REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CRIMINAL REVISION CASE NO. 110 OF 2010

ABDUL SWAMAD SAID.....APPLICANT

- VERSUS -

REPUBLIC.....RESPONDENT

RULING ON REVISION

On behalf of the applicant, M/s Swaleh & Co. Advocates moved the Court by a letter dated ***6th August, 2010*** and filed on ***17th August, 2010***. It was stated that the applicant had been charged in a Magistrate's Court on two counts (in Criminal Case No. 3328 of 2009):

(i) making a false document contrary to s.347 (a) of the Penal Code (Cap. 63, Laws of Kenya); and

(ii) forgery contrary to s.349 of the Penal Code.

Before the ***Hon. R. Kirui***, Principal Magistrate, on ***13th October, 2009*** the applicant had denied the charges, and trial commenced on ***23rd January, 2010***. At the end of PW1's testimony, the hearing was adjourned to allow the prosecution to call further witnesses who were not already before the Court; and on ***1st March, 2010*** the prosecution called two more witnesses, at the end of whose testimony adjournment was granted, as requested by the prosecution. The Court marked it as a final adjournment, and gave the next hearing date as ***25th May, 2010***; but when that date came the prosecution again sought adjournment, for lack of certain evidentiary documents. Adjournment was granted till ***13th July, 2010*** and, on that occasion, again the prosecution sought adjournment, but this time the application was declined; and in consequence, the prosecution formally closed their case. The Court's ruling date, set for ***20th July, 2010*** was later put off to ***26th July, 2010***.

When the matter came up on ***26th July, 2010*** and the Court's ruling was expected, the prosecution introduced a ***nolle prosequi*** statement dated ***26th July***, [***2010***], to which the defence counsel objected, but which was allowed by the Court. But thereafter, the applicant was arrested and later charged with the same offence, in Criminal Case No. 2246 of 2010.
Counsel stated the foregoing account as the basis for the instant application for revision, brought within the framework of ss. 60(1) and 123(8) of the Constitution that, at the time, was in force: and the relevant question was in respect of the manner in which the Attorney-General and other public officers involved in

the matter, had acted. The applicant asked that the ***nolle prosequi*** recorded by the trial Court be annulled, on the ground that "the power to enter it was exercised improperly"; the applicant asked that the trial Court be directed to proceed with the trial of Criminal Case No. 3328 of 2009 in accordance with the law.

Learned counsel, ***Mr. Ondari*** had a preliminary objection to the application: that the application was bad in law, in the light of the orders made by the trial Court in Criminal Case No. 3328 of 2009. What were those orders made by the trial Court? This will be appreciated when set out in the relevant part of the trial Court's proceedings of ***26th July, 2010***:

"PROSECUTOR: I have instructions from the Attorney-General's Chambers to enter a *nolle prosequi.* ***I produce a copy of the*** *nolle prosequi* ***to the Court.***
"COUNSEL [MR. CHEKERA]: The *nolle prosequi* ***is very late in the day. What was pending was the ruling. Let the ruling be read out.***
"PROSECUTOR: There is law allowing the *nolle prosequi* ***to be entered at any stage before the ruling.***
"ORDER: The matter is terminated under section 82(1) of the Criminal Procedure Code and the accused is discharged accordingly."

Mr. Ondari urged that since, on ***26th July, 2010*** the Court terminated the proceedings in Criminal Case No. 3328 of 2009, those proceedings are no longer in existence, and so they are not available to be examined; besides, the trial Court in that matter is already rendered ***functus officio***: and hence the orders now sought cannot be claimed through the ***revision jurisdiction***, and it would be more proper for the applicant to file a special application. Counsel urged that the Subordinate Courts, under s. 82 of the Criminal Procedure Code, lack the power to challenge the Attorney-General's competence to enter ***nolle prosequi*** in criminal trials. The trial Court, it was submitted, had made no irregular order, and the same could not be contested as a revision matter by virtue of s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

Learned applicant's counsel, ***Mr. Magolo***, submitted that the preliminary objection was misplaced; that the question whether there are valid reasons for asking the Court to exercise the revision jurisdiction, was one to be substantively considered by this Court; that there was the applicant's letter of ***6th August, 2010*** invoking this Court's jurisdiction, and this Court has jurisdiction to consider the matter so raised. Counsel urged that under s.364 of the Criminal Procedure Code, the manner of approaching the Court is not limited to the formal application, and the High Court can intervene in respect of any Subordinate Court order other than an acquittal order.

