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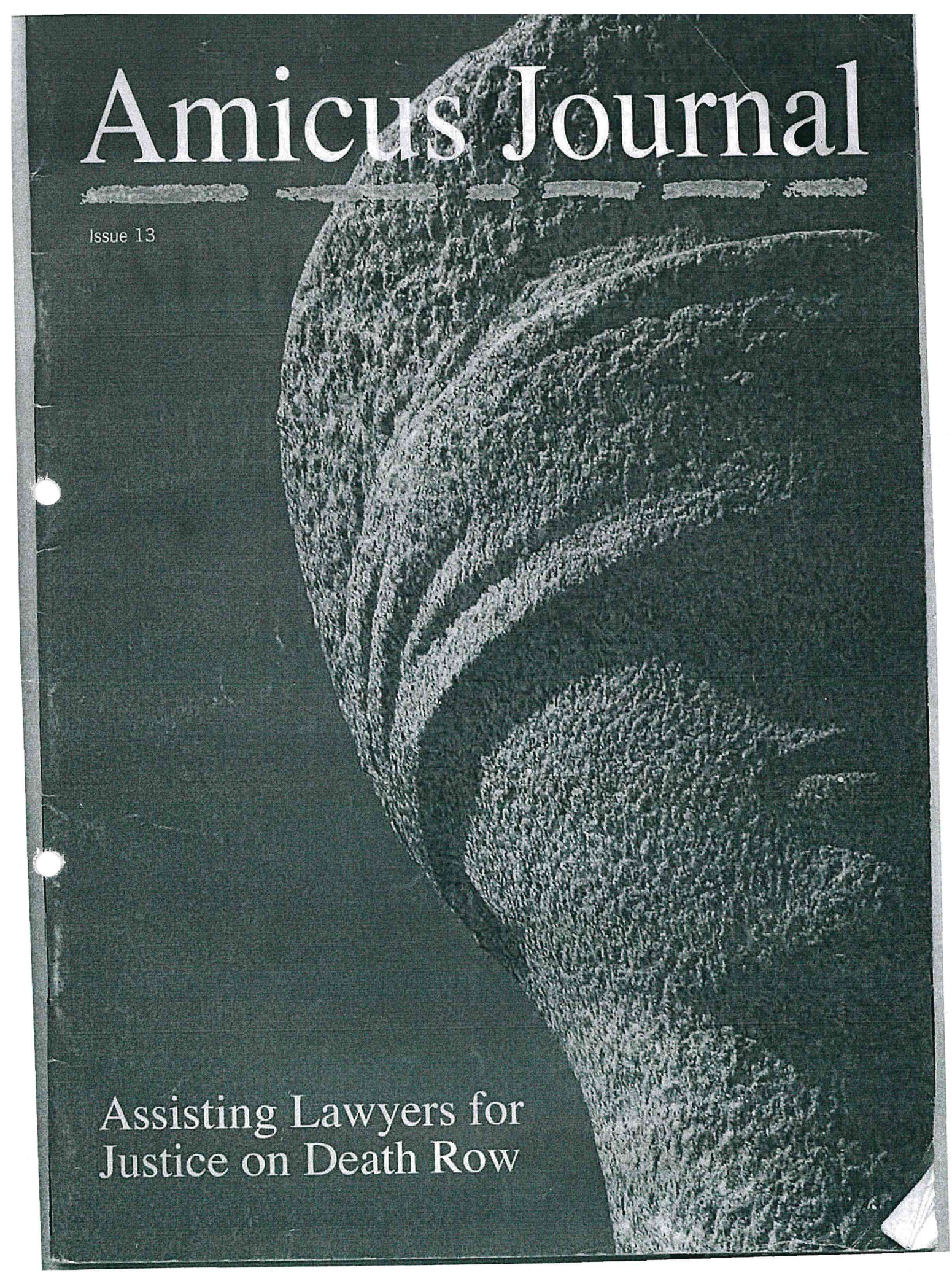

Assisting Lawyers for Justice on Death Row

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ISSUE 13

EVALUATING THE COMPETENCE OF INVESTIGATIVE AND PROSECUTORIAL AGENCIES FOR CAPITAL OFFENCES IN KENYA: A CASE STUDY

Republic* v. *Kamlesh Mansukal Damji Pattni, Alias Paul Pattni

E. Z. Ongoya*

" 'The case was hopelessly investigated and prosecuted', concludes Githu Muigai"

Introduction

The above sentiment was a defence lawyer's response to a press interview upon winning a sensational murder case in which a Permanent Secretary had been found brutally killed in a fire inferno. His wife was charged with starting the fire. She was convicted of murder and sentenced to the mandatory death sentence by the High Court, but the Court of Appeal quashed the conviction. The grounds of suspicion and circumstantial evidence were the only means which the High Court used to determine that the accused had a strong motive for killing her husband. The Court of Appeal found that the circumstantial evidence relied on by the High Court was not sufficient to condemn the accused person.

