REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal 'Revision' 68 of 2003

GEORGE GITAU WAINAINA..... APPLICANT

VE RSUS

ATTORNEY GENERAL..... RESPONDENT

RULING

There is before us a Constitutional Reference from the learned Senior Resident Magistrate, Kibera (Ms Siganga) to the High Court under section 67(1) of The Constitution of Kenya ('the Constitution') following an application by the applicant for such reference to be made to the High Court for it to address and determine several questions as to the interpretation of the Constitution. The questions were said to involve substantial questions of law revolving around an attempt by the Attorney – General to enter a *Nolle Prosequi* in the above Magistrates court case after the accused therein, who is now the applicant, had embarked upon his defence. Initially 5 Constitutional Questions were framed on 13.10.03 by counsel for the applicant herein. However, on 06.10.05 applicant's counsel filed a revised and expanded version of the Constitutional Questions for determination, which Constitutional Questions now number 7 as follows:-

1. Whether Respondent should give reasons for attempting/seeking to enter *Nolle Prosequi* in Kibera Chief Magistrates Criminal Case No.4445 of 2002.

2. If the answer to 1 above is in the affirmative, whether the said reasons are valid reasons constituting a proper exercise of powers of the Respondent donated by section 26 (3) of the Constitution and section 82 of the Criminal Procedure Code, Cap.75 to enter a *Nolle Prosequi*.

3. Whether in the circumstances of this case and considering the stage at which these proceedings are, a *Nolle Prosequi* does or does not constitute an abuse of due process.

4. Whether in seeking to enter a *Nolle Prosequi* the Respondent has acted in a manner that is oppressive, capricious and in derogation to the applicant's right to a fair trial and equal treatment before law or otherwise against public policy.

5. Whether having refused to utilize section 87 (b) of the Criminal Procedure Code to bring the proceedings to an end, the Attorney – General has acted *mala fides* with the obvious intention of preferring fresh charges and hence subjecting the applicant to the agony of a fresh trial.

6. Whether a *Nolle Prosequi* signed by the Director of Public Prosecutions is a valid exercise of the Attorney – General's powers under section 26 (3) of the Constitution.

7. Whether in all the circumstances of this case the Attorney – General's attempt to enter *Nolle Prosequi* should be rejected.

On 23.11.05 the respondent filed his skeleton arguments of the same date in support of his case and on 12.05.08 the applicant filed his counter-skeleton arguments dated 09.05.08.

Hearing of the Constitutional Reference took place before us on 21.05.08 whereat the applicant was represented by learned counsel, Mr J.K. Njuguna while the respondent was represented by learned counsel, Mr J. Kaigai. Both counsel adopted their skeleton arguments and gave such highlights as they deemed appropriate.

The applicant's counsel's submissions in support of the application may be summarized as under. The applicant was arraigned on 13.06.02 on two criminal charges:-

1. Malicious damage to property, contrary to section 339 (1) of the Penal Code, Cap.63. Under this section an accused, if convicted, is liable to imprisonment for 5 years.

2. Stealing, contrary to section 275 of the Penal Code. Under this section an accused, if convicted, is liable to imprisonment to 3 years.

The value of the subject matter of count 1 was given as Kshs.50,000/= while the value of the subject matter of count 2 was given as Kshs.150,000/=. The prosecution called 5 witnesses and closed its case. The applicant herein who was the accused in the then Kibera Senior Principal Magistrate Court submitted that he had no case to answer but the court ruled that he had a case to answer. The applicant indicated he would call 4 defence witnesses to testify on his behalf. He started giving evidence and called 2 witnesses, i.e. himself and his brother, Benson Wathome Wainaina. In the course of the defence hearing, the accused/applicant fell ill. On 24.09.03, during a normal mention, the prosecutor told the court that he had been instructed to present a *Nolle Prosequi*. Applicant's counsel opposed entry of the *Nolle Prosequi* relying on High Court Criminal Application No.39 of 2000, Crispus Karanja Njogu -vs- Attorney – General, which was filed under section 67 (1) of the Constitution. With regard to the reason given by the respondent that he chose to enter a *Nolle Prosequi* because the proceedings had been conducted by an unqualified person, contrary to the then section 85(2) of the Criminal Procedure Code, applicant's counsel pointed out that the applicant as the accused attended the trial court 31 times in a trial lasting 15 months (he actually phyisically attended 26 court sessions while on 3 other sessions his advocate represented him); that if the prosecutor was unqualified, the mistake was the respondent's and should not be visited on the applicant; that the applicant as the accused had been placed on his defence and that, therefore, section 87 (b) of the Criminal Procedure Code was the proper section to use under which the applicant would have been entitled to an acquittal.

