosecutions Act is also to the effect that “no appeal against the decision of the Director to refuse a private person to conduct an appeal of a case originally conducted by the Director or public prosecutor shall be entertained.”

Implied in sections 102(5) of the Criminal Procedure Act and 15(5) of the Prosecutions Act is the fact that the DPP may permit a private person to appeal a case originally conducted

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<sup>31</sup> *Id.*, at 211.

<sup>32</sup> The Interpretation of Laws Act, Cap. 1.

<sup>33</sup> See, *Lois Holdings Limited v. Ndiwa Tamboi & 184 others* [2014] eKLR 1 para 7.

<sup>34</sup> See generally, Mujuzi, J.D. *Private prosecutions in Zimbabwe: Victim participation in the criminal justice system versus prosecutorial independence*, 56 SOUTH AFRICAN CRIME QUARTERLY (2016), at 37 – 45.

<sup>35</sup> See generally, Mujuzi, J.D. *Private prosecution of environmental offences under the South African National Environmental Management Act: Prospects and challenges*, 29(1) SOUTH AFRICAN JOURNAL OF CRIMINAL JUSTICE (2016), at 24 – 43.

by the DPP or a public prosecutor. However, if the DPP refuses a private person to appeal such a case, such person is barred from appealing against the DPP's decision. What is not clear is whether in such a case, should the DPP grant permission to a private person to appeal, the appeal becomes a private appeal or remains a public one. A similar provision does not appear in the Criminal Procedure Act of Mainland Tanzania although the Prosecutions Service Act empowers the DPP to take over an appeal arising out of a private prosecution.<sup>36</sup> However, the Mainland Tanzanian High Court appears to be of the view that a private prosecutor has a right to appeal against a court's decision.

In *Fanuel Msengi v. Peter Mtumba*,<sup>37</sup> the magistrate, in a public prosecution, acquitted the respondent on the charge of stealing the complainant's cow. When the complainant was "aggrieved by the decision of the District Court in acquitting the respondent," he "appealed to" the High Court.<sup>38</sup> In dismissing the case, the court held that:

This was a public prosecution conducted by the Director of Public Prosecutions (D.P.P.). It was not a private prosecution. That being the case the complainant has no right of appeal to this court. According to section 43 of the Magistrate's Court Act No. 2/1984, appeals from District Courts to the High Court have to be done in accordance with the procedure stipulated in the Criminal Procedure Act No. 9/1985. Now according to section 378(1) of the Criminal Procedure Act No. 9/1985 only the D.P.P. may appeal against an acquittal to the High Court in respect of public prosecution. The complainant is not personally allowed to appeal in a public prosecution – what he can do is to ask the D.P.P. to appeal on his behalf. So the appeal in this case was misconceived.<sup>39</sup>

Implied in the above ruling is that a private prosecutor may appeal against an acquittal in a private prosecution although this is not expressly provided for in section 378 of the Criminal Procedure Act.<sup>40</sup>

### ***B. Prima facie case before instituting a private prosecution***

Related to the issue of *locus standi* is the question of whether a private prosecutor has to have a *prima facie* case before he may be permitted by the DPP to institute a private prosecution. This issue is addressed differently in the Zanzibar Criminal Procedure Act and in the Prosecutions Act. Section 102(4) of the Criminal Procedure Act provides that "[a]ny application to conduct a private prosecution must be supported by an affidavit of the applicant and attached with a brief of evidence which may establish a *prima facie* case." On the other hand, section 15(2) of the Prosecutions Act provides that "any application to

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<sup>36</sup> Section 10(1)(b) provides that the DPP may 'take over an appeal, revision or application arising from private prosecution, whether as appellant, applicant or respondent and where the Director takes over the appeal as appellant or applicant, he may continue or otherwise withdraw the appeal.'

<sup>37</sup> *Fanuel Msengi v. Peter Mtumba* 1992 TLR 109 (HC).

<sup>38</sup> *Id.*, at 109.

<sup>39</sup> *Id.*, at 109 – 110.

<sup>40</sup> Section 378 provides that 'Where the Director of Public Prosecutions is dissatisfied with an acquittal, finding, sentence or order made or passed by a subordinate court...he may appeal to the High Court. (2) An appeal to the High Court under this section may be on a matter of fact as well as on a matter of law.'

conduct private prosecution shall be supported by an affidavit of an applicant and attached with a summary of evidence to be relied upon during the trial.”

Section 15(2) is silent on the issue of evidence which may establish a *prima facie* case against the accused. Section 15(4) could be invoked by the DPP to require the applicant to have a *prima facie* before he is permitted to institute a private prosecution. It is to the effect that the DPP “may grant or refuse an application or may direct further evidence to be collected before the application is granted.”

Unlike in Zanzibar, in Mainland Tanzania, neither the Criminal Procedure Act nor the Prosecutions Act requires that a private prosecutor should have a *prima facie* case before he may institute a private prosecution. One of the issues that the Court of Appeal had to decide in *Edmund Mjengwa and six others v. John Mgaya and four others*<sup>41</sup> was whether in terms of sections 99(1) and 128(2) of the Criminal Procedure Act a magistrate should only permit a person to institute a private prosecution when there is evidence of a *prima facie* case against the accused. In order to put the discussion in context, these sections will be reproduced here. Section 99(1) provides that:

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 president in this behalf shall be entitled to conduct the prosecution without such permission.

And section 128(2) provides that:

Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint of the offence to a magistrate having competent jurisdiction.

The accused’s lawyer argued, *inter alia*, that before leave is granted to a person to institute a private prosecution, the magistrate had to examine “closely the circumstances on which the application was based” otherwise there was “the danger of granting leave for private prosecution on vexatious and frivolous charges.”<sup>42</sup>

Referring to case law from the United Kingdom, he added that “before granting leave, the magistrate should at the very least, ascertain whether the alleged offence is known to the law and if so whether essential ingredients of the offence are *prima facie* present.”<sup>43</sup>

In response, the private prosecutor’s lawyer argued that the magistrate had “judicially exercised his discretion to invoke the provisions of section 99(1) of the Act’ as the offences

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<sup>41</sup> *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.

<sup>42</sup> *Id.*, at 208.

