



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 24 OF 2013**

**REPUBLIC**

**VERSUS**

**PHILIP MUTHIANI KATHIWA..... ACCUSED**

**R U L I N G**

1. By a writ dated 16<sup>th</sup> October 2014 the office of the Director of Public Prosecution entered a *Nolle Prosequi* against the Accused. The reason being that the wrong facts were mistakenly read to the accused following a plea of guilty.
2. The defence objected to the *Nolle Prosequi* on the grounds that the prosecution case was already closed.
3. The law that governs *Nolle Prosequi* is enshrined in **Article 157 (6)** of the **Constitution** that states:-

(6) “The Director of Public Prosecutions shall exercise State powers of prosecution and may-

- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- 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). ”

4. The criteria for such discontinuance has been set out in **Article 157 (7) (8)** 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 of Public Prosecutions may not discontinue a prosecution without the permission of the court.”

5. The application for *Nolle Prosequi* must also pass the test of constitutionality as stated in **Crispus Karanja Njogu –vs- The Attorney General Ur Criminal Application No. 39 of 2000 (HC)** where it was stated as follows:-

**“Thus, rightly contended; this court is the sole constitutional entity vested with the Responsibilities, rather than the Attorney General, of ensuring that criminal justice**

**system is not abused or used oppressively. This court does, for instance, by inquiring whether the power of entering a *Nolle Prosequi* vested in the Attorney General has been exercised in accordance with this Constitution or any other law...so that, under our Constitution, the exercise of such powers of the Attorney General with respect to the entering of a *Nolle Prosequi* can be questioned by the court...the power of the Attorney General under section 26 (3) of the Constitution are subject to the jurisdiction of the courts by virtue of section 123 (8) of the Constitution. Where therefore the exercise of the discretion to enter *Nolle Prosequi* does not meet the test of constitutionality by virtue of section 123 (8) of the Constitution then the *Nolle Prosequi* so entered will be deemed and declared, unconstitutional.”**

6. **Article 159 (2) (d) of the Constitution of Kenya 2010** provides that justice shall be administered without undue regard to technicalities of procedure. The wider interests of justice dictate that cases be heard on merits and not on technicalities. The sword of justice cuts both ways. The Accused cannot seek to benefit from a mistake made by the prosecution counsel. The mix up of the files has been explained. The exercise of discretion by the State to enter the *Nolle Prosequi* meets the test of Constitutionality. Consequently, I allow the same.

**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 17<sup>th</sup> day of February 2015.**

**B. THURANIRA JADEN**

**JUDGE**