



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Case 24 of 2008

REPUBLIC

VERSUS

GEOFFREY MULWA MUTUNDAACCUSED

RULING

1. On 19/3/2009, learned Principal State Counsel, Mr O’Mirera tendered a nolle prosequi in this case and he did so under Section 26 (3) of the Constitution and as delegated to him under Section 26 (5) of the Constitution vide Kenya Gazette Notice No. 72 of 30/6/2005. He thereafter applied that the criminal proceedings against Geoffrey Mulwa Mutinda and Paul Mathina Mutua be terminated.
2. Mrs Nzei, learned advocate for the accused protested and stated that the nolle prosequi was being entered purely to defeat the purpose of a preliminary objection on record wherein the accused persons are challenging the manner of their arrest and the period within which they were held in police custody before they were arraigned in court. She asked me to reject the nolle prosequi. Should I?
3. I am aware that sometime in the year 2008, a bench comprised of three judges of the High Court held that any court can and should reject a nolle prosequi if the same is being used in contravention of the law. I was unable at the time of writing this Ruling to access it but I am certain of the holding in general.
4. Section 26 (3) of the Constitution provides as follows:
“26 (1)
(2)
(3) **The Attorney-General shall have the power in any case in which he considers it desirable so to do-**
 - a) **to 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 by that person;**
 - b) **to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and**
 - c) **to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.”**

5. In exercise of these powers or any other powers conferred on him by law, the Attorney-General shall not be subject the direction or control of any person or authority hence the provisions of Section 26 (8) of the Constitution. Further Section 26 (6) of the Constitution provides as follows:

“26 (1)

(2)

(3) (a)

(b)

(c)

(4)

(5)

(6) The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(7)

(8)”

6. It seems to me therefore that reading all these sections, together a party that is the subject of criminal proceedings has no choice but to accept a nolle prosequi should it be tendered, with all the consequences that goes with it including re-arrest.

7. I say this well aware of Section 123 (8) of the Constitution which provides as follows:-

“123 (1)

(a)

(b)

(c)

(2)

(3)

(4)

(5)

(6)

(7)

(8) 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 construed 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.

(9)

(a)

(b)

(10)

(11)

(12)

(13)”

8. The import of this section is of course that where a person is granted constitutional powers to do certain things, the power should not be used in contravention of the Constitution or any other law. That is where the advocate for the accused should have started; by showing me any law that has been contravened by the Attorney-General or someone exercising his authority under Section 26 (5) of the Constitution. Sadly, it is not enough to say, in my view, that the nolle prosequi is meant to defeat a pending Preliminary Objection on record. There is no presumption that the objection may or may not succeed and so the issue is purely speculative even if the objection may later on be found to be merited.

9. In the end, no credible and lawful reason has been given why the nolle prosequi should be rejected and I hereby accept the nolle prosequi dated 19/2/2009 and having so done, the proceedings herein are ordered to be terminated. The accused person is hereby discharged and shall be ordered to be released unless he is otherwise lawfully held.

10. Orders accordingly.

Dated and delivered at Machakos this **14th** day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau for family of the deceased**

Mr O’Mirera for Republic

Accused: present

ISAAC LENAOLA

JUDGE