REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Misc Appli 9 of 2008

JARED ALUPI MAKOKHA ……...…… PETITIONER

V E R S U S

REPUBLIC ……..……. RESPONDENT

R U L I N G

This court was moved by way of a Petition, pursuant to the provisions of ***s****ections 84 (1)* and *123 (8)* of the Constitution of Kenya, as read together with *section 77 (1)* of the Constitution, and ***s****ections 82 (1)* and *211* of the Criminal Procedure Code.

It is the applicant's prayer that this court makes the following findings;

" *(a) It be declared by this Honourable Court that the exercise of the power by the Attorney General to intend to enter a Nolle Prosequi under section 82 (1) of the Criminal Procedure Code in Kakamega Chief Magistrate's Court Criminal Case No.3058/06 is capricious, oppressive and against Public Policy amounting to an abuse of the court process and/or intended to defeat justice hence a contravention of the fundamental rights and freedoms of the petitioner.*

(b) It be declared by this Honourable Court that the Nolle Prosequi 21/1/2008 presented to the Trial Court on 21/1/2008 signed by A. N. KITHAKA, Senior Principal State Counsel is null and void for all ***purposes.***

(c) The Trial Magistrate be ordered to reject the intended Nolle Prosequi and proceed with the case under Section 210 or 211 of the Criminal Procedure Code Cap. 75 Laws of Kenya.

(d) And such orders as this Honourable Court shall deem fit."

The applicant was an accused person in Criminal Case No.3058/06. He says that he is apprehensive that his rights under section 77 of the Constitution are not being accorded to him.

His reason for so saying was the learned state counsel had expressed a desire to enter a Nolle Prosequi in the criminal case, whereas such action was, in the applicant's opinion, in bad faith.

His said opinion was shaped by what the applicant perceives as a deliberate attempt by the prosecution to circumvent the trial court's refusal to grant an adjournment to the prosecution.

The applicant concedes that pursuant to the provisions of ***section 82 (1)*** of the Criminal Procedure

Code, and ***section 26 (3) (c)*** of the Constitution, the Attorney General has power to enter a nolle prosequi at any time before judgement.

However, the applicant holds the view the powers of the Attorney General, to enter a nolle prosequi, were not absolute. He submitted that the Attorney General ought to only exercise his said powers in public interest.

In this case, the Attorney General is said to have tried to exercise his powers against public policy, and in violation of the applicant's fundamental rights.

Therefore, this court was urged to hold that the nolle prosequi, sought to be entered by the trial court before whom the applicant was being tried, to be null and void.

But the learned senior state counsel, Mr. Daniel Karuri responded by pointing out that the Attorney General intended to exercise his lawful authority, in a manner that was justified.

It is common ground that the Attorney General informed the trial court of his intention to enter a nolle prosequi, just before the said court was due to deliver its decision on the question as to whether or not the accused had a case to answer.

In so far as the trial had not yet delivered its judgement, the Attorney General was entitled, by law, to enter a nolle prosequi.

Section 82 (1) of the Criminal Procedure Code provides as follows:-

"***In any criminal case and at any stage thereof before verdict or judgement, as the case may be, the Attorney General may enter a nolle 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 nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances 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."***

The powers of the Attorney General to discontinue cases before judgment do have a constitutional underpinning.

Section 26 (3) (c) of the Constitution stipulates as follows:-

"***The Attorney General shall have power in any case in which he considers it desirable so to do –***

……

(c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority."

Clearly therefore, the applicant was right to have conceded that in principle, the Attorney General has authority to enter a nolle prosequi in any criminal case, at any stage of the proceedings, provided that no verdict or judgement had been handed down by the court.

By virtue of the provision s of ***section 26 (8)*** of the Constitution, the Attorney General shall not be subject to the direction or control of any other person or authority, when he is exercising such authority as is vested in him under ***section 26 (3) (c)*** of the Constitution.

Notwithstanding the said provisions of ***section 26 (8)*** however, the (then) Constitutional Division of the High Court expressed itself as follows, in the case of **CRISPUS KARANJA NJOGU Vs ATTORNEY GENERAL, CRIMINAL APPLICATION NO.39 OF 2000**;

"***We however do hold that despite the provisions of section 26 (8) of the Constitution, the powers of the Attorney General under section 26 (3) of the Constitution are subject to the jurisdiction of the Courts by virtue of section 123 (8) of the Constitution. Where therefore the exercise of the discretion to enter a nolle prosequi does not meet the test of Constitutionality by virtue of section 123 (8) of the Constitution, then the nolle prosequi so entered will be deemed and declared unconstitutional."***

Therefore the powers of the Attorney General under ***section 26 (3)*** of the Constitution and ***section 82*** of the Criminal Procedure Code are not absolute.

