



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 39 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

BONFACE ROTA ONCHIEKU.....1ST ACCUSED

HENRY MAYAKA.....2ND ACCUSED

JUDGMENT

1. On 28th March 2017, the prosecution made an oral application under Article 157 (6) of the **Constitution** and **Section 25** of the **Director of Public Prosecutions Act** (hereinafter "the DPP Act") to discontinue the prosecution of this case against the accused persons herein who had been arraigned before this court for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. It was alleged that on 13th December 2011 at Marani Market, Igembo Sub Location within Kisii County, murdered Omingo Atika. The prosecution had indicated that it would avail at least 5 witnesses in support of its case, but as at 28th March 2017 when the application to discontinue the case was made, none of the said witnesses had testified in court.

2. Miss Ouko counsel for the state made the application to enter nolle prosequi in the matter citing non availability of witnesses, especially a key witness, a minor who could not be traced as her whereabouts were unknown. Miss Ouko also explained that 2 other witnesses could also not be traced while one of her witnesses was deceased thereby leaving the doctor and the investigating officer as the only available witnesses whose testimony, in her view, could not sustain a conviction.

3. Mr. Momanyi, counsel for the 1st accused opposed the application on the ground that the 1st accused had been waiting for his trial for a period of over 5 years yet no attempts had been made by the police to trace the witnesses. Mr. Momanyi argued that even though section 82 of the Criminal Procedure Code (CPC) allows the DPP to enter a nolle prosequi, the said section is double-edged as it also allows the prosecution through the police, to re arrest the accused persons and charge them afresh in court should the witnesses resurface and that this eventuality would be extremely prejudicial to the accused. The accused persons were also concerned about the time lost and the expenses that they had so far incurred in defending themselves.

4. Mr. Bosire, counsel for the 2nd accused also opposed the application while arguing that the same was an afterthought and that the timing was suspect considering that the prosecution had been unable to avail their witnesses in court despite numerous adjournments. He added that the police had not shown what measures they had put in place to trace the witnesses and thus it would be unfair to grant the prosecution

the leave to terminate the case. In reference to Article 157 of the Constitution, counsel argued that the DPP is required to take into account the public interest, fair administrative action and avoid abuse of the legal process. He added that the application had been made too late in the day as the matter had been in court for five years and therefore the rights of the accused were being oppressed and impeded by the DPP. He urged that the court to reject the application for leave to enter a nolle prosequi.

5. The main issue in contention is whether or not the DPP should be allowed to discontinue the trial of the accused persons and whether or not the accused persons' right to fair trial and fair administrative action will be breached if the application is allowed.

6. Black's Law Dictionary, 8th edition defines a nolle prosequi as **"a legal notice that a law suit or prosecution has been abandoned."**

7. The powers of the DPP to enter a nolle prosequi are derived from Article 157 (6) (c) of the Constitution which stipulates that –

"(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)."

8. Article 157 clauses (7) and (8) provides as follows: -

"(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director for Public Prosecutions may not discontinue a prosecution without the permission of the court. " (own emphasis).

9. The same power is also donated under section 25 (1) of the DPP Act which provides that: -

"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."

10. Section 82 (1) of the CPC on the other hand provides that: -

"In any criminal case and at any stage thereof before verdict or judgement, as the case may be, the Director of Public Prosecutions 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 be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts."

11. From the above provisions, it is clear that while the DPP has the discretion to enter a nolle prosequi in criminal proceedings, that discretion is subject to the supervision by the court which ought to ensure that there is no abuse of legal process, *mala fides*, misuse of the power or oppression that would cloud the exercise of the said discretion. In the case of **Moses Miheso Lipeya V Republic [2007] eKLR** Justice G.B.M. Kariuki (as he then was) observed: -

"I think the hearing of a criminal case where the prosecution unfairly uses its power under the law to oppress or undermine the rights of the accused cannot be said to be a fair hearing even if it be conducted within a reasonable time."

12. The judge referred to the case of **Harrison Auko V Republic (H.C. Misc. Cr. Application No. 55 of**

2006 (Kakamega) (unreported), wherein it was held that the Attorney General;

“is expected to exercise his power to enter nolle prosequi for the public good, and in good faith. In short, his action is expected to promote public interest.”