The recent past has seen some very critical utterances being levelled against the investigative and prosecutorial agencies of the Republic of Kenya by the judiciary, owing to the cavalier manner in which these agencies have handled criminal cases. In *Republic* v. *David Manyara Njuki and Twelve Others*, the thirteen accused persons were facing ten counts of murder under Section 203 as read with Section 204 of the Penal Code, Cap. 63 of the Laws of Kenya. The trial judge, in declaring that the accused persons had no case to answer at the close of the prosecution case, criticised the police for relying on the evidence of an informant without attempting to verify its accuracy. "It is incumbent upon the police to verify the truth and accuracy of the information which they allegedly received from their informer but they do not seem to have carried out any independent investigations at all..." This failing was particularly serious given the gravity of the alleged offence.

It is against such a backdrop that this paper sets out to interrogate the efficacy of the investigative and prosecutorial agencies in Kenya in handling capital cases, and to highlight the problems that ail them. Particular emphasis will be laid on a case study of *Republic* v. *Kamlesh Mansuklal Damji, alias Paul Pattni*.[2]

Investigative and Prosecutorial Functions in Kenya

In Kenya the principal agency that investigates crime is the Kenya police. The investigative procedure from the time of arrest of the suspect is provided for under the Criminal Procedure Code, Cap. 75 of the Laws of Kenya.[3] On the other hand the principal agency that undertakes criminal prosecutions in Kenya is the office of the Attorney General. This is established as such under Section 26(3) of the Constitution of the Republic of Kenya. This section provides that the Attorney General shall have the power to institute and undertake, to take over and continue, and to discontinue criminal proceedings. Section 26(5) of the Constitution provides that these powers may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

The interplay between the investigative and the prosecutorial functions in criminal offences in Kenya is to be found *partly* in Section 26(4) of the Constitution of the Republic of Kenya, which provides that the Attorney General may require the Commissioner of Police to investigate and report to him on any matter which, in the Attorney General's opinion, relates to any offence, including an alleged or suspected offence.

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Appointment of Public Prosecutors

Section 85 of the Criminal Procedure Code, whose side note reads "power to appoint public prosecutors", provides for the appointment of public prosecutors by the Attorney General. Section 85(2) is of particular relevance as it provides that he 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 case.

The provision that a person who is not legally qualified may be appointed as a public prosecutor is unsatisfactory and open to abuse. The possibility of abuse came to the fore in *Roy Richard Elirema and Anor* v. *Republic*,[4] when, in spite of the clear wording of the law, the Attorney General appointed police officers below the rank of Assistant Inspector to be public prosecutors. In that case, contrary to section 85(2) of the Criminal Procedure Code, the prosecution was conducted by a police corporal. Moreover, not being legally qualified, the prosecutor did not understand the law relating to registrable instruments, including traveller's cheques, and other relevant provisions of the law.

The accused were convicted and subsequently sentenced to death, but their convictions were quashed by the Court of Appeal.

The accused were convicted and subsequently sentenced to death, but their convictions were quashed by the Court of Appeal. The Court confirmed that, as per the requirements of Section 85(2) of the Criminal Procedure Code, for a person to be appointed a public prosecutor, he or she must be either an advocate of the High Court of Kenya or be a police officer not below the rank of Assistant Inspector of Police.

The Court went on to examine the fairness and impartiality of a trial where the prosecution had been conducted by an incompetent prosecutor. The principles of impartiality and fairness of a trial are some of the lynchpins of section 77(1) of the Constitution in attempting to offer the accused person the secure protection of the law. The Court held that where the prosecution had been conducted by an incompetent prosecutor, the accused person could not be said to have been afforded secure protection of the law since in such a case, the trial court had acted both as a trial court and a prosecutor, which is contrary to Section 77(1) of the Constitution.

Republic v. *Kamlesh Mansuklal Damji Pattni, Alias Paul Pattni:* a *Locus Classicus* on how not to Investigate and Prosecute a Capital Offence.