Counsel submitted that the trial Court's order allowing withdrawal of the prosecution case, could be reversed by the High Court. Counsel urged that a ruling had been pending before the trial Court, and so the learned Magistrate may be directed to proceed with the matter and to deliver a ruling.
Counsel submitted that the preliminary objection be rejected, because neither the Constitution nor the Criminal Procedure Code, bars the High Court from considering the request for revision by the applicant herein.

This kind of case has come up before the High Court on several other occasions. In ***Republic v. John Muthoka Suri***, Mombasa H.C.Cr. Case No. 30 of 2000 [2005eKLR], a case which differs from the instant one in that it was commenced at the High Court, a trial commenced, ended, and later re-commenced; and on this second occasion the prosecution, rather than call witnesses, sought to enter ***nolle prosequi*** by virtue of s.26 (3) (c) of the Constitution then in force, and s.82 (1) of the Criminal Procedure Code. Considering that the accused had remained in custody for as much as seven years, and that by s.82(1) of the Criminal Procedure Code the discharge of an accused "shall not operate as a bar to subsequent proceedings ……on account of the same facts", and also taking into account the constitutional guarantees for the expeditious trial of a criminal case, ***Lady Justice Khaminwa***, on ***6th September, 2005***, held that it was "unreasonable, unfair, and a misuse of powers granted to the Attorney-General to take steps to prolong these charges by entering a ***nolle prosequi***". The learned Judge rejected the ***nolle prosequi***, and ordered that the trial proceedings do continue.

More in the same class as the instant case is ***Philemon Musembi v. Republic*** Kakamega H.C.Cr. Case No. 50 of 2005 [2005eKLR]. The applicant in that case was the accused in Crim. Case No. 350 of 2004 at

the Vihiga Senior Resident Magistrate's Court. Several adjournments, during the hearing, were granted to the prosecution whose witnesses were unavailable. Such requests for adjournment were, in the course of time, declined, occasioning the closure of the prosecution case. On the day appointed for a preliminary ruling on the case, the prosecution, just as in the matter before this Court, applied to enter ***nolle prosequi***; and the defence took objection; the defence, moreover, sought to have its objection referred to the High Court under s.67(1) of the Constitution then in force. The trial Court allowed the objection, and referred the matter to the High Court, the relevant question being: whether the State's application to enter ***nolle prosequi*** in those circumstances should be allowed.

While acknowledging that the Attorney-General, by s.26(3) (c) of the former (1969) Constitution and by s.82(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya), could discontinue any criminal proceedings in progress, the Court ruled that "the exercise of that power can be challenged by dint of the fact that section 60(1) of the [1969] Constitution which confers on this Court unlimited original jurisdiction in civil and criminal matters also recognizes the conferment on this Court of such other jurisdiction and powers as may be conferred on it by the Constitution or any other law". The learned Judge (***G.B.M. Kariuki, J***) found such "other" conferment of jurisdiction upon the High Court, in s.123 (8) of the said Constitution of 1969, which thus stipulates:

"No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be considered as precluding a Court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law".

The learned Judge came to the conclusion which, in my opinion, was a logical one, that:

"the discretionary power of the Attorney-General under section 26(3) (c) of the [1969] Constitution and section 82(1) of the Criminal Procedure Code is subject to the supervisory role of the Court."