It was applicant's counsel's contention that the respondent's intention in not using section 87 (b) but using section 82 to enter a *Nolle Prosequ*i instead must have been to preserve the right to present fresh charges against the applicant. Applicant's counsel drew attention to the fact that the respondent is the appointing authority for public prosecutors and that his appointment of unqualified prosecutors had previously been castigated by the Court of Appeal in Criminal Appeal No.67 of 2002, Roy Richard Elirema & Vincent Joseph Kessy -vs- Republic. Applicant's counsel submitted that the respondent cannot benefit from his own fault by using a *Nolle Prosequi* and his attempt to enter a *Nolle Prosequi* in the present applicant's lower court case is not a fair exercise of the applicant's power to enter a *Nolle Prosequi.*

Applicant's counsel pointed out that the subject offences are said to have been committed on 08.04.02, that if the *Nolle Prosequi* is permitted, it would leave the door open for the respondent to prefer fresh charges against the applicant and that the applicant would be denied the right to a fair trial in that whatever defence he might have had may no longer be in existence. Applicant's counsel said that tracing witnesses and lapse of memory may stand in the way of the defence case. Reacting to a criticism from respondent's counsel, applicant's counsel pointed out that the present Constitutional Reference was not made under section 84 but under section 67 (1) of the Constitution and that the rules cited by

respondent's counsel are not applicable to a Constitutional Reference under section 67 (1) of the Constitution.

With regard to prayer 6 in the Constitutional Reference challenging the validity of a *Nolle Prosequi* signed by the Dirctor of Public Prosecutions (DPP), applicant's counsel said he was no longer questioning the DPP's authority to enter a *Nolle Prosequi* on behalf of the respondent in view of gazettement of the office of the DPP vide Legal Notice No.71 of 2005 which was backdated.

Applicant's counsel finally submitted that the intended *Nolle Prosequi* is improper and urged this court to reject the same.

On the other hand, respondent's counsel opposed the application and said he adopted the skeleton arguments filed for the respondent on 23.11.05. He noted and stressed that the procedure adopted for bringing the Constitutional Reference was captioned as a revision and pointed out that revisional matters have their procedure set out in sections

362 - 367 of the Criminal Procedure Code and not under section 67 (1) of the Constitution. He submitted that the procedure adopted is improper. He also contended that the reasons given by the respondent for invoking the procedure of *Nolle Prosequi* are lawful, proper and genuine and that the court should accept them as validating the intended *Nolle Prosequi.* He added that junior officers had been prosecuting for decades until the Elirema case *(supra)* brought the illegality of the practice into focus and that the respondent moved with speed to remedy the situation. We interpose here to observe that although respondent's counsel did not elaborate on his allusion to the respondent remedying the situation, Act No.7 of 2007 deleted from section 85 (2) of the Criminal Procedure Code the requirement that the person the respondent appointed as a public prosecutor from the public service had to be a person of not below the rank of Assistant Inspector of Police. Subsequent to the amendment, any person the respondent deems fit to appoint from the public service as a public prosecutor no longer suffers a disability on account of being a police officer below the rank of Assistant Inspector of Police. In respondent's counsel's view, the trial of the applicant herein as the accused in the lower court case is a nullity, notwithstanding the stage the trial proceedings had reached and that the *Nolle Prosequi* cannot be successfully resisted. Respondent's counsel added that while it is easy to blame the respondent herein, the courts also allowed unqualified persons to prosecute and that they contributed to the wrong complained of by the applicant.

As regards the prospect of a re-trial of the applicant herein, respondent's counsel pointed out that once the *Nolle Prosequi* is entered, the matter will be taken back to the respondent who will decide whether to prosecute or not. In respondent's counsel's view, this is a relatively new matter and that the fear of the respondent laying dangerous cards under the table is speculative as the entry of a *Nolle Prosequi* does not necessarily lead to a re-trial. Respondent's counsel pointed out that public policy dictates that all trials should be conducted according to law, that the complainant also deserves justice and that his or her interests should likewise be considered. Respondent's counsel asked this court to take into account all factors and find that the intended *Nolle Prosequi* is proper.

