



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 123 OF 2018**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**DOYO GALGALO.....1<sup>ST</sup> ACCUSED**

**GALMO GUYO GALGALO ALIAS MAKAYANGU.....2<sup>ND</sup> ACCUSED**

**BOKAYO DIDA BORU ALIAS WARABO.....3<sup>RD</sup> ACCUSED**

**RULING**

The accused persons herein Doyo Galgalo, Galmo Guyo Galgaho alias Makayangu and Bekayo Dida Boru were jointly charged with the offence of murder contrary to section 204 of the penal code, particulars are that the accused persons.

On the 16<sup>th</sup> day of December 2018 at Gargasa area in Quilta Korara Location in Marsabit Central sub -county within Marsabit County jointly with others not before the court murdered George Dordon Dolara.

When this matter came up for mention on 17<sup>th</sup> January 2019 for pre-trial directions the state represented by Ms Mwanza applied for termination of the trial with instructions from the Deputy Director of Public Prosecutions instructions in a letter dated 14<sup>th</sup> January 2019. The defense complained they had just been served with the copy of the letter in court and didn't have sufficient notice to respond and there were also no reasons advanced to warrant the termination of trial.

This court directed that Article 157(8) provided that the DPP may discontinue the prosecution with permission of the court and therefore reasons must be given by way of an affidavit to be responded by the defense as to why the trial should be allowed to be terminated.

On 24.1.2019 when matter came back to court to confirm if directions of the court had been complied with, the state through Mr. Gitonga assisting Ms Mwanza filed a Nolle Prosequi dated 23.1.2019 seeking to terminate the trial herein. The Nolle prosequi was supported by the sworn affidavit of Fridah Mwanza Senior Assistant Director of Public Prosecutions. The reason given by the state at paragraph 12 for seeking to terminate the trial is so that way may be paved for further investigations and to track other suspects that are still at large and also to tighten lose ends in the statements that were already recorded. Paragraphs 13 and 14 also have reasons for seeking termination.

The 3<sup>rd</sup> accused responded to the affidavit and said he was rashly charged and arraigned in court before police had sufficient evidence to sustain a charge against him. He said even after he had been remanded for 7 days Investigative Officer didn't obtain further evidence. He said withdrawing charge under S. 82(1) CPC will aid the prosecution and the police officers in correcting their mess. He said the ODPP acted unfairly and prejudicially against the accused persons in the manner which they have conducted themselves. He averred the prosecutions intention is to oppress the accused person and application is an afterthought, mischievous and is brought in bad faith.

He said he would like the court to quash the trial and prohibit the police from charging him. Mr. Halake for A1 and A2 also responded orally to the application objecting to termination.

From the submissions made in support and in opposition of application to enter Nolle prosequi what the court is to consider whether in withdrawing the trial the state has given due regard to the public interests, the interests in the administration of justice and the need to prevent and avoid abuse of legal process as envisaged in Article 157(11) of the Constitution of Kenya 2010. It is also to be considered whether reasons given by prosecution meets the threshold under Article 157 (8) and (11) of the constitution of Kenya 2010.

Under Article 157(6) (c) the constitution empower the DPP to discontinue at any stage before judgment, any criminal proceedings instituted by the DPP or by another person or authority. The DPP is required to obtain the court's permission before discontinuing prosecution. In Republic vs Enock Wekesa & Another. H.C. of Kenya at Kitale, Misc CR. Rev No. 267 of 2010 the court held that this requirement to get permission applies to all cases and submission that control of criminal trial is pressure of DPP is contrary to the spirit of the constitution . S.

82(1) (C.P.C) cannot supercede the provision of the constitution. The jurisdiction of the High Court to preside over murder trials cannot be barred from questioning reasons behind actions of the DPP while conducting prosecution before it. Whether the prosecution had sufficient time to investigate the offence, I think Ms Mwanza in her averments is not candid in her paragraph 3 & 4 of the affidavit because I have looked at the records and seen that on 27.12.2018 when the defence sought that accused persons be remanded in police custody instead of prison, the prosecution was very emphatic that there was no need for the police to keep holding the accused persons as investigations were complete. The allegation that sufficient time was not afforded by the court is therefore not a good reason because the courts have no role to play in investigation of charges of accused persons yet to be presented before them.

The blame game in paragraph 6, 7 and 8 are not good reason to be relied upon to terminate prosecution is of the view that accused persons should not be released on bond it will be good practice to file an affidavit upfront and place before the court. Where the prosecution is of the view bond terms are lenient there is always a procedure for review and/or appeal.

Having analyzed the submissions, I do however find that the accused persons have no objection to termination but are apprehensive that they may be taken through the motions that superseded their being arraigned in court and that will be prejudicial to their rights of dignity and liberty.

This court finds that the reason given at paragraph 11,12,13 and 14 are valid considering no evidence has been tendered in court and statements are yet to be supplied to the defence. It would save courts time as well as the state and defence to put on hold the trial so that all necessary evidence is gathered before a substantive, exhaustive and all inclusive charge is brought before the court. As the prosecution said they may find that there is no need to prefer charges against the accused persons.

In that regard, this court allows the prosecution to enter Nolle Prosequere pursuant to 82(1) CPC and Article 157 (6)(c) & (8) of the constitution and thereby discharge accused persons. Save that the discharge shall be subject to the condition that in the event that the state decides to charge the accused persons again then they shall summon the accused persons to the police station and shall bond them to attend at the police station or the court whoever is appropriate. This is because the accused persons were in custody from time of arrest, 7 days granted by the court and subsequently from 24.12.2018 to 2.1.2019 when they were released on bond. Those are the orders of the court.

**HON A. ONG'INJO**

**JUDGE**

**25.1.2019**

**Before Adwera – Ong'injo J**

Mr. Kinoti- C/A

Mr. Gitonga Advocate for State

Mr. Ndubi Advocate holding brief for Victims – N/A

Mr. Halake Advocate A1 & A2.

Mr. Kiget Advocate for A3

**Court**

**Ruling Delivered, Dated and Signed in Court on 25<sup>th</sup> Day of January 2019.**

**HON A. ONG'INJO**

**JUDGE**