



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE 33 OF 2008

REPUBLIC

versus

MWANIA KITHOME

RULING

1. That objection taken to the proceedings herein is dated 12.7.2008 and reads as follows:-

“i. That the constitutional rights of the accused person as entrenched under section 72(3) (b) and section 77(1) (1)2, (a) (b) and (c) and 84 of the constitution have been, are being and are likely to be violated by these proceedings which were rendered null and void by virtual of the said violations of the constitutional rights of fair and just trial.

ii. That these proceedings be declared null and void for the reasons advanced stated above and further grounds that may be adduced at the hearing hereof in the annexed affidavit of Mwanias Kithome and marked “MK1”

2. I have noted that Mr. Konya’s simple complaint is this; the accused person was initially arrested on 19.5.2004 and arraigned in court in H.C.CR. Case No.60/2004 on 29.7.2004. That matter proceeded on for hearing until on an unclear date, the State entered a nolle prosequi and those proceedings were terminated. On 19.6.2008 the present proceedings were commenced when the Information was filed in this court and on the same day, the accused person was again arraigned in court to answer the same charge of murder. I am now asked to declare the present proceedings null and void because of the period in the prior proceedings in which the accused person was held in police custody.

3. Mr. Konya referred me to the following authorities in support of the argument that breach of section 72(3) of the Constitution would render the proceedings a nullity;

- i. James Njuguna Nyaga vs R H.C.Cr. No. 50/2004 (Nai)
- ii. Raphael Wambua vs Republic H.C.Cr. No. 53/2003 (Machakos)
- iii. John Mwanias Musyoka vs Republic HCCR. No. 56/2006(Machakos).

iv. Elizabeth Akinyi vs Republic C.A. No. 161/2006.

4. Mr. O'mirera, learned Principal State Counsel, while agreeing that an objection can be raised at any stage of criminal proceedings, took the view that the objection is misguided because HCCR.C. Case No. 60/2004 was properly terminated and any Constitutional issue arising from those proceedings cannot be legitimately raised in subsequent proceedings. Since therefore the present proceedings are wholly different from the terminated one, then there is no reason whatsoever why the present proceedings should be terminated because of factual events in the previous ones.

5. In determining the matter, I must begin by stating that both parties seemed to have misconstrued the issue before me. I say this, with respect, because on 30.6.2008, Mr. Konya stated that he was objecting to the taking of plea to the charges laid on 19.6.2008 and I allowed him to do so. In taking the plea in the present proceedings, this court can only look to the Information before it and nothing else. H.C.CR. Case No. 60/2004 was terminated by the entering of a nolle prosequi and that issue ended there. Section 26(3) and section 26(8) of the Constitution provides as follows:-

“(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 .

(8) In the exercises of the functions vested in him by subsections (3) and (4) of this section and by section 44 and 55, the Attorney General shall not be subject to the direction or control of any other person or authority.”

6. The proceedings leading to the entering of a nolle prosequi were not challenged. In fact as a matter of fact and law they cannot be challenged by dint of section 26 (8) above although I am aware of the decision in Gregory & Another vs Republic thro' Nottingham & 2 others (2004) KLR 547 where it was held as follows;-

“(1) Where the Attorney General has entered a nolle prosequi in a criminal prosecution, he should in general be the only person who may, for good cause, recommence the trial process. However an open window is left to a private prosecutor who disagrees for good cause such as bad faith or corruption, but such a private prosecutor must apply directly to the High Court challenging the decision of the Attorney General.

(2) The exercise of the Attorney General's powers under section 26 of the Constitution is not subject to oversight by any person or authority except the High Court.

(3) Although criminal prosecutions may be commenced by a person other than the Attorney General, such occasions must be few and limited and even when they come to pass, the Attorney General's authority remains entirely uncompromised and he can at his own discretion take over the case in question and either continue it or terminate it.

(4) The exercise of the power by the Attorney General to terminate criminal proceedings by entering a nolle prosequi is quasi-judicial in nature. It follows therefore that a person aggrieved by the Attorney General's termination of criminal proceedings may invoke the High Court's judicial review jurisdiction. However, the Attorney General's discretion to terminate proceedings is constitutional. Therefore the misapplication thereof of that discretion can be challenged by a Constitutional reference and this means in the High Court.

(5) The High Court and not the Subordinate Court has an oversight jurisdiction over the exercise of the Attorney General's power to terminate criminal prosecutions.

