



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 16 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. GODFFREY BULIMO MABIALA.....1<sup>ST</sup> ACCUSED**

**2. JOHN OKUMBA OKWAR.....2<sup>ND</sup> ACCUSED**

**3. PATRICK OPANGA MESHACK.....3<sup>RD</sup> ACCUSED**

**4. CALEB MUKUNZI OMUNGAVO.....4<sup>TH</sup> ACCUSED**

**R U L I N G**

**Introduction**

1. The four accused persons first appeared in court on 07.07.2010 when they were remanded in custody pending plea on 27.07.2010. They accordingly took plea on 27.07.2010 before Lenaola J (as he then was). The four were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on the night of 21<sup>st</sup> and 22<sup>nd</sup> June, 2010 at Wamianda village, Musutwi Sub location North East Bunyore Location in Emuhaya District of the Western Province, jointly with others not before court murdered Jane Okochi Robert. They all denied committing the offence. The case was then fixed for hearing on 14.12.2010

**The Prosecution Case**

2. The first witnesses for the prosecution were availed in court on 03.11.2015, but on that day the case could not proceed because defence counsel had taken a patient to hospital. The first prosecution witness PHILIP M1ABIALA HEMAN, PW1 (Philip) stated that while he was in Nakuru on 22.06.2010, he received a call from one Beatrice Athirwa informing him of the presence of a woman's dead body in his compound, and further that his house had been broken into and that some blood stains had been found on the floor on some beddings and on tables.

3. Philip also stated that his informer told him that the first accused herein was not at home though Philip knew that his son was staying at home. On the same day, the first accused arrived in Nakuru where Philip and the first accused's step mother lived. Because of custom, the first accused was not allowed into Philip's house in Nakuru, but at about 6.00pm, the Officer Commanding Station (OCS) and the Bondeni Police Station in Nakuru went to Philip's house and arrested the first accused, on suspicion that he may

have had a hand in the death of the woman whose body was found in Philip's rural compound.

4. According to Philip the first accused told him that he (first accused) was shocked by what had happened at the rural home. Later Philip came to discover that the deceased was a relative of his mother from Ebubayi in Bunyore. Thereafter Philip went and recorded his statement at Vihiga Police Station.

5. During cross examination, Philip testified that he took his son, the first accused herein to the police because of mere suspicion. Philip also testified in examination in chief that he knew the rest of the accused persons and that they also knew him.

6. PW2 was Hudson Lubuya Mugunda (Hudson). The Assistant Chief of Hamuyunda Sub-Location in West Maragoli Location of Vihiga County. He recommended how on 28.06.2010, in the night, he received a call from informing him that a stranger was hiding in his area. In the morning, he and other people went to the home of one Selpher where they found a person hiding under a bed in one of the rooms of Selpher's 4 roomed house that person was the 4<sup>th</sup> accused, Caleb Mukunzi Omungavo. Hudson called police from Kilingili Police station who came and took away the 4<sup>th</sup> accused person. The 4<sup>th</sup> accused was removed from under the bed at around 10.00am on 28.06.2010.

7. During cross examination, Hudson told the court that the 4<sup>th</sup> accused person was suspected to have taken part in the murder of the deceased in this case. Selpher, also known as Milika was arrested alongside the 4<sup>th</sup> accused.

8. After Hudson testified the prosecuting counsel, Mr. Joshua Onyango Jamsumba asked for adjournment and though there was strong opposition to the same, the court allowed it and adjourned the case to 14.12.2016 for further hearing. Prosecution counsel also asked for summons to DCIO Vihiga Division to attend court on 26.10.2016 and explain why he could not avail witnesses.

9. On 26.10.2016 when the case came up for mention Mr. Jamsumba informed the court that he had personally spoken to the DCIO Vihiga and that the DCIO had assured him that witnesses would be availed if the prosecution was given another date for further hearing of the case. And so it was that the case was fixed for further hearing on 22.02.2017

10. When the case came up on 22.02.2017, prosecution counsel Mr. Ngetich told the court that there were no witnesses present. On that day too defence counsel was absent and for reason that defence counsel was absent, the case was adjourned to 08.03.2017. On that day too, the prosecution had no witnesses because the witnesses had not been bonded. The defence counsel also not being present in court the case was adjourned to 12.06.2017. The prosecution was granted a last adjournment.

11. When the case came up on 12.6.2017, the prosecution did not have witnesses and applied for adjournment. The application for adjournment was vehemently opposed in light of the length of time taken for the prosecution to avail all witnesses in court and on account of the second last adjournment order issued on 08.03.2017. The defence, in opposing the application also submitted that in light of the order for summons upon the DCIO to explain why witnesses could not be availed, there was no justification for another adjournment.

12. In light of the history of the case, and that fact hat on 26.10.2016 prosecution counsel informed the court that the DCIO Vihiga had assured him that witnesses would be availed if the prosecution was given another date for the hearing of the case, the court rejected the application for adjournment and ordered the case to proceed.

### **The Nolle Prosequere.**

13. The same day, the prosecution upon realizing that it had no witnesses applied to enter a nolle prosequere in accordance with Section 82(1) of the Criminal Procedure Code, Cap 75 Laws of Kenya. The application was opposed on grounds that the prosecution as mischievously trying to get an adjournment

through the back door. Counsel for defence submitted that the purported nolle was an abuse of the court process and urged the court to reject it.

**Determination**

14. Section 82(1) of the Criminal Procedure Code (CPC) provides that:-

“ 82(1) in any criminal case, and at any stage therefore before verdict or judgment, as the case may be, the director of public prosecutions may either 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 there upon 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 recognizances 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.” [ Emphasis is mine]

15. The above provisions give the director of Public Prosecutions. The discretion to apply to the court to enter a nolle. Such an application may be made at any stage of the Criminal case before a verdict or judgment.

16. The question that arises now is whether the proposed nolle Prosequi should be accepted by the court. In my considered view, and though the prosecution has submitted as to its good intentions for making the application, the application by the prosecution has been made in bad faith, especially for adjournment was rejected. I do agree with the submission by defence counsel. That the prosecutions attempt to enter a nolle at this stage is an abuse of the court process. The accused persons have been in remand since July, 2010 (except for the 2<sup>nd</sup> accused person who is out on bond). To allow the application seven years after the accused persons were apprehended and kept in custody would be trash their Constitutional rights to a speedy trial. The prosecution either have the witnesses or they do not.

**Conclusion**

17. In light of all the above the prosecution’s attempt to have the accused persons discharged under Section 82(1) of the CPC is ill timed and motivated by mischief. The same is accordingly rejected. The case against the accused persons shall continue.

It is so ordered.

Ruling delivered dated and signed in open court at Kakamega this 19<sup>th</sup> day of June 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Juma.....for State

.....Mr. Ondieki (present).....for Accused persons

.....Polycap.....Court Assistant