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TOPIC: ETHICS AND INTEGRITY OF A PUBLIC PROSECUTOR -
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Let me first express my gratitude to the Director of Public Prosecutions ("DPP") and your team for inviting me to join you here at what you are calling the National Inaugural Prosecutors Conference. It's always an honour for me to join you my distinguished colleagues on these occasions. I was here on the 1st October, 2009, and spoke on this same subject at what was then dubbed the 5th Annual State Advocates Workshop.

The subject of Ethics and Integrity is sufficiently broad to cover a whole year of a College Syllabus. For the purposes of this discussion, I propose to focus only on that special section of this subject that relates to Public Prosecutors.

Special ethical rules are appropriate for prosecutors because the role of a prosecutor is significantly different from that of a Defence Counsel in this special area of legal practice.

In his letter to the New York Times on the 4th March, 1941 Mr. Justice Felix Frankfurter said the prosecutor:

"Wields the most terrible instruments of government."

Power and accountability have now become Siamese twins. One should not discuss power without contemporaneously discussing accountability. The Rules of ethics crafted for Public Prosecutors are in essence the regulation of that power to achieve accountability. The Public Prosecutor is merely a delegatee of the power reposing in the people.

In their joint Report on Professional Responsibility prepared in 1958, the American Bar Association and the Association of American Law Schools concluded that:

"The public prosecutor cannot take as a guide for conduct of his office standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged."

Thus although the ethical rules designed for a prosecutor still grant a lot of discretion in decision making the limitations imposed are intended to ensure that justice is served and guaranteed to all manner of persons without fear or favour affection or ill will.

Often the decision making function of a Prosecutor is usually classified as **"quasi judicial."** Thus the American Model Code for Public Prosecutors says:

"Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is

*to protect the innocent as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus the prosecutor has sometimes been described as a “**Minister of Justice**” or as occupying a quasi judicial position.”*

In this elevated position of a “**Minister of Justice**” the public prosecutor is required to make a series of very important decision that usually have far reaching and grave consequences on the life and livelihoods of individuals. One of those responsibilities is the decision to prefer select and institute criminal charges.

When a prosecutor chooses to charge or indict an individual with the offence of murder, theft of motor vehicle or indeed Treason, that genre or category of offences that are non bailable and attract capital punishment, the Prosecutor must be satisfied that he is doing the right thing. These offences should never be charged merely as holding charges to take a person out of circulation and in the custody of the state. A decision to charge must never serve the banality of political convenience. Politics is simply not one of the factors a prosecutor needs to take into account when considering whether to charge or not.

A decision to charge can be ruinous to an individual even when they are subsequently released either by acquittal or discontinuance. An individual’s reputation could be permanently damaged. The mental anguish and anxiety endured by an individual charged with such serious offences is indescribable. The accused family and friends suffer a similar

fate and the State or Governments on whose behalf such decisions are made is pleased to move on and ignore the suffering endured by the victims of bad prosecutorial decisions.

A Prosecutors decision can, should and ought to serve only one interest that of justice. A Prosecutor must serve this interest without fear favour or prejudice. A prosecutor must consider only those factors that are relevant and must ignore anything that unjustifiably favours or discriminates against a particular individual or his/ her interest.

In common law Jurisdictions as it is the case in Zambia, the Director of Public Prosecutions is the **"Chief Prosecutor of the Government"** and is constitutionally responsible for the institution and undertaking of criminal proceedings against all persons brought before courts of law. The provisions of Article 180 of the Constitution as well as the National Prosecution Authority Act, No. 34 of 2010 are very instructive.

In order to guarantee his independence, the decisions of the DPP and his officers are usually made without any judicial oversight. As it was clearly stated in the Australian case of Maxwell V. Queen [1995] 184 CLR 501.

"Our Courts do not purport to exercise control over the institution or continuation of criminal proceedings save where it is necessary to do so to prevent an abuse of process or ensure a fair trial." Per Dawson and McHugh JJ).

When called upon to make that all important decision to bring or approve charges against any individual, prosecutors should always have, like a bell ringing in their ear, the words of RR Kidson QC:

"It behoves him neither to indict, nor on trial to speak for conviction except upon credible evidence of guilty; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious intolerant or over-pliant in the firm or abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance." (Kidson was a Senior Prosecutor in New South Wales – Australia.)

Discussing the specialised and demanding role of the prosecutor, Rand J in the case of Boucher V. Queen (1954)110 CCC 263 at page 270 (a decision of the Supreme Court of Canada) said:

"It cannot be over emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength; but it must also be done fairly. The role of a prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal

responsibility. It should be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

The justness and sacredness of judicial proceedings quite clearly exclude the arraignment of an individual where no evidence exists to support the charge. A well disposed and properly trained prosecutor knows that his/her true role is merely to present what credible evidence he/her has against an accused and not merely to secure a conviction.

