



**Republic v Nyambura (Criminal Case 54 of 2018)  
[2023] KEHC 1345 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE 54 OF 2018  
RB NGETICH, J  
FEBRUARY 23, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EUNICE NYAMBURA ..... ACCUSED**

**RULING**

1. The accused Eunice Nyambura alias Waithera was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). Particulars are that on the 28<sup>th</sup> day of November, 2018 at Kamae village in Kahawa West within Kiambu County murdered Francis Kamau.
2. On October 4, 2022, the prosecution made an oral application to terminate the proceedings after the court declined to grant an adjournment at the request of the Prosecution. On October 5, 2022, the prosecution filed a formal *nolle prosequere*. Ms Kibebo orally opposed the nolle prosequere and urged the court to disallow the same. She submitted that the accused has been in custody since 2018 and allowing the nolle prosequere will amount to double jeopardy on the accused.
3. Mr Gacharia in a rejoinder submitted that the court can only refuse to allow a *nolle prosequere* if the Director of Public Prosecutions is abusing its power.
4. The defence counsel filed submissions on November 10, 2022. She submitted that out of the eleven (11) witnesses the prosecution intends to call, only three (3) witnesses have testified; that the accused has been in custody for five years and is unable to raise bond. She submitted that the prosecution cannot enter a *nolle prosequere* without the leave of the court and the prosecution have not tendered sufficient reasons to warrant permission by this honorable court to warrant allow a *nolle prosequere*.
5. She submitted that since the court declined application for adjournment, the available option for prosecution was to withdraw or close its case and submitted that as per Article 157 (7) of the [Constitution](#) any discontinuation of the proceedings after the close of the prosecution case shall result



in an acquittal of the accused. Counsel urged the court to acquit the accused and in the interest of justice the nolle prosequi entered by prosecution be dismissed.

### **Analysis and Determination**

6. I have considered submissions filed by defence counsel in opposition of decision by the prosecution to enter nolle prosequi. I wish to consider whether the court should permit or decline to allow the Director of Public Prosecutions to enter the nolle prosequi.
7. Record show that the accused was arraigned in court for plea on December 13, 2018. The first prosecution witness testified on July 4, 2019. Only three (3) witnesses have testified. The prosecution has sought adjournment severally for lack of witnesses. On two occasions, the matter was adjourned at the instance of the accused for non-attendance by her counsel.
8. On July 4, 2019 the prosecution availed two (2) witnesses who testified and the case was adjourned to enable other witnesses attend court.
9. The case did not proceed due to unavailability of witnesses save for two occasions when defence counsel was not available. On 31/5/2022 the prosecution was granted a last chance to avail the remaining witnesses.
10. On 4/10/2022 one witness (3<sup>rd</sup> witness testified) and prosecution sought adjournment on ground that the incident occurred at a changaa den and Investigating Officer is not able to trace the witnesses; that he is not able to reach the witnesses through the mobile number provided. It is now five years since the accused took plea. The court rejected the application for adjournment prompting the prosecution to seek to enter nolle prosequi.
11. The powers of the Director of Public Prosecutions to enter a nolle prosequi are derived from Article 157 (6) (c) of the Constitution which stipulates as follows: -
  - “(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may –
    - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”
12. Further under section 25 (1) of the DPP Act provide as follows: -
  - “The Director may, with the permission of the court, discontinue a prosecution commenced by the Director, any person or authority at any stage before delivery of judgement.”
13. Section 82 of the Criminal Procedure Code (CPC) provide that at any stage of the trial before verdict or judgment, the Director of Public Prosecution may enter a nolle prosequi either by stating in court or by informing the court in writing that the republic intends that the proceedings shall not continue and thereupon, the accused shall at once be discharged... but the discharge shall not operate as a bar to subsequent proceedings against the accused on account of the same facts.
14. Article 157 of the Constitution and Section 82 of the CPC provide for discontinuation of a criminal case at any stage of the trial. Under Article 157(8) of the Constitution, the Director of Public Prosecutions (DPP) may not discontinue a prosecution without the permission of the court. In my view, the requirement for permission by the court is to check abuse of powers granted to the DPP to discontinue



prosecution. The said power granted to DPP is not therefore absolute. This court has a duty of balancing the rights of parties herein.

15. Mr Gacharia informed the court the reasons for the nolle prosequi is not an abuse of the powers conferred to DPP but based on the none availability of the witnesses.
16. Record show that only three witnesses have testified in this matter. The accused herein has been in custody for five years waiting for the prosecution to trace witnesses who cannot be reached on the mobile numbers they provided. Five years is a long period; chances of locating the witnesses continue to diminish with the passage of time. In my view the likelihood of tracing the witnesses is minimal in view of the fact that the Investigating Officer does not have the witness's current mobile numbers and the incident having occurred in a changaa den as stated by prosecution, tracing their place of aboard is close to impossibility.
17. The pendency of this suit may not serve any useful purpose. The court's mandate is to serve justice to all parties. The court is required to balance between the rights of an accused and the justice of the victims. The accused is guaranteed fair trial as per Article 50 (2)(e) of the Constitution of Kenya.
18. I take note of time the accused has spent in custody. The first two witnesses testified on July 4, 2017. On May 31, 2022, Mr Gacharia sought adjournment on ground that the Investigating Officer had difficulties reaching witnesses and request had been made to Safaricom to assist in tracing the witnesses. On October 4, 2022, one witness a Police Officer was availed by prosecution and he testified as the third witness. The prosecution did not demonstrate any efforts made to avail the other witnesses five (5) months after adjournment was sought with the intention to seek assistance of Safaricom to trace the witnesses. In fact, the Investigating Officer did not attend court to explain efforts made in tracing witnesses
19. There is no explanation given as to why from July 4, 2017, the prosecution never made any efforts to involve Safaricom in tracing the witnesses. The accused has been in custody for five (5) years now. Entry of nolle prosequi before close of prosecution case is not a bar to subsequent proceedings against the accused herein as provided in Section 82 of the Criminal Procedure Code the accused can be rearrested and charged on the same facts. The fact that accused can be charged again on the same facts, will linger in the mind of the accused who has been in custody for five (5) years waiting for the prosecution to avail witnesses. In my view this is abuse of use of power to terminate proceeding which will occasion mental torture on the accused person who has been in custody for five (5) years. I see this as an indirect way of seeking an adjourned which was declined.
20. Final orders:-
  1. Entry of nolle prosequi is not permitted/allowed.
  2. Prosecution to either close its case or proceed.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Martin – Court Assistant**



**Ms. Ngesa for State**

**Accused – Present**

**No appearance for Accused**