The learned Judge, on that basis, proceeded to consider the question whether the Attorney-General, in entering ***nolle prosequi*** had exercised his power properly, in accordance with the law. The test, in this regard, as the Court held, was:

"….whether the exercise of such power was in good faith, oppressive, capricious, antithetical to [the] public interest or public good and whether it was influenced by irrelevant considerations, or corrupt practices or whether it was in accord with the Constitution and the law of the land or whether it amounted to abuse of the process of the Court."

In the ***Philemon Musembi*** case the trial had been in progress between ***25th March, 2004*** and ***27th April, 2005***, and as many as 12 witnesses had testified. The trial Court ultimately declined the prosecution's repeated requests for adjournment for the purpose of calling a final witness, and set ***20th May, 2005*** as the date for a ruling on whether the accused had a case to answer; but on that date, the prosecution sought to enter ***nolle prosequi***.

The Court in that case disallowed the Attorney-General's decision to enter ***nolle prosequi***, on the following reasoning:

"The prosecution had been given ample opportunity and adjournments had been granted to enable it to bring its witness to Court but it had failed to do so. The Court had used [a] considerable amount of judicial time on the case, and public resources had been expended to mount the prosecution in which a total of twelve….witnesses had testified. The Attorney-General was enjoined to be fair in the prosecution of the case against the accused and to accord the accused a fair hearing within a reasonable time. The use of the nolle prosequi would undoubtedly prejudice the accused's right to a fair hearing in that it would result in his discharge with the possibility of being charged again."

The Court declared the Attorney-General's exercise of the power to enter ***nolle prosequi*** a nullity, and ordered the trial to proceed to defence hearing.

A similar result was reached in ***Veronicah Njeri Kiarie v. Republic***, Kakamega HC Misc. Crim. Appl. No. 29 of 2005 [2005eKLR], where ***Mr. Justice G.B.M. Kariuki*** declared null the ***nolle prosequi*** entered by the Attorney-General: on the ground that "the power to enter it was improperly exercised". The trial Magistrate was, in that case, directed to proceed with the hearing of the criminal case in question.

The consistent course of High Court decisions, on the relevant question here, has established a process of justice which is ordinarily to be followed, as an antidote to the negative perception that judicial yardsticks have been applied irregularly or discriminatorily. Save for good cause built on the merits of a particular case, and dependent on any divergent facts and circumstances, it is the obligation of this Court to uphold the tenets that guided my brothers and sisters on the Bench.

The facts and circumstances of the instant case have already been set out in this ruling: the prosecution had on a good number of occasions sought adjournment, and their request had been granted; the trial Court showed concern about the prosecution's dilatoriness, by making the several adjournment orders as the very last; even when adjournment was granted with abundant time-allowance, the prosecution returned only to seek further adjournment; when the latest adjournment request was refused and the prosecution had to close their case, they returned before the Court on the reserved preliminary-ruling day, with a formula for averting the effect of the learned Magistrate's orders ? they stopped the Court in its tracks, and awarded themselves, through ***nolle prosequi***, another opportunity to begin fresh prosecution against the applicant.

I am not in agreement with learned counsel that the trial Court is now ***functus officio*** and has no more business with the trial of the applicant; because this Court has a controlling jurisdiction which can invest that Court with the competence to hear and dispose of the original matter.
From the facts on record, this Court concludes that the prosecution powers have not been responsibly exercised, and accommodating the Magistrate's order allowing entry of ***nolle prosequi*** will be harmful to the proper conduct of the judicial process, and will certainly be prejudicial to the trial-rights of the applicant.
Therefore, I hereby nullify the order allowing entry of ***nolle prosequi*** of ***26th July, 2010***. The effect is that Criminal Case No. 3328 of 2009 shall be listed for mention before the learned Principal Magistrate, for directions for the continued conduct of the trial to conclusion.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this ***19th day of October, 2010.***

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Applicant: ***Mr. Magolo***
For the Respondent: ***Mr. Ondari***