Regarding the authorities applicant's counsel referred to, respondent's counsel maintained that except for Elirema's case, the others are distinguishable. He said the other cases were lawful whereas Elirema's case was a nullity.

Respondent's counsel urged this court to disallow the applicant's application and allow the respondent to tender the *Nolle Prosequi.*

In reply, applicant's counsel pointed out that section 85 of the Criminal Procedure Code which gives the respondent power to delegate prosecutorial power does not anywhere mention the courts as sharing that power and that, therefore, the respondent's counsel's insinuation that the courts have contributed to the morass arising from unqualified persons being appointed public prosecutors misses the point of the applicant's complaint in that regard. Applicant's counsel pointed out that the courts have no interest in the matter at hand and that the court cannot inquire on its own about competence of those who appear before it, unless the matter is brought to the court's attention. In applicant's counsel's view, the

respondent should apologise to those who may have gone to prison unlawfully. Applicant's counsel urged this court not to subject the applicant to the mercy of the erring respondent Attorney – General but protect the applicant from possible abuse of the prosecution office in the event of a re-trial. As regards the claim in the subject before the Kibera court, applicant's counsel noted that the said case is based on quantifiable damages and that the complainant can sue for damages.

Applicant's counsel reiterated that the respondent made the mistake of appointing an unqualified prosecutor who undertook prosecution of this case in the lower court; that the respondent must balance the interests of the State and the interests of the individual as both are subjects that the respondent is to blame for the error of appointing an unqualified public prosecutor; and that the error should not be visited on the applicant.

We have given due consideration to the rival arguments of the parties, including the authorities cited by their advocates.

It is our intention to address the issues raised before us as far as possible in the order of their presentation by the parties. However, we shall deal with two preliminary matters straightaway and get them out of the way first. The first is to examine the effect of partly entitling the present application as a revision case on the validity of the application. The second relates to prayer 6 which essentially questions the validity of a *Nolle Prosequi* signed by the Director of Public Prosecutions.

Description of the application before court

We note that it is counsel for the applicant who on 29.09.03 asked the trial Magistrate in the Kibera criminal case to make a reference to the High Court under the Constitution. The prosecutor asked for a week to respond to the objection raised to the proposed entry of the *Nolle Prosequi*. The matter was re-scheduled for 13.10.03. At this latter session, counsel for the accused, who is now the applicant before us, framed 5 broad questions he wished to be determined by the High Court. The questions essentially questioned the propriety of the Attorney-General's choice of using a *Nolle Prosequi* under section 82 of the Criminal Procedure Code instead of using section 87 (b) of the same Code. Section 67 of the Constitution provides, *inter alia*, as follows:

'67. (1) Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.'

The learned trial Magistrate held, correctly, that she had no choice but to refer the matter to the High Court for determination since it is the defence, i.e. the accused, that had applied for the reference. The trial Magistrate then referred the matter to the High Court for determination and in the meantime stayed the proceedings before her pending the reference and framing by the defence of the questions to be determined by the High Court. On 06.10.05 the applicant herein filed the 7 Constitutional Questions listed at the start of this Ruling for determination by the High Court. No issue of revision features in the Constitutional Questions framed, neither is the issue of revision raised in the rest of the title of the matter before the High Court. Why the applicant deemed it fit to caption this matter as a Criminal Revision comes as a puzzle to us.

In our view, respondent's counsel was right in criticizing the caption. Revision has a specialized meaning in Kenya's criminal law and the procedure for invoking revision is laid down in sections 362 – 367 of the Criminal Procedure Code. None of the factors pertaining to revision exists in the matter at hand and the captioning of the matter before us a Criminal Revision is a misnomer and has no place in this matter. This is a Constitutional Reference, pure and simple, as correctly described in the rest of the title to the matter before us as well as in the arguments advanced in support thereof. Indeed the applicant has not anywhere in the questions he framed or in the arguments he advanced in support of his application alluded to any revision.