<sup>43</sup> *Id.*, at 209.

proposed in the charge sheet were known to the law and ‘the essential ingredients of the proposed offences had been shown.’<sup>44</sup> The Court observed that:

From the submissions by learned counsel for both parties on this ground, we think the central issue is whether the magistrate in dealing with the application for leave addressed and satisfied himself that there were reasonable and probable cause [sic] for mounting a private prosecution...[The accused’s lawyer] firmly maintained that the magistrate did not. It is to be observed that section 128(1) and (2) of the Criminal Procedure Act 1985 provides for the institution of criminal proceedings. Sub-section (2) of this section also provides for the parameters in which an individual may make complaint to a magistrate of competent jurisdiction. According to this sub-section, in order for any person to make a complaint to the magistrate with a view to institute proceedings, it is necessary to show that such a person believes from a reasonable and probable cause that an offence has been committed.<sup>45</sup>

The court observed further that case law from the United Kingdom “regarding this requirement...provides helpful guidance on this point.”<sup>46</sup> The court held that:

The provisions of section 99(1) of the Criminal Procedure Act relating to permission to conduct private prosecutions are almost similar to the equivalent provisions in England and Wales...It was imperative therefore for the magistrate to satisfy himself that the essential ingredients of the offence to be preferred against the appellants [the accused] *prima facie* were present.<sup>47</sup>

The court held that the record showed that the charge sheet had not disclosed a *prima facie* case against the accused and that it was wrong for the magistrate to grant the private prosecutor leave to conduct the prosecution.<sup>48</sup> What amounts to ‘probable and reasonable cause’ is not defined in the Criminal Procedure Act. The Mainland Tanzanian High Court has relied on jurisprudence from the United Kingdom for the definition of ‘reasonable and probable cause.’ This, the court held, means that:

[A]n honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the offence imputed.<sup>49</sup>

The above discussion shows that in Mainland Tanzania, although the Criminal Procedure Act does not require a private prosecutor to have a *prima facie* case before

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at 209 – 210.

<sup>47</sup> *Id.*, at 210.

<sup>48</sup> *Id.*, at 210 – 211.

<sup>49</sup> *Amina Mpimbi v. Ramadhani Kiwe* 1990 TLR 6 (HC), at 8 (referring to *Hick v Faulkner* (1881) 8 Q.B.D. 167, at 171); *Jeremiah Kamama v. Bugomola Mayandi* 1983 TLR 123 (HC), at 125 – 126.

he is permitted to institute a private prosecution, the Court of Appeal has held that he has to have one. The question of whether a private prosecutor should have a *prima facie* case because he is permitted to institute a private prosecution has been addressed differently in different countries. In some countries such as Australia (New South Wales),<sup>50</sup> the existence of a *prima facie* case is one of the requirements that have to be met before a person may be permitted to institute a private prosecution. The rationale behind this requirement is to prevent people from abusing their right to institute a private prosecution.

As the Tanzanian Court of Appeal held in *Edmund Mjengwa and six others v. John Mgaya and four others*,<sup>51</sup> “in all applications of this kind, unless the magistrate judicially applies his mind to all the circumstances in which to grant leave for private prosecution, the danger of victimization and abuse of process is imminent. The essential ingredients of the offence is [sic] one such factor that should not be overlooked.”<sup>52</sup> In other countries such as South Africa, there is no need for a *prima facie* case before a private prosecutor may institute a private prosecution. In fact the South African High Court held that:

The Legislature...must have contemplated that private prosecutors might in many cases have weak grounds for prosecution – a decision by the [DPP] not to prosecute would indicate this – but the policy of Parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a *prima facie* case. The penalty for vexatious and unfounded prosecution is liability for costs.<sup>53</sup>

The question of whether it should be the DPP or a judicial officer who determines whether or not a private prosecutor has a *prima facie* case has been addressed differently in different countries. In some jurisdictions such as Taiwan<sup>54</sup> and Hong Kong,<sup>55</sup> this power is in the hands of judicial officers. In Australia (New South Wales), it is in the hands of the court registrar.<sup>56</sup> What is evident in both examples is that this question is not left in the hands of the DPP. It appears that in Zanzibar the final decision of whether or not permission should be granted to institute a private prosecution lies with the court as opposed to the DPP. Section 15(5) provides that “[w]here the application is refused, the applicant may petition the High Court for review of the decision of the Director [of Public Prosecutions]...” As discussed above, in Mainland Tanzania, it is the magistrate on the basis of section 99(1) of the Criminal Procedure Act to decide whether or not to grant a private prosecutor permission to institute a private prosecution.

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<sup>50</sup> Regulation 8.4 of the Local Court Rules 2009.

<sup>51</sup> *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.

<sup>52</sup> *Id.*, at 211.

<sup>53</sup> *Solomon v. Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T), p.613.

<sup>54</sup> Article 326(1) of the Code of Criminal Procedure.

<sup>55</sup> Section 8 of the Magistrates Ordinance (Cap 227). For a detailed discussion of this provision, see Jamil Ddamulira Mujuzi, *Private Prosecutions in Hong Kong: The Role of the Magistrates and State Intervention to Prevent Abuse*, 4 (2) THE CHINESE JOURNAL OF COMPARATIVE LAW (2016), at 253-273.

<sup>56</sup> Regulation 8.4 of the Local Court Rules 2009.

### ***C. DPP to decline to prosecute before a private prosecution is instituted***

Article 56A(A) of the constitution of Zanzibar provides that one of the functions of the DPP is “to institute and prosecute all criminal cases against any person before any Court (except martial court) in relation to any offence in which the person is charged.” The DPP has the discretion whether or not to prosecute a person who has allegedly committed an offence. Section 9(2)(a) of the Prosecutions Act provides that the DPP has the power to “decide to prosecute or not to prosecute in relation to an offence.” Neither the Prosecutions Act (section 15) nor the Criminal Procedure Act (section 102) provides expressly that a private prosecution will only be instituted after the DPP has declined to prosecute. However, in light of the fact that both section 102 of the Criminal Procedure Act and section 15 of the Prosecutions Act expressly state that a private prosecution cannot be instituted without the DPP’s permission, there is room for the argument that in Zanzibar a private prosecutions cannot be instituted unless the DPP has declined to prosecute.

As is the case in Zanzibar, legislation in Mainland Tanzania does not provide that a private prosecution will only be instituted after the DPP has declined to prosecute.<sup>57</sup> Case law from the Court of Appeal shows that private prosecutions have been instituted not because the DPP had declined to prosecute but because the police had refused to take action against the alleged offenders.

