



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO.3 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

PATRICK KIBET KOECH.....ACCUSED

RULING

1. The accused herein having been charged with murder contrary to section 203 and read with section 204 of the Penal Code (Cap.63) in 2016; the prosecution has not since then availed in court witnesses.
2. On 13th May 2019 the Assistant Deputy Public Prosecutor Mr. Ayodo informed the court that the families of the deceased and that of the accused had agreed to an amicable resolution of the matter in order to bring harmony in the family, as the deceased was the wife of the accused and the two had five (5) children who would now be cared for by the accused person. Counsel further informed the court that the said family members were also the witnesses in the case, and that they would not be able to come to court to testify in the criminal case, consequent upon that settlement.
3. Counsel thus sought to terminate the criminal proceedings under Article 157 (6) and 157 (8) of the Constitution of Kenya 2010, as witnesses were not available and stated that he would file a *Nolle Prosequi* under section 82 of the Criminal Procedure Code (Cap.75), which he did.
4. Mr. Nyaingiri the learned defence counsel in response, opposed the request of the State for termination of proceedings, and submitted that the Constitutional requirements of fair trial were not subject to any limitations. Counsel emphasized that the court had a duty to protect his client's Constitutional rights, and that in the event the State would seek to charge his client on the same facts again, he would raise the issue.
5. Counsel argued also that in any event, the powers of entering a *Nolle Prosequi* contravened the provisions of the Constitution. In effect therefore, the Director of Public Prosecutions did not have the legal basis for relying on a *Nolle Prosequi* procedure to terminate criminal proceedings, as such would deny the court its discretionary powers to ensure fair trial.
6. I have considered the request of the Director of Public Prosecutions for termination of the criminal proceedings herein. I note that the Director of Public Prosecution filed a *Nolle-Prosequi* dated 13th May 2019.
7. With regard to the *Nolle Prosequi*, I agree with Mr. Nyaingiri that the powers of the State entering *Nolle Prosequi* were overtaken by the provisions of the Constitution of Kenya 2010 which has no provisions for the same. The powers to enter a *Nolle Prosequi* under section 82 of the Criminal Procedure Code (Cap.75) were conferred on the Attorney General, and were not passed on to the Director of Public Prosecution under the new Constitutional dispensation. Secondly, the *Nolle Prosequi* prevented the court from enquiring into the reasons for such termination of criminal proceedings. However, under Article 157 (8) of the Constitution of Kenya 2010, criminal proceedings may not be terminated by the Director of Public Prosecution without the permission of the court. Therefore, in my view the Director of Public Prosecutions has no mandate or powers to seek to terminate criminal proceedings using the *Nolle Prosequi* procedure under section 82 of the Criminal Procedure Code (Cap.75).
8. That said, the Director of Public Prosecution under Article 157 of the Constitution has powers to seek permission of the court to terminate criminal proceedings which he/she is prosecuting. The relevant parts of Article 157 state as follows-

“157 (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)

(7) If the discontinuance of any proceedings under clause 6 (c) takes places after the close of the prosecution case, the defendant

shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court. “

9. In the present case, the Director of Public Prosecutions has given his reasons for asking for discontinuance of the criminal proceedings herein. The main reason is due to inability to avail witnesses in court due to a compromise entered into between the family of the victim (deceased) and the family of the accused, who are the prosecution witnesses in this case. The defence counsel has opposed the request for discontinuance of the criminal proceedings, on fair trial considerations, since the case has been pending from 2016, and is apprehensive that the accused might be charged afresh.

10. Since the prosecution have explained to this court that they are not able to avail prosecution witnesses in my view it will be futile to retain the case as live and pending criminal case. I will thus grant permission to the Director of Public Prosecutions to discontinue the criminal proceedings herein under Article 157 of the Constitution and section 25 of the Office of the Director of Public Prosecution Act – 2012.

11. Since the prosecution has not called any witness yet, I cannot acquit the accused under Article 157 (7) of the Constitution and will therefore discharge him.

12. Consequently, I allow the request of the Director of Public Prosecutions, and order as follows-

i. The criminal proceedings herein be and are hereby discontinued.

ii. The accused person is hereby discharged.

Dated and delivered at Kericho this 25th day of July 2019.

George Dulu

JUDGE