13. And further that:

“... The court is enjoined to impeach its use if and where it is exercised in bad faith, oppressively, capriciously, or for interest antithetical to public good. This court’s supervisory power is derived from sections 60 and 123 (8) of the Constitution. Both the letter and the spirit of the Constitution demonstrate that the fundamental rights and freedoms of the individual enshrined in Chapter V of the Constitution which include the right to fair trial within a reasonable time (section 77 (1) of the Constitution) are designed to be protected by the High Court in its supervisory role. The High Court has inherent power to prevent abuse both of the exercise of the power conferred on the Attorney General by section 82 of the CPC and of abuse of process of court. The discretionary power can only be exercised where the Attorney General acts in good faith and in public interest or for the public good. If and where it is shown that the exercise of power to enter nolle prosequi under section 82 (supra) was in bad faith, or was oppressive, or capricious or against public interest, the High Court would be entitled to intervene to challenge, not the Attorney General’s power to enter nolle prosequi, but rather the use of that power.”

14. In the case of **Naibei Gerishom Kisach V Republic [2011] eKLR** the court dismissed an application for nolle prosequi as it deemed that the use of that power was prejudicial to the petitioner’s right to a fair trial. Azangalala J. (as he then was) held: -

“The Attorney General was exercising his powers to enter the nolle prosequi not in good faith but oppressively, capriciously and was probably influenced by irrelevant considerations.”

15. The question that is begging an answer in this case is whether or not the DPP is acting in good faith for the sake of public interest. The main ground for seeking leave to enter a nolle prosequi in this case was that the prosecution was unable to secure the attendance of their witnesses in court. Justice Odunga had the following to say when faced with a similar question in the case of **Seenoi Ene Parsime Esho Sisina & 8 Others V Attorney General [2013] eKLR** wherein he held: -

“In my view the decision whether or not to enter a nolle prosequi is an exercise of discretion and ought to be exercised bonafide based on reasons. ... The court can only intervene in the following situations:

- (1) where there is an abuse of discretion;**
- (2) where the decision-maker exercises discretion for an improper purpose;**
- (3) where the decision-maker is in breach of the duty to act fairly;**
- (4) where the decision-maker has failed to exercise statutory discretion reasonably;**
- (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;**
- (6) where the decision-maker fetters the discretion given;**
- (7) where the decision-maker fails to exercise discretion;**
- (8) where the decision-maker is irrational and unreasonable.”**

16. The accused persons have urged that their right of fair hearing under Article 50 of the Constitution would be prejudiced if the application is allowed. Article 50 (2) (e) of the constitution provides that: -

“Every accused person has the right to a fair trial, which includes the right –

(e) to have the trial begin and conclude without unreasonable delay.”

17. Article 47 of the Constitution on the other hand stipulates as follows:

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

18. In the instant case, the scenario is that this case has been pending in court since 2012. Not even a single prosecution witness has testified in the case for the reason that the prosecution has been unable to trace their witnesses especially the key witness who is reported to be a minor whose whereabouts remains unknown. Under the circumstances and taking cognisance of the fact that Article 157 of the constitution envisages the fact that discontinuance of a criminal trial can take place at any stage of the trial and further being cautious to balance the interests of the accused persons and that of the public, I am of the humble view that keeping this case pending in court, in the face of the obvious challenges faced by the prosecution in securing the attendance of their witnesses in court, would serve no useful purpose whatsoever. I am also of the view that the application has been made in good faith and I find that there is no violation of the accused persons' rights under Article 47 and 50 of the Constitution. No material has been placed before me to show that the DPP, in seeking to enter the nolle prosequi, is exercising his discretion for an improper purpose or in an irrational or unreasonable manner.

19. The upshot of my ruling is that the request by the DPP to enter a nolle prosequi is hereby allowed. The prosecution against the accused persons is hereby terminated and the accused persons shall be set free forthwith unless they are otherwise lawfully held. The sureties for the accused are discharged and the securities that they submitted in court shall henceforth be released to them.

Delivered, dated and signed in at Kisii 24th of May, 2017.

W.A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Magara for the 2nd Accused

N/A Momanyi for the 1st Accused

Omwoyo court clerk