In *EphantaLema v. The Republic*<sup>58</sup> (discussed in detail below in this article), the Court of Appeal observed that the magistrate permitted the private prosecutor to institute a private prosecution because “no action had been taken by the police against the persons accused; and that on the contrary, there had been earnest efforts by the police to impede court process against them.”<sup>59</sup> The Court held, however, that the DPP could “take over and continue the proceedings” as “[t]here was no tangible evidence that the D.P.P. had sanctioned or countenanced those acts...”<sup>60</sup>

In *Edmund Mjengwa and six others v. John Mgaya and four others*,<sup>61</sup> the Court of Appeal referred to jurisprudence from the United Kingdom to hold that:

[T]he individual’s right to prosecute remains a valuable constitutional safeguard against inertia or partiality on the part of authority.” In this case and as [the private prosecutor’s lawyer] submitted, from the affidavital depositions in support of the application, it can hardly be said that the authorities concerned with prosecution were free from inertia in mounting prosecution against the appellants. Apparently, the matter has for long gone the rounds in Mbarali District and the Regional level without any action to institute prosecution. This is borne out from the affidavit of Francis Merere who deponed that he reported the matter to the Regional Police Commander Mbeya to no avail. For this

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<sup>57</sup> See section 9 of the National Prosecutions Service Act and sections 99 and 128 of the Criminal Procedure Act.

<sup>58</sup> *EphantaLema v. The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

<sup>59</sup> *Id.*, at 10.

<sup>60</sup> *Id.*

<sup>61</sup> *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.

reason, we agree with [the private prosecutor's lawyer] that the [private prosecutor] had cause to resort to private prosecution.<sup>62</sup>

The position in Zanzibar and Mainland Tanzania should be contrasted with that in other countries. In some countries such as South Africa,<sup>63</sup> Zimbabwe<sup>64</sup> and Namibia,<sup>65</sup> the relevant legislation provides expressly that a private prosecution will only be instituted once the DPP has declined to prosecute. However, in other countries such as Uganda, a private prosecution may be instituted even if the DPP has not declined to prosecute although the DPP has the power to take over a private prosecution, in which case it becomes a public prosecution, to continue with it or discontinue it.<sup>66</sup>

#### ***D. Costs for conducting a private prosecution***

In Zanzibar, both the Criminal Procedure Act and the Prosecutions Act are silent on the issue of the costs for conducting a private prosecution. However, section 320(1) of the Criminal Procedure Act implies that the costs for conducting a private prosecution are to be borne by the private prosecutor. The section states that:

It shall be lawful for a Judge of the High Court or a magistrate of a subordinate court...to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such Judge or magistrate may seem fit, in addition to any other penalty imposed: Provided that such costs shall not exceed two hundred thousand shillings in the case of the High Court or one hundred thousand shillings in the case of a subordinate court.

The above provision implies that the private prosecutor incurs the costs for conducting a private prosecution. A similar provision is contained in the Mainland Tanzania Criminal Procedure Act.<sup>67</sup> In some African countries such as Namibia<sup>68</sup> and South Africa,<sup>69</sup> the law is clear that it is the private prosecutor who incurs all the expenses related to conducting a prosecution. Unlike in some jurisdictions such as Kenya, Canada and the United Kingdom (as illustrated below), where there is no statutory provision requiring the state to make available evidence in its possession to the private prosecutor, in Zanzibar the situation is different. Section 15(7) of the Prosecutions Act provides that:

Any person authorised to conduct private prosecution shall, on the instruction of the Director [of Public Prosecutions], have the right to statement of witnesses, documents, articles and other items likely to be used as evidence which are in the custody of any

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<sup>62</sup> *Id.*, at 207 – 208.

<sup>63</sup> Section 7(2)(b) of the Criminal Procedure Act 51 of 1977.

<sup>64</sup> Section 16 of the Criminal Procedure and Evidence Act Chapter 9:07.

<sup>65</sup> Section 7(2)(b) of the Criminal Procedure Act 51 of 1977.

<sup>66</sup> Sections 42 and 43 of the Magistrates Courts Act, Chapter 16. There is case law to the effect that private prosecutions have been instituted without the DPP declining to prosecute and the DPP has taken them over. See, for example, *Uganda v. Inspector General of Police, General Kale Kayihura and 7 others* (High Court of Uganda, Kampala, Criminal Division), Revision Cause No. 34 of 2016 (17 August 2016).

<sup>67</sup> Section 345.

<sup>68</sup> Section 15(1) of the Criminal Procedure Act 51 of 1977.

<sup>69</sup> *Id.*

investigation authority and where such document or item may not be handed to such a person for any justifiable reason, arrangements shall be made for its production and be tendered as evidence during the trial.

Section 3 of the Prosecutions Act defines ‘investigation authority’ to mean “any authority charged with the responsibility to conduct criminal investigation either generally, for specific category of offences or for a specific case.” Section 15(7) shows that the DPP is willing to do anything possible to help a private prosecutor present the best case before a court. The issue of whether or not state institutions such as the police should make the evidence in their possession available to a private prosecutor in a case where the public prosecutor has declined to prosecute has been contentious in some countries.

For example, in the United Kingdom, the Court of Appeal held that should the public prosecutor decline to prosecute, the police may provide the evidence in their possession to a private prosecutor if there are no compelling reasons why such evidence should not be withheld from him or her.<sup>70</sup> The Kenyan High Court held that if the DPP declines to prosecute, he has a constitutional duty to make the evidence in his possession available to the private prosecutor to enable him or her to conduct a private prosecution.<sup>71</sup> The court added that this obligation only arises if the DPP declines to prosecute “for reasons that do not accord with its constitutional and statutory mandate.”<sup>72</sup> In Canada, the Information and Privacy Commissioner of Ontario and the Information and Privacy Commissioner of Alberta have held that the police should grant a private prosecutor full access to evidence in their possession if such access will not breach other people’s privacy or security laws.<sup>73</sup>

On the basis of section 15(7) of the Prosecutions Act, a private prosecutor in Zanzibar is very unlikely to resort to the courts to force the police to provide the evidence in their possession to him or her in order to institute a private prosecution.