Respondent's counsel urged us to find the above misdescription fatal to the Constitutional Reference before us. The matter before us raises fundamental issues regarding the control by the Republic of criminal prosecutions through the procedure of *Nolle Prosequi*. We would rather address the fundamental issues than be bogged down by the aforesaid misdescription. We hold that the misdescription is a curable irregularity, that it is not fatal to the matter before us and deem the aforesaid matter or proceeding before us not as a CRIMINAL REVISION but as a CONSTITUTIONAL REFERENCE and shall treat it as the latter henceforth.

Validity of a Nolle Prosequi signed by the Director of Public Prosecutions (Question 6)

Section 47 of the Interpretation and General Provisions Act provides as follows:

'47. (1) Whenever the title of a public officer is changed, the President may, by notice in the Gazette, declare that, for the purposes of all written laws, the title of the officer shall be replaced by the new title specified in the notice.

(2) Where a notice is published under subsection (1), a written law containing a reference to the title which is changed shall be deemed to have been amended by substituting for the reference a reference to the new title.'

In exercise of the powers conferred on him by the above section, the President did on 30.06.05 issue Legal Notice No.71 published in Kenya Gazette Supplement No.49 of 01.07.05 declaring that the title 'Deputy Public prosecutor' shall be replaced by the title 'Director of Public Prosecutions' and that the Legal Notice would have effect from 05.12.96. In view of the foregoing, applicant's counsel informed us at the hearing of the present application on 21.05.08 that the applicant was withdrawing Constitutional Question 6. We endorse the withdrawal and mark Constitutional Question 6 as duly withdrawn.

Whether respondent should give reasons for attempting/seeking to enter a Nolle Prosequi (Question 1)

Before addressing this specific question, we consider it helpful to trace the parentage of the respondent Attorney - **General's powers over criminal proceedings in Kenya. Section 26 of the Constitution provides, *inter alia*, as follows:**

'26. (3) The Attorney – General shall have 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.'

These are very wide powers indeed. The Constitution does not enumerate the factors that would entitle the Attorney – General to consider it desirable to initiate criminal proceedings or to discontinue such proceedings. He seems to have a wide discretionary latitude in the matter. This does not imply that the Attorney – General has absolute and unfettered discretion since it is a legal expectation in civilized systems of justice that any person exercising a discretion on a matter dealing with public rights of a citizen must exercise that discretion judicially, fairly and properly, taking into account all relevant considerations and excluding irrelevant ones. As was correctly observed by Lord Greene (M.R.) in Associated Provincial Picture Houses Limited -vs- Wednesbury Corporation [1947] I K.B. 223, the courts would not interfere with the exercise of discretionary powers unless the discretion was exercised in bad faith, dishonestly, unreasonably or in regard to

extraneous matters or if the authority concerned failed to take into account relevant matters. The court in the above case, *inter alia*, held that:

'In considering whether the authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matter that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it (the authority) has contravened the law by acting in excess of its power.'

We associate ourselves with the above holding and, arising therefrom, wish to observe that for this court to be able to make an informed decision whether the respondent Attorney – General took into account only relevant matters or took into account irrelevant matters in his decision to want to enter the *Nolle Prosequi*, this court needs to know the reason or reasons for the intended *Nolle Prosequi*. It seems that in the present case the respondent appreciated the court's dilemma if it were to be asked to decide Question 1 without knowing what prompted the intended *Nolle Prosequi*, hence the respondent's disclosure at skeleton argument 4 that:

'The said *Nolle Prosequi* is being entered because the trial was conducted by unqualified person c/s 85 (2) C.P.C. Cap.75 Laws of Kenya.'

The respondent Attorney – General adopted a pro-active approach and disclosed his reason for the intended *Nolle Prosequi* before we made a pronouncement on Question 1, which obviates the need for us to answer the question formally. Since the reason for the intended *Nolle Prosequi* has been disclosed to us, we now proceed to consider whether it is a valid reason as we were called upon to pronounce vide Question 2.