In the case of **ALIELO Vs REPUBLIC [2004] 2 KLR 333**, at page **344**, Hon. Onyancha J. expressed the view that;

"***It is only the circumstances surrounding the entry of the nolle prosequi that will be taken into account in order to guide the court to either grant or refuse such declaration"***

Bearing that in mind, I now ask myself whether or not I can now state that the power had been or was about to be exercised in a manner that was "capricious, oppressive and an abuse of the process of the court."

In this instance, the trial court had rejected the prosecution's application for an adjournment. That happened on 24th October 2007.

The prosecution was thus compelled to close its case.

The question which I must answer is whether or not the Attorney General intends to use his power to enter a nolle prosequi for anything else other than for the advancement of the cause of justice.

In that regard, the applicant did assert that the Attorney General's action was against Public Policy. However, when canvassing the petition, the applicant did not elaborate on the assertion. He failed to demonstrate the specific public policy which would be violated if the nolle prosequi was entered.

From the record of the proceedings before the trial court, it is clear that the plea was taken on 3rd October 2006. After the applicant had pleaded not guilty, he applied for and was granted bail. The case was then set down for hearing on 6th December 2006.

On that date (the 6th of December 2006) the prosecutor had 3 witnesses in court. However, the prosecutor was unwell, as he had malaria.

When the case next came up for hearing on 5th February 2007, it could not proceed because the trial court had other cases which kept it busy.

On 2nd April 2007, the prosecution amended the charge, and a new plea was taken. The complainant then testified.

Thereafter, the trial court adjourned the case, due to shortage of time. However, it is instructive to note that on that date, the prosecutor had 2 more witnesses who were ready to testify.

When the trial resumed on 12th June 2007, the prosecution had 3 witnesses in court. However, due to time constraints, the learned trial magistrate only managed to receive the evidence of one witness. The case was then adjourned.

On 31st July 2007, the prosecutor had one witness in court. He sought an adjournment after the said witness had testified. His reasons for seeking an adjournment were that the photographer was at Busia Court, whilst 3 other witnesses had not been bonded.

Although the accused opposed the application for an adjournment, the trial court granted to the prosecutor, the last adjournment.

On 24th October 2007 the prosecutor notified the court that his witnesses were ready to testify.

However, after only one witness had testified, the prosecutor sought an adjournment. He explained that Clinical Officer Orege, (who was to have produced medical documents on behalf of Clinical Officer Ochanji), was involved in theatre. He also said that 2 other witnesses had not been bonded.

In her ruling, the learned trial magistrate Hon. M. C. Chepseba (Mrs.) Ag. Senior Principal Magistrate (as she then was) observed that Ms Otieno, the In-charge of Clinical Officers, had testified before her court earlier that day. On that occasion, the learned magistrate impressed upon Ms. Otieno to provide the court with written information about Clinical Officer Ochanji, who had allegedly been interdicted.

Although Ms. Otieno was supposed to provide the written information by 3.00 p.m., she had not done so by 3.45 p.m. Therefore, the court noted that Ms. Otieno had failed to comply.

The learned trial magistrate went on to hold that;

"*without copy of attempted bonding of the remaining clinical officer, no further adjournment is merited."*

Two issues come to mind. First, the learned trial magistrate appears to have allowed her mind to be influenced by something which happened in another case.

The fact that Ms. Otieno had failed to provide the court with written information by 3.00 p.m. on 24th October 2007 should not have been a factor in determining whether or not the prosecution should have been granted an adjournment.

Secondly, the prosecutor did not say that the other clinical officer, Mr. Orege had not been bonded. If he had said so then it would have made perfect sense for the trial court to have commented that the court and the defence counsel had not been shown a copy of such document as would have demonstrated the attempts made to serve the said clinical officer.

But the record of the proceedings actually reads as follows;-

"*Clinical Officer Orege had been bonded to appear today but I received information that he was involved in theatre."*

In view of the fact that the prosecution had regularly had witnesses available and ready in court, and as Clinical Officer Orege was only unavailable on the material date because he was in theatre, I hold the considered view that the decision to reject the application for adjournment was influenced by extraneous circumstances and considerations.

It resulted in the prosecution closing its case prematurely, through no fault of theirs.

In the event, the steps taken by the Attorney General, to enter a nolle prosequi cannot be deemed to constitute an abuse of the process of the court. To my mind, the said step was actually an endeavour to ensure that the state is accorded a reasonable opportunity to put forward all the evidence at its disposal. By so doing, the Attorney General would be enhancing the course of justice. He would definitely not be acting in a capricious or oppressive manner.

I find and hold that the petitioner has not shown any bad faith on the part of the Attorney General.

The petition therefore fails. It is dismissed.

The order staying proceedings in the criminal case is hereby vacated forthwith. The trial court may

now proceed to receive the nolle prosequi and to thereafter act on it.

Dated, Signed and Delivered at Kakamega, this 22nd day of October 2008

FRED A. OCHIENG

J U D G E