REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
MISC CRIMINAL REVISION NO. 267 OF 2010

REPUBLIC (STATE COUNSEL) ……..APPLICANT
VERSUs

1. ENOCK WEKESA)
2. MICHAEL B. WATAH)……..RESPONDENT

RULING

1. This matter was referred to the High Court for revision by Mr Onderi the learned senior principal State Counsel Kitale. He sought for an order of revision of an order by the Kitale Senior Principal Magistrate Mrs Chepseba dated 12th October 2010. The application is made under the provisions of sections 362 and 364 of the Criminal Procedure Code as well as article 165 (3) d (ii), (6) (7) of the Constitution of Kenya 2010. The brief background of this matter relates to **Criminal Case No. 4379 of 2009, Republic Versus Enock Wekesa and Michael Biketi Wata**.

2. The two accused persons in that case are charged with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. They also face a fourth charge of defilement of a girl contrary to section 10 of the Sexual offences Act 2006 and in the alternative, a charge of indecent act, contrary to section 11(1) of the Sexual Offences Act. The trial began before the Senior Principal Magistrate and on 13th August, 2010 the learned Senior Principal State Counsel presented a **writ of nolle prosequi** dated 10th September, 2010 to discontinue the criminal proceedings against the two accused persons. The writ reads as follows

"IN EXERCISE, of powers conferred on the Attorney General by Article 157 (4) (6) and (9) of the Constitution of Kenya, as read with Section 31 (5) of the Sixth Schedule thereto (Transitional and Consequential Provisions) and delegated to me vide Legal Notice No. 134 of 2010, I HEREBY, enter NOLLE PROSEQUI and inform this Honourable Court that, THE Republic intends that, the Proceedings agaist: ENOCK WEKESA AND MICHAEL BIKETI WATAH, who are charged with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code SHALL NOT CONTINUE."

3. The learned Trial Magistrate delivered a ruling on the 12th October, 2010 in which she dismissed the writ of **nolle prosequi** on the grounds that no reasons were given for consideration as required by the provisions of the Constitution of Kenya 2010 which make provisions for the powers given to the Director of Public Prosecutions. The powers donated to the Honorable Attorney General under Section 82 of the Criminal Procedure Code are now to be exercised as per the transitional clauses of the Constitution of Kenya 2010. The trial Magistrate also held that the provisions of the Constitution rank higher than those of the Criminal Procedure Code.

4. The learned Senior Principal State Counsel being aggrieved by that ruling, referred this matter for this court to satisfy itself the correctness, legality, propriety or regularity of the order made by Senior Principal Magistrate on 12th October, 2010. This court invited the learned State Counsel to make

submissions on this application for revision and such submissions were made on 3rd November, 2010.

5. According to Mr. Onderi, the learned Senior Principal Magistrate has no powers under the Constitution to question the writ of **nolle prosequi.** The Attorney General is authorized to enter nolle and is not bound to give any reasons to the trial court. In this regard counsel made reference to the case of **MWANGI AND SEVEN OTHERS VS ATORNNEY GENERAL {2002} 2KLR**. Where a Bench of Three Judges held that :-

…8 " The High Court specifically given jurisdiction to hear the applications made by the Attorney General, therefore it is only the High Court that can question the functions of the Attorney General.

…9 The restriction of the word "Court" to the High Court only does not deprive an accused person who considers that the use of *Nlle Prosequi* interferes with his fundamental right of recourse to the protection of the law. Such an accused may then invoke the provisions of Section 84 of the Constitution.

…12 Sections 77 and 84(3) of the Constitution provide sufficient guidance as to the steps to be taken by the accused person or the Court in a given case, where it is felt that the exercise of the Attorney General's power in entering a *Nolle Prosequi* is unconstitutional or improper."

6. The other reason urged by the state counsel is that he is mandated by legal Notice No. 331 to exercise the powers under sections 81 and 82 of the Criminal Procedure Code. Under Kenya Gazzete supplement No. 61 he was similarly gazetted under the Constitution of Kenya 2010 to carry out the powers conferred under article 157(9) of the Constitution of Kenya thus he had the requisite authority to enter a writ of ***Nolle Prosequi*** which should not have been questioned by the trial magistrate.

7. This application is brought to this court under the reversionary powers donated under sections 362 and 364 of the Criminal Procedure Code. Under those Provisions, the High Court may call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.

8. I have considered the ruling by the learned trial magistrate and the reasons given for her refusal to grant leave to the State to enter the writ of ***Nolle Prosequi*** with an anxious mind for the reasons which will become clear in this ruing. Firstly, the learned trial Magistrate held that under the new Constitution the State Counsel should give reasons for the court's consideration and she rightly held that the Provisions of the Constitution overrides the provisions of the Criminal Procedure code. That holding is trite law, it is basic as provided for under Article 2 of the Constitution of Kenya 2010, I do not think that is the preserve of the High Court to determine.