Even if the police have a justifiable reason not to give such evidence to the private prosecutor, they have to make arrangements to bring it to court. Zanzibar does not have legal aid legislation<sup>74</sup> and therefore there is no legal aid for private prosecutors. Although

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<sup>70</sup> *Scopelight Ltd & Ors v. Chief of Police for Northumbria & Anor* [2010] QB 438. See also, *Scopelight Ltd & Ors v. Chief of Police for Northumbria & Ors* [2009] EWHC 958 (QB) (07 May 2009); *R v. Rollins* [2010] WLR 1922.

<sup>71</sup> *Samuel Kamau Macharia & 2 others v. Attorney General & another* [2013] eKLR, para 41.

<sup>72</sup> *Id.*, para 41.

<sup>73</sup> *Toronto Police Services Board (Re)*, 2009 CanLII 41338 (ON IPC). See also, *Nova Scotia (Justice) (Re)*, 1998 CanLII 3725 (NS FOIPOP) where the Justice Department was ordered to disclose information, which disclosure would not violate the attorney-client privilege and the right to privacy; *Toronto Catholic School Board (Re)*, 2003 CanLII 53762 (ON IPC) where it was held that the school body should not disclose information about one of its learners to a person who wanted to institute a private prosecution against the learner as that disclosure would have violated the learner’s right to privacy; *Order F2008-007*, 2008 CanLII 88744 (AB OIPC), *Order F2008-002*, 2008 CanLII 88751 (AB OIPC), *Port Hope Police Services Board (Re)*, 1998 CanLII 14447 (ON IPC), *Hamilton-Wentworth Regional Police Services Board (Re)*, 2000 CanLII 21054 (ON IPC), *York Regional Police Services Board (Re)*, 2001 CanLII 26328 (ON IPC), *Ontario (Attorney General) (Re)*, 2003 CanLII 53953 (ON IPC); *Ontario (Attorney General) (Re)*, 1996 CanLII 7406 (ON IPC) (disclosure was denied because of privacy issue); *Dubé c. R.*, 2009 QCCS 6749 (CanLII). See also, *Niagara Regional Police Services Board (Re)*, 1998 CanLII 14418 (ON IPC); *Order F2005-013*, 2006 CanLII 80871 (AB OIPC).

<sup>74</sup> See generally, Zanzibar Legal Service Centre, accessed at <http://www.zlsc.or.tz/>

Mainland Tanzania has legislation on legal aid, it does not provide for legal aid to private prosecutors.<sup>75</sup>

### ***E. Costs in the event of a successful or unsuccessful private prosecution***

Related to the issue of costs for conducting a private prosecution are the questions of how the private prosecutor recovers his costs in the event of a successful private prosecution and how the accused recovers the expenses incurred in defending himself in the case of an unsuccessful private prosecution. Section 320(1) of the Criminal Procedure Act deals with the question of costs in the event of a successful private prosecution. It provides that:

It shall be lawful for a Judge of the High Court or a magistrate of a subordinate court...to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such Judge or magistrate may seem fit, in addition to any other penalty imposed: Provided that such costs shall not exceed two hundred thousand shillings in the case of the High Court or one hundred thousand shillings in the case of a subordinate court.

A similar provision appears in the Criminal Procedure Act of Mainland Tanzania.<sup>76</sup> Section 320(1) makes it clear that in the case of a successful private prosecution, a judge or magistrate may order the offender to pay the private prosecutor such reasonable costs that the judge or magistrate may deem fit. In the author's opinion, the private prosecutor would have to make submissions to the judge or magistrate on the question of costs for him or her to determine the reasonable costs before making the order. The challenge with section 320(1) is the limitation in the proviso to that section to the effect that in the High Court the costs cannot exceed 200,000 shillings and in a subordinate court the costs cannot exceed 100,000 shillings. This limitation ignores the fact that a private prosecutor may spend more than that amount in conducting the prosecution

It is argued that the preferable approach would be for the court to be empowered to order the convicted person to compensate the private prosecutor all the expenses he, the private prosecutor, has incurred in securing his, the offender's, conviction. This is the approach taken in some countries such as South Africa,<sup>77</sup> Namibia<sup>78</sup> and Zimbabwe.<sup>79</sup> If the offender does not have the means to compensate the private prosecutor, such costs should be recoverable from the state. This is so because the state, through the DPP exercising his constitutional mandate, should have prosecuted the offender in the first place. This is an approach followed in some countries such as South Africa,<sup>80</sup> Namibia<sup>81</sup> and Zimbabwe.<sup>82</sup>

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<sup>75</sup> The Legal Aid (Criminal Proceedings) Act, Chapter 21. See also, Legal Aid Bill 2016 (this Bill is also silent on the issue of legal aid for private prosecutors).

<sup>76</sup> Section 345(1).

<sup>77</sup> Section 15(2) of the Criminal Procedure Act 51 of 1977.

<sup>78</sup> *Id.*

<sup>79</sup> Section 22(3) of the Criminal Procedure and Evidence Act Chapter 9:07.

<sup>80</sup> Section 15(2) of the Criminal Procedure Act 51 of 1977.

<sup>81</sup> *Id.*

<sup>82</sup> Section 22(3) of the Criminal Procedure and Evidence Act Chapter 9:07.

The Criminal Procedure Act also deals with the question of costs in the event of an unsuccessful private prosecution. Section 320(2) provides that:

It shall be lawful for a Judge of the High Court or a magistrate of a subordinate court who acquits or discharges a person accused of an offence, if the prosecution for such offence was originally instituted on a summons or warrant issued by a court on the application of a private prosecutor, to order such private prosecutor to pay to the accused such reasonable costs as to such Judge or magistrate may seem fit: Provided that such costs shall not exceed three hundred thousand shillings in the case of an acquittal or discharge by the High Court or two hundred thousand shillings in the case of an acquittal or discharge by a subordinate court: Provided further that no such order shall be made if the Judge or magistrate shall consider that the private prosecutor had reasonable grounds for making his complaint.

A similar provision appears in the Criminal Procedure Act of Mainland Tanzania.<sup>83</sup> If the accused in a private prosecution is acquitted or discharged, the judge or magistrate is empowered to order the “private prosecutor to pay to the accused such reasonable costs as to such judge or magistrate” seems reasonable. The section also imposes a limit on the amount of costs that may be awarded to the accused depending on the court that acquitted or discharged him or her. However, the judge or magistrate is barred from making such an order if he or she considers that the private prosecution had been instituted based on reasonable grounds. Section 320(2) raises the same challenge that we pointed out above about section 320(1) – it ignores the fact that an accused may have spent more money on defending himself than the limit that a court may award him.