Whether the fact of the prosecution having been undertaken by an unqualified person is a valid reason constituting a proper exercise of the powers to enter a Nolle Prosequi donated to the respondent Attorney – General by section 26 (3) of the Constitution and section 82 of the Criminal procedure Code (Question 2)

Elirema's appeal *(supra)* was decided by the Court of Appeal on 05.08.03. It did not introduce any novel point of law but merely pronounced what had been the law all along although it had not been observed. The criminal charges against the applicant in the present case were preferred against him in June, 2002. It appears to have dawned on the respondent Attorney - General herein who must have represented the respondent Republic in Elirema's appeal that the Court of Appeal decision in Elirema's appeal dealt a deadly blow on prosecutions undertaken by unqualified persons and that proceeding with the present applicant's criminal trial, which was partly conducted by an unqualified person after 05.08.03 would be an exercise in futility. Therefore the respondent's decision announced on 24.09.03 to terminate the present applicant's trial on the basis of the decision in Elirema's appeal is based on a valid reason. What is highly debatable is whether that reason constitutes a proper ground for the respondent Attorney – General to terminate the criminal proceedings by exercising the powers donated to him by section 26 (3) of the Constitution and section 82 of the Criminal Procedure Code to enter a *Nolle Prosequi*, and to that we now turn.

We have already reproduced hereinabove the text of section 26 (3) of the Constitution.

As for section 82 of the Criminal Procedure Code, which falls immediately after the heading 'CONTROL BY REPUBLIC IN CRIMINAL PROCEEDINGS', the relevant part is subsection (1) which is in the following terms:

'82. (1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney – General may enter a N*olle Prosequi*, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the n*olle*

prosequi **is entered, and if he has been committed to prison shall be released, or if on bail his recognizanes shall be discharged; but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.'**

It is to be recalled that one of the complaints of the applicant herein is that the respondent should have utilized section 87 (b) of the Criminal Procedure Code to discontinue the criminal proceedings in Kibera Chief Magistrate's Court Criminal Case No.4445 of 2002, which would have resulted in the acquittal of the accused in that case, who is the applicant in the application now before us. For the record, Section 87, which has two subsections, is reproduced below:

'87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney-General, at any time before judgment is pronounced, withdraw from the prosecution of any person and upon withdrawal ?

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.'

As we understand it, the intended entry of a *Nolle Prosequi* was objected to on the grounds:-

(a) That it would deny the accused in the lower court, who is the applicant in the application before the High Court, a fair trial in case of a re-trial in that whatever defence he might have had may no longer be in existence as tracing of witnesses may stand in the accused's/applicant's way.

(b) That lapse of memory on the part of available witnesses may also stand in the way.

For the above reasons, applicant's counsel submitted that the entry of a *Nolle Prosequi* by the respondent Attorney - General in the present case would not be a fair exercise of his power to enter a *Nolle Prosequi* and that he should not be permitted to do so.

Regarding the prospect of a re-trial if the intended *Nolle Prosequi* is entered, respondent's counsel stated that once the *Nolle Prosequi* is entered the matter will be taken back to the respondent who will decide whether to prosecute or not. On this point we wish to make the following two observations: One is that once the *Nolle Prosequi* is entered, it will then be open to the respondent to charge the applicant afresh as the respondent is entitled so to do, which is the very prospect the applicant says he finds agonizing and prejudicial to him. The other observation relates to the possibility that the respondent may quietly decide not to take any further action against the applicant herein. In the latter scenario, the applicant would remain in the dark as to whether to put the prospect of criminal charges arising out of the subject property dispute behind him, or to continue having nightmares over the prospect of such charges being sprung upon him again.

It is to be recalled in the above regard that the offences with which the applicant was charged before the Kibera court are said to have been committed on 08.04.02. The applicant was charged therewith before court on 13.06.02. He denied the charges. The prosecution called 5 witnesses at the end of whose evidence applicant's counsel submitted there was no case for the accused, who is now the applicant before this court, to answer. The trial court ruled that the accused had a case to answer. Thereafter the accused told the trial court that he would call 4 defence witnesses. He himself gave evidence on oath first as D.W.1, followed by his brother, Benson Wathome Wainaina as D.W.2. At the conclusion of D.W.2's evidence there was an application for adjournment, which the court granted. The trial court also invoked section 150 of the Criminal Procedure Code, which empowers the court at any stage of a trial to summon or call any person as a witness if it appears that the evidence of such witness is essential to the just decision of the case, and directed that a

surveyor appears at the next hearing and produce a report relating to boundaries of Plot No. Dagoretti/Riruta/4621 (suit property) and the adjacent road reserve; and also relating to the position of the structures along the said boundaries.