9. The learned trial magistrate also held that the prosecution should have given reasons pursuant to the provisions of Article 157 (11) of the Constitution. Finally she made a finding that the accused persons are also facing a fourth count of gang rape which the writ of ***Nolle Prosequi*** did not address. Under Article 157 (6) of the Constitution of Kenya 2010, it is provided as follows:-

1. 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 that 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).

….

(11) In exercising the power conferred by this Article, the Director of Public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

10. It is a general principle borne out of practice that the whole fundamental objective of the interpretation of statute is to give it the overarching objective which was meant by a particular legislation. The Constitution recognizes as fundamental respect of human rights, equality before the law and other values. The protection of human rights in my humble view includes those of the accused person(s) and also the complainant(s). This is in line with provisions of Article 159 (2) of the Constitution of Kenya 2010 which provides as follows:-

"In exercising Judicial authority, the courts and tribunals shall be guided by the following principles:-

(a) justice shall be done to all, irrespective of status;
(b) justice shall not be delayed;
(c) alternative forms of dispute resolution including reconciliation, mediation., arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
(d) justice shall be administered without undue regard to procedural technicalities; and
(e) the purpose and principles of this Constitution shall be protected and promoted."

11. The above provisions resonate well with Provisions ofArticle 157(11) of the constitution; if the Director of Public Prosecutions decides to exercise his or her powers to enter a *writ of Nolle Prosequi*, they should have regard to the **public interes**t, the **interests in the administration of justice** and **the need to prevent and avoid abuse of the legal process**. The learned trial magistrate was faulted for making a constitutional interpretation and questioning the powers granted to the learned State Counsel to enter the writ of ***nolle Prosequi***.

12. As I understand the ruling by the learned Senior Principal Magistrate, she made an inquiry which can now be made under the Constitution so as to satisfy herself on whether the powers in the writ of *nolle prosequi* are in consonant with the provisions of the constitution. This is a thin line to be drawn on whether that enquiry is an interpretation of the constitution. The magistrate while exercising judicial powers must adhere to the principles set out in the constitution. By trying to satisfy herself that the order sought meets the thresholds set out in the constitution, that cannot be termed a usurpation of powers of the DPP.

13. I agree with **Mr. Onderi** that under the old Constitution the powers of the Attorney General were absolute. With the current constitution, those powers have to satisfy three criterias. Making an enquiry can not be said to be an interpretation of the constitution which is the preserve of the High Court under the Provisions of Article 165 .The overarching objective in the administration of justice that is to do justice to all, irrespective of status, is a cardinal value that cuts across all cadre of judicial officers, it is not only Judges but everybody exercising judicial powers. Before the trial court; there were complainants and the accused persons. The record shows that the prosecution's case had started.

14. Surely if the case were to be terminated, should the complainant not be given a reason? Should the court that gives the leave to terminate the proceedings be a mere rubberstamp? Is asking questions that will satisfy the court that there is no abuse of process interference with the powers of the Director of Prosecutions? The criminal charges that are before the learned trial magistrate involve both the accused persons and the complainants who were the victims. By the trial Magistrate seeking for reasons so as to satisfy herself that there is no abuse of the legal process cannot be said to overstep on the powers of the Director of Prosecutions.

15. The constitution provides that public interest, the interest of justice and abuse of the legal process be protected, this is the duty of the trial court. This being a new constitution one can only hope that the enabling legislation especially the Criminal Procedure code will be reviewed to draw the parameters

within which the Tribunals, Kadhis and Magistrates courts can protect public interest and guard against abuse of the legal process without being accused of interpreting the constitution.

16. Finally the learned trial magistrate also paused a very important question "what will happen to the fourth count of defilement?" this question was not answered by the State because the writ of ***nolle prosequi*** was only in regard to the offences of capital robberies. Even on this ground alone, the court was entitled to dismiss the writ for being vague and abuse of the court process.

17. For the foresaid reasons, I do not think I should exercise my powers to set aside the order by the learned trial magistrate. I hold that the enquiry made by the trial magistrate was within the provisions of article 157 (11) of the Constitution and within the other broader principles and values in the administration of justice. Justice is open, transparent and should be responsive and accountable. These are not fashionable terms any more, but a reality under the Constitution of Kenya 2010. If the State wants to exercise the power of entering whatever writs no one will stop them as long as they meet the threshold of public interest, interest of justice and ensure non abuse of the court process.

Accordingly, the application for revision is hereby dismissed.

Ruling read and signed this 19th day of November, 2010

MARTHA KOOME
JUDGE