Unlike in the case of a private prosecutor who may be assisted by the DPP in acquiring the evidence he may need in instituting a private prosecution, no such assistance is available to the accused. This loophole could be remedied by the DPP under section 15(3) of the Prosecutions Act which provides that “[t]he Director [of Public Prosecutions] may require a letter of indemnity or any other form of liability cover from the applicant against any civil liability that may arise out [of] the case.”

In some countries such as South Africa,<sup>84</sup> Namibia<sup>85</sup> and Zimbabwe,<sup>86</sup> one of the conditions that a private prosecutor has to fulfil before he institutes a private prosecution is that he has to deposit some money with the court as security for the accused to cover the expenses incurred in his defence should he be acquitted. If he does not have such an amount, he is

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<sup>83</sup> Section 345(2).

<sup>84</sup> Section 9(2) of the Criminal Procedure Act 51 of 1977.

<sup>85</sup> *Id.*

<sup>86</sup> Section 17 of the Criminal Procedure and Evidence Act Chapter 9:07.

allowed to enter into a recognisance with or without sureties. The constitutionality of such an approach could, however, be challenged.<sup>87</sup>

The fact that the judge or magistrate is not allowed to order a private prosecutor to pay the accused's costs where the private prosecution was based on reasonable grounds could be one of the ways to ensure that people are not deterred from instituting private prosecutions where they have reasonable grounds to do so. Section 320(2) may have to be read with section 325 of the Criminal Procedure Act which is to the following effect:

If on the dismissal of any case any court shall be of opinion that the charge was frivolous or vexatious, such court may order the complainant and or any police officer involved in the institution of the case to pay to the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge in addition to his costs.

Provided that no police officer shall be ordered by the Court to pay such compensation if it is proved that the officer acted in good faith. A similar provision appears in the Criminal Procedure Act of Tanzania mainland.<sup>88</sup> Section 3 of the Zanzibar Criminal Procedure Act defines a complainant in a private prosecution as "the private prosecutor or the person making the complaint before the court." A private prosecution has to be instituted in the private prosecutor's name.<sup>89</sup> Under section 325 of the Criminal Procedure Act, the court, after dismissing the case on the basis that the charge was frivolous or vexatious, has the discretion whether or not to order the complainant to compensate the accused person for the trouble suffered and expenses incurred. A different approach is taken in some countries such as South Africa, Namibia and Zimbabwe on this issue. In South Africa and Namibia, the law obligates a court to order the private prosecutor to compensate the accused should the court be of the opinion that the private prosecution was unfounded and vexatious. However, the accused must first make a request to the court for that order.<sup>90</sup> The Zimbabwean legislation follows a similar approach.<sup>91</sup>

### ***F. DPP's intervention in private prosecutions***

A private prosecution may be abused and there is case law from countries such as South Africa, the United Kingdom, Canada, Australia, Trinidad and Tobago, Kenya, and New Zealand showing how some people have abused their right to institute private prosecutions.<sup>92</sup>

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<sup>87</sup> *Julius Ishengoma Francis Ndyababo v. The Attorney General* 2004 TLR 14 – 44 in which the Court of Appeal declared section 111(2) of the Elections Act, 1985 which required petitioners to make a deposit before they could challenge the outcome of elections, unconstitutional.

<sup>88</sup> Section 347.

<sup>89</sup> Section 95 of the Criminal Procedure Act.

<sup>90</sup> Section 16(2) of the Criminal Procedure Act 51 of 1977 (of both South Africa and Namibia) provides that 'Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred by him as it may deem fit.'

<sup>91</sup> Section 22(2) of the Criminal Procedure and Evidence Act Chapter 9:07, provides that 'Where the court, upon hearing the charge or complaint on a private prosecution, pronounces the same unfounded and vexatious, it shall award to the accused on his request such costs as it may think fit.'

<sup>92</sup> Jamil Ddamulira Mujuzi, *The Right to Institute a Private Prosecution A Comparative Analysis*, 4 INTERNATIONAL HUMAN RIGHTS LAW REVIEW (2015), at 250 – 254.

One of the ways in which to prevent people from abusing their power or right to institute private prosecutions is to provide for circumstances in which the DPP may intervene in such prosecutions. Article 56A(3) of the Constitution of Zanzibar provides for the powers of the DPP. These powers include “to take and prosecute all criminal cases which were instituted earlier by any person or other organ” and “to stop any criminal suit instituted by any person or other organ.”<sup>93</sup> The constitution does not empower the DPP to delegate his powers under Articles 56A(3)(b) and (c).<sup>94</sup> Article 56A(5) states that:

The power of the Director of Public Prosecutions under paragraph (b) and (c) of sub-article (3) of this Article shall be in his hands and shall not be interfered [with] by any person or organ. Except when another person or organ has instituted a criminal suit, nothing in this sub-article will bar the person or organ concerned from withdrawing the suit with the Court’s permission.

Under Article 56A, the DPP does not need the private prosecutor or the court’s consent to take over and continue with or discontinue a private prosecution. However, a private prosecutor may only withdraw a prosecution with the court’s permission. Articles 56A(3) and (6) give the Zanzibar DPP many powers compared to those of his counterparts in some African countries such as Uganda, Kenya and The Gambia. In Uganda, when the DPP takes over a private prosecution, he cannot discontinue it without the consent of the court.<sup>95</sup> In Kenya, a DPP has to seek a private prosecutor’s consent before taking over a private prosecution.<sup>96</sup> The Constitution of The Gambia empowers the DPP to take over private prosecutions provided that he/she “shall not – (i) take over and continue any private prosecution without the consent of the private prosecutor and the court; or (ii) discontinue any private prosecution without the consent of the private prosecutor.”<sup>97</sup>

In Mainland Tanzania, the DPP is also empowered to take over a private prosecution. Section 9(1) of the National Prosecutions Services Act provides, inter alia, that:

Notwithstanding the provisions of any other law, the functions of the Director shall be to- (a) decide to prosecute or not to prosecute in relation to an offence; (b) institute, conduct and control prosecutions for any offence other than a court martial; (c) take over and continue prosecution of any criminal case instituted by another person or authority; (d) discontinue at any stage before judgement is delivered any criminal proceeding brought to the court by another person or authority.

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<sup>93</sup> Article 56A(3)(c).