(6) The Attorney General's exercise of discretion to terminate proceedings can only be challenged by an application to the High Court and not by institution of criminal proceedings by a private prosecutor.

(7) The Attorney General's authority in respect of criminal prosecutions is founded upon the Constitution and a challenge to this authority must be direct and can only be dealt with in the High Court.

(8) The conduct of criminal prosecutions is always a matter of public interest; therefore the Attorney General is under a duty to safeguard the public interest as he manages the prosecutorial process.

(9) Once the Attorney General has terminated criminal proceedings, the private prosecutor cannot informally revive the terminated proceedings. The private prosecutor will be required to first make an application before the High Court challenging the exercise of the Attorney General discretion.

(10) The Constitution section 26 (8) guarantees the Independence of the Attorney General in relation to private prosecutions. The issue as to whether or not Attorney General exercised the independence as required is a triable constitution question which only the High Court can resolve.

(11) Only a legitimate prosecutor validly in office can comply with the tenets of affair prosecution process in the terms of section 88 of the Constitution. The applicants were justified in arguing that they would not achieve their rights to affair trial at the hands of an incompetent prosecutor.

7. The above holding may be the correct exposition of the law but again that court decided as follows:-

“Suppose the Attorney General, while conducting a prosecution that to all right-thinking people ought to be pursued, abruptly terminates the proceedings by entering *nolle prosequi*, can this be challenged under the Law? It is now clear from case law that the exercise of the power to terminate criminal proceedings is quasi-judicial in nature; *Kimani vs Kahara [1985] KLR 79*; *Gouriet v Union of Post Office Workers & Others [1977] 3 all ER 70*. By the fact alone of this quasi-judicial review character, it follows that an aggrieved person, by the Attorney General's termination of criminal proceeding, may invoke the High Court's Judicial Review jurisdiction. But it has to be remembered that the Attorney – General's discretion is constitutional one. This necessarily means that a misapplication of that discretion can be challenged by constitution reference; and this means, in the High Court. We can thus say that the High Court, but not the Subordinate Court, has an oversight jurisdiction over the exercise of the Attorney General's power to terminate criminal prosecutions.”

8. If therefore, it is the law that by the nolle prosequi properly entered, the proceedings in H.C.CR.C. No. 60/2004, were terminated, it follows that the present proceedings were legitimately commenced on 19.6.2008 when the Information was filed. Any challenge to the taking of plea because of undue incarceration must be taken in that light. I have not been told when the accused person was arrested so as to face the present proceedings. I cannot without that information determine that he was held beyond 14 days before 19.6.2008. I cannot at the same time and in the present proceedings, look to the period of incarceration in the previous proceedings, find that the period was unconstitutional and order the release of the accused person in the present proceedings. By so doing, this court would be acting unconstitutionally and clearly beyond its mandate as regards the proceedings lawfully before it. What this court can properly do, however, is to take proceedings under section 72 (6) of the Constitution and award damages to an offended party. That section for avoidance of doubt provides as follows:-

“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

9. The proceedings under the above sub-section will obviously be separate from the criminal proceedings and will have to be brought under section 84(1) (2) and (6) of the Constitution. Those sub-sections provide as follows:-

“(1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

a) to hear and determine an application made by a person in pursuance of subsection (1);

b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)

(3) ...

(4) ...

(5) ...

(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court)

10. The proceedings under section 72(6), section 84(1) (2) and section 84 (6) cannot automatically impeach proceedings such as the present one and only when the High Court by a Constitutional reference to it has made such an order, can the proceedings be impeached. I have elsewhere however said that I have no information to enable me follow the decision of Albanus Mutua vs Republic, Criminal Appeal No. 120/2004 and all decisions subsequent to it and make any determination under section 72 (3) of the Constitution. Neither is there a proper Application before me to enable a finding under section 84 of the Constitution. Without proper evidence before me, I can only use the words of the Court of Appeal in Daniel Nyanza & Others vs Republic Cr. Appeal No. 134/2005 and state as follows:

“Under all those circumstances, there is no proper evidence on the complaint based on violation of the appellants’ rights under section 72(3) (b) of the Constitution. They cannot get the benefit of the alleged violation of that provision as no evidence of any such violation is discernable from the record.”

11. It follows from all my findings above that I see no merit in the objection to the taking of a plea in this matter and I will overrule it.

12. Orders accordingly.

Dated and delivered at Machakos this **8th** day of **December 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. Konya for Accused

Mr. O'mirera for Republic

Isaac Lenaola

Judge