



- there was a case to answer;
5. That the 2<sup>nd</sup> termination of the said case ignored the said order of this court and threatens the Petitioner's liberty hence this petition.

When served, the office of the Attorney General did not respond to the Motion on Notice and when the motion came up before me for hearing on 2/12/2010, **Mr. Oluoch**, Learned Counsel who represented the Republic did not oppose the same- contending that the 2<sup>nd</sup> *Nolle Prosequi* was presented in ignorance of the order of this Court.

The facts leading to this Petition are therefore not in dispute. They are as given in the petitioner's affidavit already alluded to above. The authorities are united that whereas the Attorney General had power to enter a *Nolle Prosequi* under section 26(3) (c) of the repealed Constitution and section 82(1) of the Criminal Procedure Code, such power could only be exercised properly in accordance with the law and in good faith and not oppressively, capriciously or against public interest or public good. The authorities are also united that the discretionary power of the Attorney-General to enter the *Nolle Prosequi* was subject to the Supervisory power of the High Court. See **Adan Kayman Wehliye –vrs- Republic [Criminal Case No. 223 of 2003] (UR).**

The supervisory role of the court has been elevated to a Constitutional provision under our current Constitution. Article 157 (8) reads as follows:-

**“ 157.(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the Court.”**

What happened in the case? The Petitioner was charged in Eldoret Criminal Case Number 5235 of 2008 and took his plea on 28/10/2008. The trial process commenced and all prosecution witnesses, save the Investigating Officer, testified. When he took the witness stand, he (the Investigating Officer), informed the trial court via a note from the OCPD Keiyo that the case be withdrawn under Section 87(a) of the Criminal Procedure Code. The Court obliged and the Petitioner was immediately arrested and charged in Iten Senior Resident Magistrate's Court Criminal Case No. 608 of 2009. That triggered these proceedings and on 25/2/2010, Mwilu J. set aside the withdrawal ordered under section 87 (a) of the Criminal Procedure Code and ordered that Eldoret Chief Magistrate's Court Criminal Case No. 5235 of 2008 proceeds from where it had reached to its logical conclusion. The trial then resumed and the Last Prosecution witness testified on 21/6/2010. However, before submissions on whether there was a case to answer, the prosecutor tendered a *Nolle Prosequi* under section 82(1) of the Criminal Procedure Code. Despite the Petitioner's protests, the Learned Chief Magistrate accepted the termination of the case on the basis that he had no choice in the matter. That decision provoked this Notice of Motion.

The Petitioner has invoked articles 50 (2) (e) and 157 R 7 of the current Constitution. The former reads as follows:-

**“50 (2) 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;**

And article 157 (7) reads as follows:-

**“ 157 (7) If the discontinuance of any proceedings under clause (6) © takes place after the close of the prosecution's case, the defendant shall be acquitted.”**

So, does the above provisions of the Constitution apply to the Petitioner's Notice of Motion, given that the *Nolle Prosequi* in question was tendered before the Constitution was promulgated? There is the Sixth Schedule article 7 on existing laws which reads as follows:-

**“7 (1) All Laws in force immediately before the effective date continue in force and shall be construed with the alterations adaptations, qualifications and exceptions necessary, to bring it into**

**conformity with this Constitution.**

**(2) If with respect to any particular matter –**

**(a) a law that was in effect immediately before the effective date assigns responsibility for the matter to a particular State organ, or Public Officer; and**

**(b) a provision of the Constitution that is in effect assigns responsibility for that matter to a different State Organ or Public Officer.**

**The provisions of this Constitution prevail to the extent of the conflict”**

It is plain therefore that the new Constitutional provisions must apply and if necessary, with alterations, adaptations, qualifications and exceptions as necessary. The prosecution in the matter at hand had rested its case when the *Nolle Prosequi* was tendered. In accordance with the provisions of article 157 (7) of the Constitution, the Petitioner should have been acquitted. In my view, the Petitioner is entitled to the benefit of the said provisions. Even if the current Constitution had not taken effect, I would still have declared the *Nolle Presequi* entered in the matter a nullity as, in my view, it undoubtedly prejudiced the petitioner’s right to a fair trial. 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.

In the end, the Petitioner’s Notice of Motion dated 5/11/2010 is allowed in terms of paragraph 3 thereof.

Order accordingly.

**DATED AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DAY OF JANUARY 2011.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of :-**

1. Mr. Nyamwaya for the applicant and
2. Mr. Chirchir for the Republic/State.

**F. AZANGALALA**

**JUDGE**

**20/1/2011**