<sup>94</sup> See also section 9 of the Prosecutions Act.

<sup>95</sup> Article 120 (3)(d) of the Constitution (1995).

<sup>96</sup> Article 157 (6)(b) of the Constitution (2010). For a detailed discussion of private prosecutions in Kenya under Article 157, see MATERU, SOSTENESS FRANCIS, *THE POST-ELECTION VIOLENCE IN KENYA: DOMESTIC AND INTERNATIONAL LEGAL RESPONSES* (2015), at 132 - 134.

<sup>97</sup> Article 85(1)(c) of the Constitution of the Second Republic of The Gambia (1996).

The Tanzanian Court of Appeal held in *Edmund Mjengwa and six others v. John Mgaya and four others*<sup>98</sup> that “[i]t is common ground that private prosecution does not usurp the powers of the Director of Public Prosecutions.”<sup>99</sup> This is so because, the court added, in terms of legislation “the Director of Public Prosecutions is empowered to take over and continue or discontinue any such criminal proceedings that have been instituted.”<sup>100</sup>

The DPP’s power to take over a private prosecution is not beyond judicial scrutiny. Article 56A(7) of the constitution of Zanzibar provides that:

In exercising his powers according to the provision of this Article the Director of Public Prosecution is not bound to follow any order or direction of any person or any government department. But the provisions of this Article will not bar the Court from using its power for the purpose of investigating whether the Director of Public Prosecutions is exercising his powers according to the provisions of this Constitution or not.

Article 56A(8) requires that the DPP, in exercising his powers under the constitution, to take “into consideration the importance of the nation in seeing that justice is done and his intention of stopping the abuse of the judicial organs is implemented.” It is argued that on the basis of Articles 56A(7) and (8) that the court may stop the DPP from taking over a private prosecution if the court is of the view that he is not exercising his powers according to the constitution or that he is abusing the judicial process. This means, inter alia, that the court may require the DPP to furnish to it the reason or reasons behind taking over a private prosecution where there are grounds to suspect that the DPP’s motive may be questionable.

The question of whether the DPP’s decision to take over a private prosecution may be subject to judicial review has been dealt with by the Tanzanian Court of Appeal in the case of *Ephanta Lema v. The Republic*.<sup>101</sup> In light of the fact that the Court of Appeal’s judgement could be invoked should the same issue arise in Zanzibar on the basis of Articles 56A(7) and (8), it is imperative to deal with that decision in detail.

Before the enactment of the National Prosecutions Service Act in 2008, the Tanzanian Criminal Procedure Act empowered the DPP to exercise different powers including taking over private prosecutions (under section 90(1)(b)).<sup>102</sup> However, the Criminal Procedure Act also provided that “[i]n the exercise of his powers under this Act, the Director of Public Prosecutions shall have regard to public interest, the interests of justice and the need to prevent the abuse of the legal process”<sup>103</sup> and that “in the exercise of the powers conferred on him by this section, the Director of Public Prosecutions shall have and exercise his

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<sup>98</sup> *Edmund Mjengwa and six others v. John Mgaya and four others* [2004] T.L.R. 200, at 206.

<sup>99</sup> *Id.*, at 207.

<sup>100</sup> *Id.*

<sup>101</sup> *Ephanta Lema v. The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

<sup>102</sup> These powers are now conferred on the DPP by sections 9 – 11 of the National Prosecutions Service Act.

<sup>103</sup> Section 90(4).

own discretion and shall not be subject to the directions or control of any person except the President.”<sup>104</sup>

The issue for determination in this case was whether the DPP’s power to take over a private prosecution could be reviewed by the courts. The appellant had been unlawfully assaulted by police officers. His lawyer, on the basis of section 99(1) of the Criminal Procedure Act, made an application before a magistrate to institute a private prosecution against the six police officers.<sup>105</sup> When the appellant’s application came before the magistrate for hearing, the state attorney “appeared and told the Magistrate that the DPP was taking over the prosecution” because “public interest demanded such action.”<sup>106</sup> The appellant’s lawyer argued that the State Attorney had not been authorised by the DPP in writing, contrary to section 92 of the Criminal Procedure Act, to take over the private prosecution and therefore did not have such powers.<sup>107</sup> The magistrate allowed the appellant lawyer’s objection and granted the application for the institution of the private prosecution.<sup>108</sup>

After just over a month, the six accused appeared before the magistrate “and immediately after their pleas were taken...[the] state attorney...stood up to announce that he was instructed by the DPP in writing to take over the prosecution.”<sup>109</sup> This “move was strongly opposed by” the appellant’s lawyer.<sup>110</sup> The questions to be answered by the magistrate included “whether the court had competence to review or control the DPP’s exercise of his powers under section 90(1)(b)”<sup>111</sup> and “whether the court can interfere where it is shown that the DPP’s taking-over [a private prosecution] is one that is predicated upon consideration other than the furtherance of public interest and the interests of justice or the need to prevent abuse of the legal process.”<sup>112</sup> The magistrate answered the above questions in the affirmative.<sup>113</sup>

On appeal to the High Court by the DPP, the High Court reversed the magistrate’s ruling and held, *inter alia*, that courts cannot impugn the DPP’s power to take over a private prosecution and that there was no evidence to support the allegation that the DPP’s decision to take over a private prosecution in this case was based on an improper motive.<sup>114</sup>

On appeal to the Court of Appeal, the appellant argued that the High Court had “erred in law in holding that the power of the DPP to take over the conduct of legal proceedings

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<sup>104</sup> Section 90(6).

<sup>105</sup> *Ephanta Lema v. The Republic*, *supra* note 58, at 2.

<sup>106</sup> *Id.*

<sup>107</sup> Section 92 of the Criminal Procedure Act provides that ‘(1)The Director of Public Prosecutions may order in writing that all or any of the powers vested in him by sections 91 of and by Part VII of this Act may be exercised also by the Law Officers, a State Attorney or a Parliamentary Draftsman and the exercise of these powers by any of them shall operate as if they had been exercised by the Director of Public Prosecutions. (2) The Director of Public Prosecutions may, in writing, revoke any order made by him under this section.’

<sup>108</sup> *Ephanta Lema v. The Republic*, *supra* note 58, at 2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, at 3.

