



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 32 OF 2010**

**REPUBLIC**

**VERSUS**

**1. KITHOME TIINI**

**2. BOSCO NZIOKA MAKOVE**

**3. SAMMY MUSYIMI MUTINDA ..... ACCUSED/APPLICANTS**

**R U L I N G**

Before me is a Notice of Motion dated 3<sup>rd</sup> June 2011 filed by KITHOME TIINI, BOSCO NZIOKA MAKOVE and SAMMY MUSYIMI MUTINDA. The application was brought under Articles 22 (1), (3), 28, 29, and 39 of the Constitution of Kenya. It was filed under certificate of urgency.

The prayers sought are as follows:-

- i) **This application be and is hereby certified as urgent and the same heard on priority basis.**
- ii) **A declaration that the Accused/Applicants right to human dignity and respect and protection of the said right, right to freedom and security of movement as enshrined under the Constitution of Kenya has been denied violated or infringed.**
- iii) **THAT upon making a declaration as prayed in prayer (ii) above, the court do order the immediate discontinuance of proceedings herein and release the accused persons unless otherwise lawfully held.**
- iv) **THAT an order of injunction to issue to the Respondent, its agents, servants and/or employees from arresting, detaining, questioning, charging, interrogating and/or in any other way deal(sic) with the accused in relation to the death of Remmy Kyalo Kyunguti.**
- v) **Any other order as this court may deem just to grant.**

The application has grounds on the face of the Notice of Motion. It was stated in the grounds that the Applicants were charged in Machakos H.C.Criminal Case No. 12 of 2008 which was terminated by *nolle prosequi* on 16<sup>th</sup> June 2008. Again, they were on 30<sup>th</sup> June 2008 charged with one Cecilia Mwelu Kyalo with the same offence in Machakos High Court Criminal Case No. 38 of 2008. A *nolle prosequi* was on 1<sup>st</sup> July 2008 entered in favour of the Applicants, while Cecilia Mwelu Kyalo who was 1<sup>st</sup> accused offered a plea of guilty to manslaughter, and was convicted and sentenced to serve 30 years imprisonment. That the cause of death of Remmy Kyalo Kyunguti was explained as an accidental act by

Cecilia Mwelu Kyalo. That though Cecilia Mwelu Kyalo appealed to the Court of Appeal in Criminal Appeal No. 166 of 2008, the sentence was reduced but the cause of death and facts remained the same. That trying the Applicants for the same offence would amount to denying, violating and/or infringing their fundamental rights and freedoms guaranteed in the Constitution.

The application was filed with a supporting affidavit sworn on 3<sup>rd</sup> June 2011 by BOSCO NZIOKA MAKOVE on his own behalf and on behalf of the other Applicants. The affidavit echoes what was stated in the grounds of the application, above. The affidavit annexes the documents of the previous proceedings relied upon.

The application is opposed. A replying affidavit sworn by No. 35831 Sgt. Francis Njuguna on 29<sup>th</sup> September 2011 was filed. It was deponed, *inter alia*, that on 16<sup>th</sup> June 2008 a *nolle prosequi* was entered in favour of the Applicants to pave way for fresh investigations and consultations. That though the Applicants were charged again, on 1<sup>st</sup> July 2008 the charges against the three were terminated when Cecilia Mwelu Kyalo pleaded guilty. That the Attorney-General called for the file and on perusal came to the conclusion that there was sufficient evidence against the three Applicants. The three Applicants were therefore charged afresh.

At the hearing of the application, Mr Mulyungi for the Applicants submitted in support of the application. Counsel emphasized that no new evidence was exhibited by the State.

Mrs Gakobo for the State opposed the application. She emphasized that the sufficiency of evidence will be determined at the trial. No violation of fundamental rights had been proved. The injunctive orders sought were not based on any known criminal law.

Having considered the application, documents filed and submissions, I find that indeed this is the third time the Applicants have been arraigned in court for the same offence (murder). The previous charges were withdrawn by entering a *nolle prosequi*. In accordance with the provisions of Section 82 (1) of the Criminal Procedure Act (Cap 75), the entering of a *nolle prosequi* is not a bar to fresh or further charges on the same facts. In my view, that provision of the law is not unconstitutional.

The Applicants have claimed contravention of Article 22 of the Constitution. However, they do not say how, under the Constitution, the Attorney-General or Director of Public Prosecution violated their rights. The powers of the Attorney-General in criminal cases under the Constitution that was replaced in August 2010 are now vested in the Director of Public Prosecutions under Article 157. The Applicants have not stated in what respects the Director of Public Prosecutions has abused or misused his powers under Article 157 to warrant a finding that their fundamental rights have been violated or granting any of the prayers sought. In that context therefore, this application will not succeed, as I find no legal or Constitutional default on the part of the Attorney-General or the Director of Public prosecutions.

In the result therefore, I find no merits in the application and dismiss the same.

Dated and delivered at Machakos this 7<sup>th</sup> day of **December** 2011.

**George Dulu**

**Judge**

**In presence of:-**

Ms Mbone holding brief for Mr Mulyungi for Applicants/Accused

All three Applicants present

N/A for State

Nyalo: Court clerk