The accused person in this case, a multi-billionaire business magnate in Kenya, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

This case is of significance in a number of respects. First, the prosecution was conducted by the Director of Public Prosecutions ("D.P.P.") in person assisted by three state counsel. In total, four lawyers from the state law office undertook the prosecution of this matter. Second, the state called a total of twenty seven witnesses before the close of the prosecution case. Third, the prosecution was commenced at the end of nine years and eight months after the deceased was buried and the matter closed. Fourth, in spite of the quantity of resources put into play by the state in terms of the technical personnel from the Attorney General's Chambers prosecuting the matter and the number of witnesses called, the state did not establish a *prima facie* case warranting the putting of the accused person to his defence at the close of the prosecution's case.

Attorney General's role in investigations

The manner in which the Attorney General's office (ab)used its powers in this case was criticised by the trial court. As indicated above, the Attorney General may require the Commissioner of Police to investigate any perceived criminal act. The Attorney General or his officers cannot, after these instructions to the Commissioner of Police, be part of the investigating team. Upon giving the instructions, the Attorney General's office should wait to receive the report from the Commissioner of Police. In this case, the Attorney General and his officers gave instructions to the Commissioner of Police and were themselves directly and intricately involved in the investigations.

It was the D.P.P. who summoned the arresting officer and instructed him to arrest the accused person. When the Director of Medical Services gave a list of pathologists that would conduct an autopsy of the exhumed remains of the deceased, the D.P.P. ignored it and appointed his own

pathologist. All witness statements were recorded in the office of the D.P.P. under his supervision. The D.P.P. wrote several letters pertaining to the exhumation of the deceased's remains and others pertaining to investigations. As the court observed, the D.P.P., having been involved in the investigations into this case, ought to have left the prosecution to be carried out by some other officer.

Prosecution Commenced after an Inordinately Long Period after Date of Alleged Crime

In Kenya, subject to exceptions, there is no statutory limitation period for criminal offences. However delay may amount to abuse of process at common law. In *Githunguri* v. *Republic*[3] the High Court observed:

> The preferment of a charge against any person nine years after the alleged commission of the offence, six years after a full inquiry in respect of it and five years after the decision of the office of the Attorney General not to prosecute and to close the file is vexatious, harassing, an abuse of the process of the court and contrary to public policy unless a good and valid reason exists for doing so, such as the discovery of important and credible evidence or the return from abroad of the person concerned.

In the matter at hand, the deceased died in 1993. An inquest was opened to investigate into the circumstances of the homicide in 1994. The inquest held that death resulted from natural causes. Consequently, no charge was preferred against anybody then. Nine years and eight months after the deceased was buried and the matter closed by the Attorney General the police decided to re-open the investigations. The accused had all along been a prominent business man in Kenya and the question of his being outside the country could not arise.

Arrest not based on Reasonable Suspicion of Commission of Offence

The accused was arrested and charged in November 2003. However the police did not start taking statements from potential prosecution witnesses until the following month. A statement was not taken from the key prosecution witness, who claimed to have been at the accused's home at the time of the murder, until March 2004. An application for a further *post mortem* was not made until June 2004, and the results of the second *post mortem* examinations, upon which the prosecution relied as to the cause of death, were not carried out until some months after that. This led the court to the inevitable conclusion that the accused was arrested before any investigations were ever commenced.

Motive and Opportunity to Kill on the Part of the Accused not Established

The first prosecution witness testified that the accused was arrested on 18th March 1994 for ten days. The deceased was killed on 24th March 1994. Thus it would appear that the accused was in police custody on the material day, and that therefore he did not have the opportunity to kill the deceased. The prosecution did not call any evidence to explain this inconsistency. The court found:

> The failure to have the records of the accused's arrest on 18th March 1994 and those pertaining to his release is quite suggestive. I find that the only inference I can make of this failure to adduce evidence surrounding the arrest of the accused on 18th March and of his subsequent release must be that such evidence would have adversely affected the prosecution case.

Conclusion

As the above cases show, particularly *Republic* v. *Kamlesh Mansuklal Damji Pattni, alias Paul Pattni,* the criminal justice process in Kenya, particularly as it relates to the investigation and prosecution of cases, is in dire need of reform. It is my hope that the current Governance Justice Law and Order Sector Reform programme that is being undertaken by the Government of Kenya will give this branch of governance some lengthy consideration.

[1] Kwamboka Oyaro, *How Sawe Widow's Freedom Was Won, The Daily Nation, Wednesday Magazine,* Wednesday June 25, 2003.
[2] Nairobi, High Court Criminal Case Number 229 of 2003.
[3] See generally Joy K. Asiema and Ongoya Z. Elisha, *The Application of the Death Penalty in Kenya: A Case of Tortuous De Facto Abstinence,* www.biicl.org/deathpenalty.
[4] Nairobi Criminal Appeal No. 67 of 2002.
[5] [1985] K.L.R. 91.