Eventually a Government surveyor, one Martin Kavita Wambua appeared and gave evidence before the trial court on 27.08.03 to the effect that the structure complained about was not within the suit land but within a road reserve; and that he prepared a plan of the subject plot, the adjacent plot and the road reserve showing the structure in question and the subject plot. The surveyor did not, however, seem to have a formal report. The trial court also found maps submitted to the court to be misleading, so the court adjourned the hearing to enable the surveyor prepare his report. Further hearing was fixed for 09.09.03. The accused did not attend court on 09.09.03 as he was reported to have fallen ill the previous night and got admitted in hospital. The surveyor was reported to be in court with his report on 09.09.03 but the court, correctly, declined to hear him further in the accused's absence. The further hearing was re-scheduled for 23.09.03 when the accused appeared without his advocate. The prosecutor told the court that he wished to make an application but the court, again correctly, directed that the application be made in the accused's advocate's presence next day, i.e. 24.09.03. And on 24.09.03 the prosecutor sought to present the *Nolle Prosequi* which provoked the Constitutional Reference subject matter of this Ruling.

One of the applicant's complaints regarding the prospect of the respondent charging him afresh if the *Nolle Prosequi* is entered is that he (applicant) would be denied a fair trial as whatever defence he might have had may no longer be in existence. The court does not know so far what evidence the remaining defence witnesses are going to give or what weight such evidence may lend to the accused's defence. The court has no way of knowing the nature of the remaining defence evidence in advance until the time of its presentation by the accused before the trial court. This is a right acknowledged on 13.06.08 by the Court of Appeal in Criminal Appeal No. 116 of 2007, Thomas Patrick Gilbert Cholmondeley –vs- Republic as belonging to an accused.

An example of a prejudicial disadvantage the accused/applicant in the present case might face in the event of being charged afresh with the subject offences may be found in the undermentioned scenario. In his existing testimony before the Kibera court, the accused/applicant said the dispute between him and the complainant, Josephine Njoki Gitu went before the Chief of Riruta Sub-Location, a Mr. Mungai who ruled that the accused was entitled to collect rent from the complainant (in respect of the suit property) and that the said Mungai subsequently stopped being a chief. It is not known at this stage of the accused's case if a written record of the proceedings before the chief's office was kept. If no written record was kept and if the chief heard the parties alone and the accused wishes to place some reliance on those proceedings, the former chief may be a material witness for the defence. And if the said former chief is no longer available, the accused's/applicant's defence may well be prejudiced.

The subject premises on the suit land are said to have been made of timber and corrugated iron sheets on the sides and on top, i.e. a temporary structure. The current trial Magistrate visited the *locus in quo* on 01.04.03 at the invitation of defence counsel 'to get a clear view of the scene ….' Should the need for such a visit be desired in the event of a re-trial, the implication would be that the temporary structure, if it still exists, would have to be preserved until the second visit is made. It is common knowledge that the courts are heavily loaded with litigation, both civil and criminal. Preserving the temporary structure might mean halting permanent development on or around the suit land. Is that desirable, especially for property offences where the value of the subject property totals only Kshs.200,000/=? Of course if the suit property has not been preserved, the opportunity to view and make a visual appreciation of the scene is lost. In the latter regard, note should be taken that the current trial Magistrate's judicial notes on what she observed at the scene during her visit there are instructive. The notes appear at page 35 of the typed trial proceedings as follows:

'Court: The court has visited the scene. The destroyed structure is not visible as the debris is lying in a heap and iron sheets stored in an adjacent store. The complainant's office still stands intact. The court is shown the boundary of the plot which accused claims to be his property. The

prosecution claims that the destroyed/demolished store was not on the accused plot, a claim the accused denies. A sketch plan of the plot in question and the location of the relevant building material has been drawn by the court clerk – Kamau for ease of reference.'

Such observations by the trial Magistrate are unlikely to be edifying to the prosecution, but our main point in reproducing them is that such a vivid picture as the trial Magistrate tried to give of the scene may be difficult to capture accurately without actually viewing the scene as it was during the current trial Magistrate's visit there. Yet if the current proceedings, in Kibera Chief Magistrate's Court Criminal Case No. 4445 of 2002 having been partly prosecuted by Police Corporal Kilimo who by virtue of the then section 85(2) of the Criminal Procedure Code as interpreted by the Court of Appeal in Elirema's appeal was unqualified to conduct public prosecutions, are continued to conclusion, such continuation would amount to an exercise in futility in that the proceedings are bound to be declared a nullity on appeal, and with such declaration the vivid and highly descriptive judicial notes made of the scene by the current trial Magistrate on 01.04.03 would disappear into oblivion. Termination of the criminal proceedings seems in this case to be the logical step to take. The big question is whether using the termination procedure of *Nolle Prosequi* is the proper course.