It is mischievous to argue, as we have heard before, that there can be public policy justification to prosecute a matter even where the DPP or a prosecutor knows that there is no evidence and the ultimate result will be an acquittal.

Prosecutors are called upon to be dispassionate and scrupulously fair in their decision to indict or continue a prosecution. And indeed in their presentation of the evidence at trial.

In the presentation of the evidence, prosecutors are enjoined to follow or heed the words of Lord Denning in the case of Dallison V. Cattery [1964] 2 ALL ER 610 at page 618 where he said:

"The duty of prosecution counsel or solicitor, as I have always understood it, is this; if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness

or make his statement available to the defence. It would be highly reprehensible to conceal from the Court the evidence which such a witness can give."

His Lordship was underlining the continuing duty if a prosecutor to an accused person.

It must be noted that Lord Denning made his statement in 1964. In 2003, the United Nations General Assembly issued Guidelines 33 on the Role of Prosecutors. One of the Rules under the guidelines states that:

"Prosecutors shall in accordance with the law perform their duties fairly consistently and expeditiously, and respect and protect human rights thus contributing to ensuring due process and the smooth functioning of the criminal justice system."

It is my argument that under the modern principles of prosecutorial responsibility, a prosecutor who has evidence which speak to material facts tending to show the innocence of an accused, should not in the first place prefer charges or an indictment. The dictates of fairness and the protection of human rights preclude the preference of charges in these circumstances. This is what the public interest is. The prosecutor has a duty of care to both the accused and the State in his/her role as the gate keeper to the Hall of Justice.

A public prosecutor deserved to be rewarded, awarded and remunerated for their:

1. Integrity

This is the attribute to do good, seek the truth, and freedom from moral turpitude. A good public servant and prosecutor should not lead a scandalous life in both private and public. This is what builds public confidence that a public prosecutor will not employ the power and instruments of his office to pursue ends that may have nothing to do with the pursuit of fair Justice.

2. Fairness and impartiality

It is wrong for a public prosecutor to have a predisposed mind. He must approach each case on its own merit and ought not to judge a person based on their place of origin, colour creed, sex and station in life. The rich, just as the poor, are entitled, in equal measure, to access the cup of justice. It is unprofessional for a prosecutor to discriminate in favour of or against any person on the basis of ethnicity or religion or political view point in exercising discretion to prosecute. A prosecutor should not use any other improper considerations in excising such a discretion.

3. Diligence and competence

A good prosecutor, must be studious, well versed in the law, and be willing to do Justice based on the law as it exist. He must be familiar with the modern rules on the treatment of victims of crime especially minors and women who quite often are the victims of abuse.

A public prosecutor must give due attention to the crimes committed by public officials especially corruption and abuse of office. Corruption impacts society gravely and disproportionately. The poor suffer more consequences arising from high level corruption and abuse of office.

In the view that I take, it would be dangerous to have a reward system for prosecutors that only take the number of convictions as the measure of success and ability.

Prosecutors, just like judges, must always endeavour to occupy the moral high ground. In their role as ministers of Justice, they hold the key to the hallowed chamber of justice itself. As Muna Ndulo recently observed;

"Justice has many branches - including but not limited to equity, fairness, due process and insulation from arbitrary use of state powers. Essentially it protects citizens-

particularly the vulnerable from abuse which is inherent in unbridled use of state powers."

Some very useful guidance is to be found in the following Rules contained in the United Nations Guidelines for Prosecutors

"13. *In the performance of their duties, prosecutors shall:*

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. *Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.*
15. *Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violation of human rights and other crimes recognised by international law and, where authorized by law or consistent with local practice, the investigation of such offences.*
16. *When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect`s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”*

The danger of selective prosecution

As I said earlier, the power to indict is the power to destroy. Rule 9.1 of the American Lawyers Code of Conduct (1980) provides that:

"A Lawyer serving as a public prosecutor shall not seek evidence to support a prosecution against a particular individual unless the individual is identified as a suspect in the course of a good faith investigation into suspected criminal conduct."

When one searches the depth and breadth of the law it is possible to charge almost everyone with an infringement of the law. It is thus possible to first identify an individual and then search the law to find a crime that fits them.

Ethics and professional conduct rules proscribe this sought of approach to law enforcement. Suspects must be identified by the evidence disclosed in the course of a good faith investigation. A properly trained prosecutor must be motivated by a desire to protect society from all criminal and harmful conduct. A criminal trial is not the forum for scoring personal and vengeful points. Its banal and just unacceptable. A prosecutor who engages in this type of conduct commits the most egregious form of professional misconduct. You can't use the authority of your office to go on a personal ego trip and injure others in the process.

Remember the whole weight of society`s expectation of a just society lies on your shoulders. It rests on your integrity, your diligence, your professionalism, on your sense of judgement.

I have every confidence that all present here are determined, committed and prepared to push the wheel of justice for the benefit of all our people.

I wish you Godspeed in your duties.