



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 24 OF 2014
REPUBLIC
VERSUS
MICHAEL ROTICH & 2 OTHERS
JUDGEMENT

The prosecution by a notice dated 30th May, 2016 made an oral application on 23rd June, 2016 under Article 157 (6) of the Constitution and section 25 of the office of the Director of Public Prosecution Act, the DPP Act, to discontinue prosecuting the accused persons. The three accused had been arraigned before court for the offence of murder. Ten witnesses had testified. One witness had been stepped down.

Mr. Oyiembo, a Senior Assistant DPP made the application. The reasons propounded were that the DPP received a letter dated 4th April, 2016 from the Independent Police Oversight Authority (IPOA) requesting for the case file. Upon its perusal, IPOA advised that the case be discontinued and an inquest be held. He explained that according to the DPP it would serve the interest of the public better if an inquest is held.

Mr. Gekanana, counsel for the 1st and 3rd accused persons opposed the application. Counsel based his arguments on the grounds that the DPP recommended for the prosecution of the accused persons, ten witnesses had already testified with the DPP's participation, time has been spent, there is no issue of public interest that had been raised since the matter commenced in 2014 and the information discovered by the DPP has not been revealed. Further, an inquest would be commencement of the case afresh yet the accused are entitled to a speedy trial under Article 50 of the Constitution. The accused persons were also concerned about the time lost and the expenses so far incurred by them.

Mr. Mbura, counsel for the 2nd accused person equally opposed the application. According to the 2nd accused, the timing of the application was suspect, that the prosecution had realized that their case was weak. In referring to Article 157 of the Constitution, counsel argued that the DPP is required to take into account the public interest and avoid abuse of the legal process. The application has been made late in the day as the matter had been in court for two years and therefore the rights of the accused were being oppressed and impeded by the DPP. He urged that the DPP closes its case as the inquest would not be a proper avenue. In response, the DPP stated that the prosecution was not frivolous, they acted in accordance with the law as a person had lost his life hence there was public interest. It is argued that an inquest would not be the commencement of the case afresh.

The main issue being raised 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 will be breached if the application is allowed.

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

The DPP draws the powers to enter a nolle prosequi from Article 157 (6) (c) of the Constitution which provides 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).

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)

This power is also donated under section 25 (1) of the DPP Act and the court is mandated to give permission to such an application. Section 25 (1) 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.

Section 82 (1) of the CPC which 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 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.

From the above provisions, it is clear that the court has a supervisory mandate over the discretion of the DPP when it comes to the exercise of nolle prosequi. The court ought to see to it that there is no abuse of legal process, malafides, misuse of the power, oppression and such like fetters to the said discretion. In **MOSES MIHESO LIPEYA V REPUBLIC [2007] eKLR** in a case where the prosecution applied for a nolle prosequi after being compelled to prematurely close their case Justice G.B.M. Kariuki (as he then was) held that: -

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.

The learned judge also referred to past unreported decisions, a case in point was the finding in **HARRISON AUKO V REPUBLIC (H.C. Misc. Cr. Application No. 55 of 2006 (Kakamega)** (unreported), where 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.”

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.”

The court in **NAIBEI GERISHOM KISACH V REPUBLIC [2011] eKLR** 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. Judge Azangalala held that: -

“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.”

The question to be posed therefore is whether or not the DPP is acting in good faith for the sake of public interest? The main reason propounded by the DPP is that they were advised by the IPOA to cease the trial and commence an inquest.

In **SEENOI ENE PARSIMEI ESHO SISINA & 8 OTHERS V ATTORNEY GENERAL [2013] eKLR** Judge G.V. Odunga, held that: -

“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.**

An inquest is ordinarily held under section 387 of the CPC. Section 387 (1) of the CPC provides that:

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When a person dies while in the custody of the police, or of a prison officer, or in a prison, the

nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386 (1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

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. Constitution Article 50 (2) (e) 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.”**

There must therefore be a balance between public interest and the rights of the accused persons. In the instant suit the trial is at an advance stage and three prosecution witnesses were remaining, save that one allegedly died – see proceedings for 22nd February, 2016.

The evidence of PW2 and PW6 alleges that the deceased on the material day was arrested and taken away by police officers. That would mean that the deceased either died in police custody or in the hands of the police.

The provisions of Article 157 (6) (c) takes into account the fact that several witnesses would have testified before the DPP makes the request to discontinue the case. The discontinuance can take place after the prosecution has closed its case as provided under Article 157 (7) of the Constitution. Therefore, the fact that several or all the prosecution witnesses would have testified by the time the request to discontinue the case is made cannot act as a bar for the court to exercise its discretion as to whether or not to allow the DPP’s request. The request can be made even after the defence case has been closed. The discontinuance of a case can be made before a judgement has been delivered. A plain interpretation of section 157 (6) (c) means that the DPP can arrest the delivery of a judgement in a criminal proceeding through a request to enter a nolle prosequi. If that happens, then the accused shall be acquitted as provided under Article 157 (7) of the Constitution.

The offence took place on 31st May, 2014. The accused were arraigned in court on 29th October, 2014. There is no evidence that the DPP’s request to have the proceedings discontinued is made in bad faith. When the inquest is undertaken, the accused shall participate and offer any assistance to the court. I see no violation to the accused’s constitutional rights under Article 50 of the Constitution. Article 50 of the Constitution should not be read in isolation. The court is also entitled to consider the other constitutional provisions such as Article 157 which gives powers to the DPP to undertake criminal prosecutions. Whenever the court is called upon by the DPP to have criminal proceedings discontinued, so long as the request is made in good faith given the circumstances of the case, then such a request ought to be considered objectively as it is part of the constitutional provisions.

In the end, I do find that the request by the DPP to enter a nolle prosequi is not made in bad faith. The same is hereby allowed. The prosecution against the accused persons is hereby terminated. The sureties for the accused are discharged.

Dated and delivered in Malindi this 15th day of December, 2016.

S.J. CHITEMBWE

JUDGE