The undermentioned summarized chronology of events relating to this case brings into sharp focus the fundamental nature of the questions raised by the case at hand. The accused's/applicant's unconcluded trial lasted from 13.06.02 when the applicant was arraigned before the trial court up to 24.09.03 when the prosecution attempted to present to the trial court the *Nolle Prosequi* subject matter of this Ruling. The unconcluded trial, therefore, lasted 15 months before the attempt to enter a *Nolle Prosequi* was made. There were 29 court sessions in the trial court upto the time the court made a ruling referring the matter to the High Court for interpretation of the constitutional issues raised. The accused/applicant physically attend 26 of those sessions while he was only represented by his advocate at the other 3 court sessions. The trial Magistrate's ruling vide which she referred the matter to the High Court for interpretation of the constitutional issues raised by the applicant was delivered on 16.10.03, i.e. some 16 months after the accused's/applicant's initial arraignment before the trial court. The final version of the Constitutional Questions, numbering 7, was filed by the applicant's advocates on 06.10.05, i.e some 31/3 years since the accused's/applicant's arraignment. Hearing of the Constitutional Reference eventually took place before the High Court on 21.05.08, i.e. about 6 years since the accused's/applicant's arraignment. If the criminal proceedings are terminated through the subject *Nolle Prosequi,* that would open the way for the 6-year old charges to be brought against the accused/applicant afresh.

Section 77 of the Constitution, which falls under Chapter V of the Constitution providing for protection of fundamental rights and freedoms of the individual, provides, *inter alia*, that if a person is charged with a criminal offence:-

i. He shall be presumed innocent until he is proved or has pleaded guilty.

ii. The case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The offences with which the accused/applicant was charged are said to have been committed by him on 08.04.02, i.e. over 6 years ago. As already recorded, he denied the charges. The offences are property – related and the properties in question were assigned a total value of Kshs.200,000/=. The procedure of entering a *Nolle Prosequi* the respondent Attorney-General has chosen to use enables him to charge the accused/applicant afresh with the same offences after entering the *Nolle Prosequi.* That would be after the charges have been hanging over the head of the accused/applicant for some 6 years while he challenged them through the judicial process.

A re-trial after the aforesaid lapse of time would be in violation of the accused's/applicant's constitutional right to a hearing over his case within a reasonable time. Respondent's counsel reminded us that the complaint's interests also deserve to be considered. We agree with the

principle but hasten to add that its application has of necessity to be coloured by the facts of a given case. In the present case, there is a constitutional presumption of innocence in favour of the accused/applicant as well as constitutional protection of his right to a hearing of his case within a reasonable time. The prospect of a re-trial of the accused/applicant herein after 6 years of his suspense over the existing charges would in our view be out of tune with his right to an expeditious trial, which would dilute his right to a fair trial.

We are aware that the respondent Attorney-General, *inter alia*, has power to initiate criminal proceedings and discontinue them and that in exercising such power he shall, by virtue of section 26(8) of the Constitution, not be subject to the direction or control of any other person or authority. That power *per se* vested in him by the Constitution is not being challenged. What is being questioned is his intended exercise of the power to discontinue the criminal proceedings in the present case using the procedure of *Nolle Prosequi* which the circumstances of the case indicate would result in oppression of the accused/applicant by using the court process. Such occurrence would amount to an abuse of the process of the court. In this regard, attention is drawn to section 123(8) of the Constitution which provides:

'123. (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.'

Under the above constitutional provision, the court is clearly entitled to inquire into the propriety or otherwise of the intended utilization of a *Nolle Prosequi* in a manner which the facts of this case indicate would violate the accused's/applicant's constitutionally protected fundamental right to an expeditious and fair trial. Our foregoing inquiry leads us to the firm conclusion that the procedure of *Nolle Prosequi* as a means of terminating the criminal proceedings against the accused/applicant is inappropriate in this case.

