



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

JR. MISC. CIVIL APPLICATION NO. 22 OF 2015

IN THE MATTER OF: AN APPLICATION BY PETER MURIUNGI KIRANGU, NIXON ODHIAMBO AND JUMA MWATSA KADZOMBA FOR ORDERS OF CERTIORARI AND PROHIBITION DIRECTED AT THE DIRECTOR OF PUBLIC PROSECUTION, AND THE PRINCIPAL MAGISTRATE'S COURT AT KALOLENI

AND

IN THE MATTER OF: KALOLENI CRIMINAL CASE O. 137 OF 2015 REPUBLIC VS. PETER MURIUNGI KIRANGU, NIXON ODHIAMBO ONGORO AND JUMA MWATSA KADZOMBA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA THE PENAL CODE CAP 63 LAWS OF KENYA THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA, THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 RULES 1 & 2 OF THE CIVIL PROCEDURE RULES

BETWEEN

1. PETER MURIUNGI KIRANGU
2. NIXON ODHIAMBO ONGORO
3. JUMA MWATSA KADZOMBA.....APPLICANTS

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTION
2. PRINCIPAL MAGISTRATE'S COURT KALOLENI.....RESPONDENTS

RULING

1. In their application dated 27th July, 2015, the Applicants sought an order of certiorari to remove into this court and quash the proceedings in Kaloleni Criminal Case No. 137 of 2015, between **REPUBLIC VS. PETER MURIUNGI KIRANGU & 2 OTHERS** (the Applicants).

2. The Applicants also sought an order of prohibition be issued by this court prohibiting the First and Second Respondents and/or any other officer acting under their authority from proceeding with KALOLENI CRIMINAL CASE NO. 137 OF 2015, being **REPUBLIC VS. PETER MURIUNGI KIRANGU, NIXON ODHIAMBO ONGORO and JUMA MWATSA KADZOMBA**.
3. The application is supported by the Statutory Statement, the Affidavit Verifying the Facts, sworn on 11th June, 2015, by one Nixon Odhiambo Ongoro, and filed on 17th June, 2015 together with the application for leave to file judicial review proceedings.
4. Though the application was served upon the Respondents, they neither filed an affidavit in reply, nor any submissions. The Applicants' counsel however filed on 5th October, 2015 written submissions dated 23rd September, 2015. The Applicants' borne of contention is that they were discharged under Section 82 of the Criminal Procedure Code, (Cap 75 Laws of Kenya). They argue that their prosecution after the state entered a **nolle prosequi** is abuse of the criminal justice system, and thus exposing them to double **jeopardy** should proceedings be commenced against them afresh (de novo).
5. The Applicants therefore urge the court to exercise its supervisory powers over the Kaloleni Principal Magistrate's Court to prohibit the prosecution of the Applicants as it is an abuse of the fundamental freedoms of the Applicants, when they had been acquitted of the same charges. The question or issue is whether the First Respondent by instituting charges against the Applicants is in abuse of his constitutional powers to institute, continue or terminate any proceedings as is vested in him under Article 157 (6) of the Constitution.
6. The power to terminate criminal proceedings is exercised by way of a **Nolle Prosequi** – Latin literally – (“**not to wish to prosecute**”), in practice, a legal notice by way of an instrument under the hand of the Director of Public Prosecutions or any of the prosecution counsel authorized by the said Director, that a prosecution has been abandoned. The consequences of such an abandonment are prescribed in both the Constitution (Article 157 (7) and the Section 82 of the Criminal Procedure Code.
7. Section 82 of the Criminal Procedure Code clearly states that once a nolle prosequi is tendered, the accused with the concurrence of court is bound to be discharged, forthwith, if he has been committed to prison, he shall be released, or if he is on bail his recognisance shall be discharged, - “**but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.**”
8. The only occasion when that discharge operates as a bar to further prosecution is where the prosecution has closed its case. Article 157(7) of the Constitution states –
- “157(1) – (6)
- (7) If the discontinuance of any proceedings under clause 6(c) takes place after the close of the prosecution case, the defendant shall be acquitted.**” (*underlining added*)
9. The question here is whether the prosecution had closed its case. In the absence of any sworn affidavit by the First Respondent, the court can only rely on the record filed by counsel for the Applicants. That record includes a Ruling by Hon. J. Wena, Principal Magistrate in which the learned magistrate discharged the Applicants.
10. The accused were subsequently charged on the same facts, and upon taking objection thereto, the presiding magistrate Hon. R. K. Ondieki (Principal Magistrate) notes that the state (the prosecution) entered a **Nolle Prosequi** because it was denied a chance to call the last witness. In other words, the state had not closed its case, and the right of the Applicants to an acquittal under Article 157 (7) had not arisen. They could therefore be charged again on the same facts, and they were bound to take a plea.
11. Though the state offered no challenge to the application, the court is bound to determine an application of this nature by strict adherence to and interpretation of the law. The Applicants cannot

therefore rely on the non-feasance on the part of the State.

12. In the circumstances, I find and hold that the subsequent charge and prosecution of the Applicants was lawful and fundamental rights of the Applicants whether called **“double jeopardy”** or otherwise were not infringed.

13. I therefore dismiss, with no order as to costs, the Applicants’ Notice of Motion dated 27th July, 2015 and filed on 22nd September, 2015.

14. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 8th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mrs. Abdulrahim holding brief Tindika for Applicants

Mr. Wameyo holding brief Masila for Respondents

Mr. Silas Kaunda Court Assistant