



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 56 of 2007

REPUBLIC.....APPLICANT

VERSUS

ISLAM A. OMAR1TH RESPONDENT

MUNIR AWADH ABDALLA.....2ND RESPONDENT

ANTHONY MBUTHIA KAMOMOE.....3RD RESPONDENT

RULING

The respondents, Islam A Omar, Munir Awadh Abdalla and Antony Mbuthia Kamomoe were charged before the Chief Magistrate’s Court, Nakuru with theft by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on diverse dates between the 11th October 2006 and the 28th of May 2007, at the National Cereals and Produce Board depot in Nakuru, being servants of Mombasa Maize Millers stole 4,205 bags of local wheat valued at Ksh.8,293,850/=, the property of Mombasa Maize Millers which came into their possession by virtue of their employment. The respondents denied the charge. They were released on bond.

The case was listed for trial before the Hon. W. Kagendo – Ag. Senior Resident Magistrate on the 14th November 2007. On that day, when the respondents and their counsel appeared before court, the prosecutor presented to the court a Nolle Prosequi duly signed on behalf of the Attorney-General by the Assistant Deputy Public Prosecutor terminating the Criminal proceedings before the said court. Before the trial magistrate’s court could accept or refuse the entering of the said Nolle Prosequi, the counsel for the respondents objected to the said Nolle prosequi on the grounds that the prosecution had ulterior motives in presenting the said Nolle Prosequi to court. The trial magistrate stayed proceedings pending the hearing of the objection by the respondents at the later part of that day. The respondents had indicated that they would file a constitutional reference challenging the legality of the exercise of the power to enter Nolle prosequi by the Attorney General. The State was dissatisfied by the decision of the trial magistrate in not accepting the Nolle Prosequi and thereby terminating the Criminal proceedings.

The Attorney General made reference to this court. He asked the court to invoke its revisionary jurisdiction as provided for under **Section 362 and 364** of the **Criminal Procedure Code** and set aside the order of the trial magistrate which declined to enter Nolle Prosequi presented to it by the Attorney General. The material part of the said reference states as follows;

“...it is our humble submission that the learned magistrate had absolutely no powers whatsoever to

either comment about the Nolle Prosequi nor invite submissions by defence counsel concerning the same as by so doing, she would be over stepping the limits of her jurisdiction and we stand guided by the decision of this Honourable Court in the case of Crispus Karanja Njogu vs Attorney General in the High Court Misc. criminal Application No.39 of 2000.

This court did stay proceedings before the trial magistrate's court pending argument of the issues raised by the Attorney General by the parties to this application. This court directed the Attorney General to serve the counsel for the respondents so that submissions could be made on the said complaint made by the Attorney General.

This court heard the submissions made by Mr. Mugambi on behalf of the State and by Mr. Ogolla and Mr. Karanja on behalf of the respondents. The issue that emerged for determination by this court is whether the Attorney General, in exercise of his power to terminate proceedings by entering Nolle Prosequi, is amenable to be being questioned by an affected party filing a constitutional reference to challenge its legality. In the present case, the respondents were aggrieved by the decision of the Attorney General to enter Nolle Prosequi under **Section 82(1) of the Criminal Procedure Code**. The respondents were of the view that the Attorney General had ulterior motives when he sought to terminate the said criminal proceedings. The trial magistrate was not given an opportunity to hear the objection raised by the respondents. This court cannot therefore rule either way whether the trial magistrate erred in law or not when considering whether or not to allow Nolle Prosequi to be entered by the Attorney General and thus terminating the said criminal proceedings.

The respondents indicated that they wished to challenge the decision of the Attorney General to terminate the criminal proceedings against them by filing a constitutional reference. That is a right which is enshrined in our Constitution. Any person who feels aggrieved or who is apprehensive that his constitutional rights may be violated, is at liberty to approach this court, sitting in its jurisdiction as a constitutional court, to seek the enforcement of his constitutional rights which are alleged to have been violated. In the present application, no decision has been made by the trial magistrate whether or not to allow the respondents to file such a constitutional reference. Issues have not been framed. The application by the Attorney General seeking to have this court exercise its powers of revision and examine the legality of the proceeding before the trial magistrate's court was therefore premature.

An interesting point which was argued before this court is whether the trial magistrate was obliged to enter the Nolle Prosequi and terminate the proceedings once the Attorney General presented the writ of Nolle Prosequi. This court's view is that if a party affected seeks to challenge the exercise of the power by the Attorney General to enter the said Nolle Prosequi, then the trial court will, of necessity, decline to enter Nolle Prosequi and hear the objection a raised by the affected party. The trend of judicial decisions in enforcing the rights of an individual to challenge the exercise of discretion by a body established by law is that such bodies cannot exercise its authority capriciously or unconstitutionally. In **Crispus Karanja Njogu vs Attorney General Nairobi HC Cr.App. No.39 of 2000 (unreported)**, the Constitutional Court in addressing the question whether or not the power of the Attorney General to enter Nolle Prosequi was absolute, had this to say; (at page 42);

“We, however, do hold that, despite the provision 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, then the Nolle Prosequi so entered will be deemed, and declared unconstitutional. We therefore answer the first question as follows; the Attorney General or his agent is not vested with absolute power under Section 26(3) of the Constitution and Section 82 of the Criminal Procedure Code to enter a Nolle Prosequi.”

In the proceedings before the trial magistrate, no decision has been made by the said trial magistrate as regard whether or not she will allow the Attorney General to enter Nolle Prosequi. Although **Section 82(1) of the Criminal Procedure Code** is worded in such a manner as to suggest that a trial court has no option but to enter a Nolle Prosequi once the same has been presented by the Attorney general, recent judicial interpretation of the said section of the **Criminal Procedure Code** points to the contrary. The role of a trial court is not and cannot be reduced to merely endorsing the decision of the Attorney

General. A trial court has a duty to ensure that justice is done to the parties who appear before it. If it appears that the Attorney General, in exercise of its powers to enter a Nolle Prosequi is acting contrary to the established constitutional norms of fair trial, a trial court is within its right to refuse to enter Nolle prosequi and refer the matter to a Constitutional court for determination as to the legality of the decision by the Attorney General. A trial court cannot fold its arms and say that it cannot hear an aggrieved party who is challenging the exercise of the power vested on the Attorney General by the law.

In the circumstances of this case therefore, I decline to grant the order sought by the Attorney General. No illegality has been shown to have been committed by the trial magistrate. She has yet to hear and determine the objections to the entering of the Nolle Prosequi by the Attorney General. She was entitled to stay proceedings pending the hearing and determination of the objection by the respondents. I therefore remit back the file to the trial magistrate's court for appropriate action.

It is so ordered.

DATED at NAKURU this 30th day of November 2007.

L. KIMARU

JUDGE