The upshot is that we answer the first limb of Question 2 by finding that the reason for the intended termination of the criminal proceedings against the accused/applicant is a valid reason. However, we answer the second limb of the same Questions 2 by finding that the aforesaid given reason does not constitute a proper exercise of the powers of the respondent Attorney-General donated by section 26(3) of the Constitution and section 82 of the Criminal Procedure Code to enter a *Nolle Prosequi*.

Whether in the circumstances of this case and considering the stage at which the proceedings are, a Nolle Prosequi does or does not constitute an abuse of due process (Question 3).

For the reasons advanced during our consideration of Question 2, we answer Question 3 by finding that the entry of the intended *Nolle Prosequi* would amount to an abuse of the process of the court.

Whether in seeking to enter a Nolle Prosequi the respondent has acted in a manner that is oppressive, capricious and in derogation of the applicant's right to a fair trial and equal treatment before the law or otherwise against public policy (Question 4)

Here also the material we analysed while considering Question 2 provides useful background material in answering this Question 4. Additionally, we wish to comment on the following remarks by respondent's counsel while addressing us. When blame was laid by applicant's counsel at the door of the respondent for having let or suffered an unqualified person to undertake the prosecution of the accused/applicant herein, respondent's counsel submitted that while it is easy to blame the respondent, the courts also did, prior to the Court of Appeal pronouncement of illegality

of prosecutions undertaken by unqualified persons, contribute to the wrong complained of by the applicant. In this connection, we draw attention to the verdict of the Court of Appeal in Elirema's appeal on this point found in the last paragraph at page 12 of their judgment, to wit:

'The mistakes which have led to our quashing the convictions were entirely of the prosecution's making.' [underlining added.]

Counsel for the applicant in the present case aptly elaborated on the above verdict by the Court of Appeal when he pointed out that:

'… section 85 of the Criminal Procedure Code which gives the respondent power to delegate prosecutorial power does not anywhere mention the courts as sharing that power and that, therefore, the respondent's counsel's insinuation that the courts have contributed to the morass arising from unqualified persons being appointed public prosecutors misses the point of applicant's complaint in that regard …. that the courts have no interest in the matter at hand; that the court cannot inquire on its own about competence of those who appear before it, unless the matter is brought to the court's attention.'

We respectfully endorse the above applicant's counsel's observations and would only add that even in situations where the court may have reason to act *suo motu*, the starting point must be availability to the court of information on incompetence or suspected incompetence of a given prosecutor before the court is put on inquiry, otherwise the court would be venturing into the untenable position of being investigator and judge, contrary to the rules of natural justice.

We answer Question 4 by finding that by seeking to enter a *Nolle Prosequi* in the present case, the respondent Attorney-General acted in a manner which is oppressive to the applicant and in derogation of the applicant's right to a fair trial and that the intended *Nolle Prosqui* would be against public policy.

Whether having refused to utilize section 87(b) of the Criminal Procedure Code to bring the proceedings to an end, the Attorney-General has acted mala fides with the obvious intention of preferring fresh charges and hence subjecting the applicant to the agony of a fresh trial (Question 5).

In this case, the material we utilized in answering Question 2 and Question 4 provides background material in answer to this question also. We answer Question 5 by finding that the respondent Attorney-General's intention in resorting to the procedure of *Nolle Prosequi* in this case may have been borne more out of embarrassment for violating the then section 85(2) of the Criminal Procedure Code, rather than outright *mala fides*. As we observed while answering Question 2, the respondent's intended *Nolle Prosequi* could simply be a face-saving device, to terminate the criminal proceedings and do nothing after that and leave the accused/applicant in the agony of suspense as to whether he will eventually face the criminal charges again or not. We have no hesitation in finding even this possible passive option on the part of the respondent unacceptable and against public policy.

Whether in all the circumstances of this case the Attorney-General's attempt to enter a Nolle Prosequi should be rejected (Question 7)

It should be clear from our above analysis of the material placed before us that we find no place for the intended *Nolle Prosequi* in this case and we hold that the said *Nolle Prosequi* must be rejected.

Conclusion

In conclusion, we direct the trial court to reject the *Nolle Prosequi* which was presented before it on 24.09.03 and let the prosecution elect another but appropriate mode of handling the case still pending before the trial court. A copy of this Ruling to be served on the trial court for due compliance therewith.

Orders accordingly.

Delivered at Nairobi this 22nd day of July 2008.

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J.G. NYAMU

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B.P. KUBO

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