<sup>114</sup> *Id.*, at 3 – 4.

instituted privately is final and cannot be questioned by a court of law.”<sup>115</sup> The appellant added that the “powers of the DPP under section 90(1) should not override the powers of the magistrate under section 99” and that “once a magistrate has made a decision under section 99 his jurisdiction is exhausted and, therefore, if the DPP is dissatisfied with the magistrate’s decision the only recourse to which he can have is to go to the High Court.”<sup>116</sup>

The Court of Appeal observed that “the principal issue involved in” that appeal was “undoubtedly one of some difficulty and importance.”<sup>117</sup> The question for the court was “whether or not the exercise of the powers of the DPP under the provisions of section 90(1)(b) of the Criminal Procedure Act, 1985, is totally immune from judicial control and review.”<sup>118</sup> The court observed that the question it was dealing with “demands careful deliberation” and that it was not to “conceal the fact” it “took it a long time to consider it.”<sup>119</sup> The court had observed that the DPP “has power to take over private prosecutions at any stage.”<sup>120</sup> It referred to jurisprudence from the United Kingdom to the effect that there are cases in which courts may review the exercise of statutory powers.<sup>121</sup> The court also referred to its own jurisprudence to the effect that where the DPP had abused his powers to oppose the accused’s release on bail, his decision was set aside because “it stemmed from a desire to abuse the legal process.”<sup>122</sup> The court held that:

[T]here should be no question that the D.P.P. is the chief prosecutor...[T]he overall control of criminal proceedings in the country is vested in him. But we cannot bring ourselves to accept the suggestion that the courts should not interfere with his exercise of those powers even where he has outrageously abused them.<sup>123</sup>

This could happen, for example, “where the DPP is strongly suspected of having been induced by a material benefit to discontinue a private prosecution.”<sup>124</sup> The court added that the constitution provides that everyone is entitled to equal protection under the law and that courts have a duty to protect and determine civil rights.<sup>125</sup> The court held that courts should not be deterred by section 90(6) of the Criminal Procedure Act “from adjudging as invalid the DPP’s exercise of the powers if it is not meant to achieve any of the three prescribed goals [under section 90(4)].”<sup>126</sup> The court concluded that:

We are not suggesting, however, that the burden to impugn the D.P.P.’s exercise of those powers should be a light one to discharge. For one thing, the presumption is that public officers do as the law and their duties require them to, and of course this presumption

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<sup>115</sup> *Id.*, at 4.

<sup>116</sup> *Id.*, at 4 - 5

<sup>117</sup> *Id.*, at 1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*, at 5.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*, at 7.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, at 8.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

prevails as to the acts of the D.P.P. But it should be right to say that if a prima facie ground is established for the proposition that the D.P.P. is on a course of misusing his powers, the court should be justified to review and decide on the validity of his exercise of the powers.<sup>127</sup>

On the facts before it, the court pointed out that although the magistrate had found that “no action had been taken by the police against the persons accused; and that on the contrary, there had been earnest efforts by the police to impede court process against them,” it held that the DPP could “take over and continue the proceedings” as “[t]here was no tangible evidence that the DPP had sanctioned or countenanced those acts, let alone that his intended taking over of the proceedings was designed to pervert the course of justice.”<sup>128</sup>

In his dissenting judgement, Kisanga J.A. observed that the majority judgement had undermined the principle of separation of powers and held that “the interpretation of [section 90(6)] to mean that the DPP’s exercise of his discretion under the section is subject to control by the courts is patently untenable having regard to the clear and unambiguous wording of the subsection itself.”<sup>129</sup> He added that “such a construction may in certain cases produce results which impair the DPP in the effective discharge of his functions.”<sup>130</sup> This could happen, for example, were the court to require the DPP to give reasons for exercising some of his powers under the act and yet by disclosing such reasons he ends up weakening his case.<sup>131</sup> The judge added that his conclusion did not mean that the DPP was above the law. If he abused his powers, he would have to be investigated and that there were other remedies such as the orders of *certiorari* and *mandamus* that could be invoked in the event of such abuse.<sup>132</sup> When the DPP took over the case, he did not continue with the prosecution.<sup>133</sup>

Courts in some countries such as Fiji and Mauritius have also held that the DPP’s powers are subject to judicial review.<sup>134</sup> This is the case whether those powers are provided for in the constitution or in another piece of legislation.

In Mainland Tanzania, the DPP’s powers to intervene in private prosecutions are provided for in section 9 of the National Prosecutions Service Act. Section 9 provides that the functions of the DPP include to “take over and continue prosecution of any criminal case instituted by another person or authority”<sup>135</sup> and to “discontinue at any stage before

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<sup>127</sup> *Id.*, at 9.

<sup>128</sup> *Id.*, at 10.

<sup>129</sup> *Ephanta Lema v. The Republic*, Dissenting Judgement of Kisanga J.A., at 2.

<sup>130</sup> *Id.*, at 2 – 3.

<sup>131</sup> *Id.*, at 3.

<sup>132</sup> *Id.*, at 5.

<sup>133</sup> It has been submitted that ‘after getting the case back, the Director of Public Prosecutions never proceeded and all accused police officers went on with their work.’ See, CHRIS MAINA PETER HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS (1997), at 93.

<sup>134</sup> *MohitJeewan v. Director of Public Prosecutions* 2005 PRV 31, 2006 MR 194.

<sup>135</sup> Section 9(1)(c).

judgement is delivered any criminal proceeding brought to the court by another person or authority.”<sup>136</sup>

Unlike in Zanzibar, in Mainland Tanzania, when the DPP takes over a private prosecution, he is permitted to continue with it in the name of the private prosecutor. This is pursuant to section 9(3) of the National Prosecutions Service Act which states that “[n]othing in this section shall prevent the Director to take over and continue proceedings in the name of the person or authority that instituted those proceedings.” This means that the DPP could conduct a public prosecution in the name of the individual. This is not the same thing as conducting it on behalf of the individual. In the latter case, it would remain a private prosecution being conducted using state resources.

However, the DPP’s exercise of his powers is subject to guiding principles which are identical to those under the repealed section 90(4) of the Criminal Procedure Act. Section 8 of the National Prosecutions Service Act provides that “[i]n the exercise of powers and performance of his functions, the Director shall observe the following principles - (a) the need to do justice; (b) the need to prevent abuse of legal process; and (c) the public interest.” This means that the Court of Appeal’s judgement in *Ephanta Lema v. The Republic*<sup>137</sup> applies with equal force to the question of judicial review of the DPP’s powers under the National Prosecutions Service Act. The National Prosecutions Service Act does not require the DPP to give reasons when he decides to take over and continue with or discontinue a private prosecution. However, the position is different when he takes over an appeal by a private prosecutor. Section 10(1) of the National Prosecutions Service Act provides that one of the functions of the DPP is to “take over an appeal, revision or application arising from private prosecution, whether as appellant, applicant or respondent and where the Director takes over the appeal as appellant or applicant, he may continue or otherwise withdraw the appeal.”<sup>138</sup> Section 10(2) states:

Where the Director takes over an appeal, revision or application pursuant to subsection (1)(b) and subsequently decides to withdraw the appeal, revision or application, he shall give reasons for the decision and inform the appellant or applicant as the case may be.

If the DPP takes over an appeal and continues with it, he is not supposed to give reasons for the decision. However, if he takes over the appeal and withdraws it, he has two obligations to discharge: one, to give reasons for withdrawing the appeal; and two, to inform the applicant or appellant “as the case may be.” It appears that the reasons for the withdrawal have to be given to the court first and thereafter the appellant should be informed of the reasons and the decision. The appellant or applicant could challenge the DPP’s decision if he is not satisfied that the reasons for the withdrawal are in accordance with the guidelines under section 8 of the National Prosecutions Service Act.

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<sup>136</sup> Section 9(d).

<sup>137</sup> *Ephanta Lema v. The Republic*, Criminal Appeal No. 2 of 1990 (judgement of 24 March 1994).

<sup>138</sup> Section 10(1)(b).

Some of the DPP's powers in the Prosecutions Act to intervene in private prosecutions are unique to Zanzibar and are likely to ensure that a private prosecution is in effect closely monitored by the DPP. In fact, it could be argued that private prosecutions in Zanzibar are in effect controlled by the DPP. Apart from the fact that a private prosecution can only be instituted with the DPP's permission, it has to be conducted under the DPP's supervision as if it were a public prosecution. Section 15(6) provides that "[a]ny person authorised to conduct private prosecution may do so personally, or upon prior authorisation of the Director, by an advocate and may change and replace such advocate as he deems appropriate upon obtaining authorisation of the Director." Section 15(8) provides that:

A person or advocate conducting private prosecution shall be subject to general or specific direction of the Director and he shall have the duty to furnish the Director with regular report [sic] on the progress of the case and at the conclusion of the trial shall inform the Director in writing on the outcome of the case.

Sections 15(6) and (8) show that the DPP in Zanzibar effectively controls private prosecutions. He decides whether or not an advocate instructed by the private prosecutor should conduct the private prosecution, the private prosecutor has to follow general or specific directions issued by the DPP, reports must be submitted to him on a regular basis on the progress of the private prosecution and at the end of the case, and a report on the outcome of the prosecution must be submitted to him. In other countries such as South Africa<sup>139</sup> and Namibia,<sup>140</sup> the DPP does not have such powers over a private prosecutor. The private prosecutor decides which lawyer to instruct, if he decides to instruct one to conduct the private prosecution. The position is the same in Mainland Tanzania where section 99(3) of the Criminal Procedure Act provides that "[a]ny person conducting the prosecution may do so personally or by an advocate."

One of the issues that would have to be resolved in Zanzibar is the tension between section 15 of the Prosecutions Act and section 102(7) of the Criminal Procedure Act on the question of the private prosecutor instructing an advocate. Section 102(7) of the Criminal Procedure Act provides that "[a]ny person conducting the [private] prosecution may do so personally or by an advocate." Unlike section 15 of the Prosecutions Act, under section 102(7) of the Criminal Procedure Act the DPP has no say whatsoever with regards to the private prosecutor's decision to instruct an advocate to conduct the prosecution. Although the Prosecutions Act repealed some sections of the Criminal Procedure Act,<sup>141</sup> section 102 was not one of those repealed. This means that the legislators decided to leave the question of private prosecutions to be governed by two different pieces of legislation. As the Tanzanian High Court stated, if the legislature intends to amend a piece of legislation, it does so "in no uncertain terms" otherwise the legal position remains unchanged.<sup>142</sup>

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<sup>139</sup> Section 7(1)(d) of the Criminal Procedure Act 51 of 1977.

<sup>140</sup> *Id.*

<sup>141</sup> Section 26 of the Prosecutions Act provides that "[t]he Criminal Procedure Act is hereby amended by repealing sections 96, 98 and 101 thereof."

<sup>142</sup> *Augustino Mponda v. Republic* 1991 TLR 97 (HC), at 99.

The DPP's powers under the Criminal Procedure Act on the issue of private prosecutions are less intrusive compared to his powers under the Prosecutions Act. This creates some ambiguity with regards to which law actually governs private prosecutions in Zanzibar. It is now up to the courts, should the issue arise, to determine which of the laws should govern private prosecutions. In resolving this issue, the courts could invoke the 'later in time' rule of statutory interpretation.<sup>143</sup> The legislature may also have to repeal section 102 so that private prosecutions are governed by the Prosecutions Act.

#### **IV. Conclusion**

In this article, the author deals with the question of private prosecutions in Zanzibar. The following issues are discussed: *locus standi* to institute a private prosecution; appeals in cases of private prosecution; the need for the private prosecutor to have a *prima facie* case before instituting a private prosecution; whether the DPP has to decline to prosecute before a private prosecution is instituted; the costs for conducting a private prosecution; the costs in the event of a successful or unsuccessful private prosecution; and the DPP's intervention in private prosecutions. It is recommended, inter alia, that section 102 of the Criminal Procedure Act may have to be repealed so that private prosecutions are exclusively governed by section 15 of the Prosecutions Act.

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<sup>143</sup> This rule has been invoked by courts in some African countries. See for example, *Nhlapo v. S* 2012 (2) SACR 358 (GSJ) para. 23 (South African High Court); *Hodoul v. Kannu's Shopping Centre* [2007] SCSC 126 (Supreme Court of Seychelles); *Transnamib Limited v. Poolman and Others* (SA 6/99) [1999] NASC 4 (17 November 1999) (Supreme Court of Namibia); *NIMR and Chapman (Pvt) Ltd and Others v. Zimbabwe Electricity Supply Authority* (Case No. HC 31/05) [2005] ZWBHC 8 (27 January 2005) (High Court of Zimbabwe).