



REPUBLIC OF KENYA
HIGH COURT AT KAKAMEGA
CRIMINAL REVISION 7 OF 2007

MOSES MIHESO LIPEYA ::::::::::::::::::::::::::::::::::::::: ACCUSED

V E R S U S

REPUBLIC ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

RULING

The lower court referred to this court on 21/9/07 criminal case No. 1601 of 2003 in which **MOSES MIHESO LUPEYA** is charged with the offence of malicious damage to property contrary to **section 339 (1)** of the Penal Code. The case is partly heard and the prosecution on 26.6.2007 intended to call several more witnesses who were not in court and for that reason sought adjournment which the trial magistrate declined to grant on the grounds, inter alia, that the prosecution had had ample time and had sought and obtained adjournments previously on similar grounds. As a result, the prosecution was compelled to close, albeit prematurely, its case on that day and accordingly the case was fixed for hearing of submissions on 5th July, 2007.

When the court sat on 5th July, 2007, the defence counsel on record, Mr. Samba, made submissions to the effect that the prosecution had not made out a prima facie case and urged the court to acquit the accused. At the end of the submissions by the defence, the prosecution sought one week to prepare its submissions. The court agreed. The hearing of the submissions was fixed on 11.7.2007 but on that day, the prosecution was not ready, so it sought extension of time which was granted and hearing of the submissions fixed on 14.8.2007.

On 14.8.2007, the prosecutor went to court with a written **Nolle Prosequi** signed by the Senior Principal State Counsel, Western Province, Mrs. A. N. Kithaka. Objection was taken by the accused's counsel, Mr. Samba, who on 21.09.07 applied to the trial court to place the matter before this court on 1.10.2007 "**for determination of a Constitutional issue**", among them determination of validity of the **Nolle Prosequi** which was said to undermine fair trial in the case.

The trial court considered the oral application by the defence counsel and was satisfied that the issues raised were constitutional in nature and ordered the file to be placed before me on 01.10.07 for determination of those issues. I have considered the matter.

Under **s. 67 (1)** of the **Constitution of Kenya**, where a question as to the interpretation of the 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. Under **section 67 (2)**, this court is enjoined to give its decision upon

the question and the trial court is enjoined to dispose the case in accordance with that decision.

Under **subsection (3) of section 67 of the Constitution**, the High Court is required to be composed of an uneven number of judges not being less than three save where the matter referred to is interlocutory. It is therefore necessary for me to ascertain whether the matter referred to me is interlocutory or not. If the former, I shall be entitled to hear it alone and determine it but if the latter, it shall be necessary to refer it to the Chief Justice for composition of a bench of not less than three Judges. So when is a matter interlocutory? And what is an interlocutory matter? Is the matter referred to me interlocutory?

BLACKS'S LAW DICTIONARY, 5TH EDITION (page 731) defines "interlocutory" thus:

"Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy."

What is the question referred to this court? The advocate for the accused in the case contended that his client's rights under **s.77 (1) of the Constitution** had been violated by the State in that he was not getting a fair hearing because the Attorney General had tendered ***nolle prosequi*** instead of making submissions which the prosecutor had undertaken to do and thus was abusing the process of the court by attempting to preempt or forestall the conclusion of the case at that stage. **Section 77 (1) of the constitution** requires that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time.

The question referred to this court for determination is whether the entry of the ***nolle prosequi*** had the effect of depriving the accused of a fair hearing within a reasonable time. Was that reference under section 67 (1) of the Constitution interlocutory? If this court determines the question in the affirmative, the trial court shall decline to enter the ***nolle prosequi*** and proceed to hear the submissions, but if the reference is determined in the negative, the court shall accept the ***nolle prosequi*** and terminate the case and discharge the accused. Either way, the trial court shall have to take steps to conclude or continue with the case. The reference therefore is in relation to a point of law in the case before the trial magistrate which relates to the accused's right to fair hearing under section **77 (1)** of the Constitution. That point is interlocutory as it determines only some point in the case which does not dispose of it. For this reason, I hold that the matter is interlocutory and consequently can be heard by one judge. It is my view that **section 67 (3)** of the Constitution does not therefore apply.

Will the accused person's right to fair trial be violated by the ***nolle prosequi***? There is no question that the hearing of the criminal case will take a little longer. But the more germane and substantial point is whether the prosecution was abusing the process of the court to obviate having to make submissions in a case which it had been compelled to close prematurely and now faced the prospect or the likelihood of seeing the accused being acquitted. I think the hearing of a criminal case where the prosecution unfairly uses its power under the law to oppress or undermine the rights of the accused cannot be said to be a fair hearing even if it be conducted within a reasonable time. In ***HARRISON AUKO v. R. (HC.MISC. CR. APPL. No. 55 of 2006 (Kakamega) unreported***, this court stated:

"It is said that the Attorney General is not required to give reasons for entering nolle prosequi. It is true that the law does not enjoin or require him to assign reasons. But it does not prevent him from assigning reasons if he so desires. And he does not withdraw a case without a reason. He is expected to exercise his power to enter nolle prosequi for the public good, and in good faith. In short, his action is expected to promote public interest. In promoting public interest, he would have nothing to hide nor would he be coy about giving reasons that would not be likely to offend the Official Secrets Act. Transparency and probity are expected of his office. If he makes known making known the reasons for the termination of criminal cases the Attorney General would enhance the confidence of the public in the discharge of his duties. The task of the court in reaching a decision in the event of challenge on the use by the Attorney General of his power under s. 82 (1) of the Criminal Procedure Code would become a lot less difficult if the Attorney General gave, in the spirit of transparency, reasons for entering nolle prosequi. The court would then not have to delve into inferences and deductions." In ***BILLY ELLIAS NYONJE v. REPUBLIC – Kakamega H.C.MISC. CRIMINAL APPLICATION NO. 34 OF 2002*** this court stated:

“In our criminal justice system, the exercise of the power conferred upon the Attorney General by section 82 of the Criminal Procedure Code, Cap 75 is not absolute. It is subject to supervision by this court. It is intended to be exercised in good faith and for the public good. It is vested in the Attorney General for the benefit of the public whose interest he is enjoined to serve. That power is discretionary. The court is enjoined to impeach its use if and where it is exercised in bad faith, oppressively, capriciously, or for interest antithetical to public good. This court’s supervisory power is derived from sections 60 and 123 (8) of the Constitution. Both the letter and the spirit of the constitution demonstrate that the fundamental rights and freedoms of the individual enshrined in Chapter V of the Constitution which include the right to fair trial within a reasonable time (s. 77(1) of the Constitution) are designed to be protected by the High Court in its supervisory role.

The High Court has inherent power to prevent abuse both of the exercise of the power conferred on the AG by Section 82 of the CPC and of abuse of the process of court. The discretionary power can only be exercised where the AG acts in good faith and in public interest or for the public good. If and where it is shown that the exercise of power to enter nolle prosequi under section 82 (supra) was in bad faith, or was oppressive, or capricious or against public interest, the High Court would be entitled to intervene to challenge, not the AG’s power to enter nolle prosequi, but rather the use of that power. In short, where the power to enter nolle prosequi is not properly exercised, the court is entitled to reject the nolle prosequi. The burden of proving that the AG has not exercised his power properly reposes on the applicant. Where, as here, the prosecution had progressed substantially, the AG or his representative ought to have proffered reasons for his action. In absence of such reasons it cannot be assumed that he had any, much less, that he had legitimate reasons that were in consonance with public good.”

In PHILLEMONA MUSEMBI v. REPUBLIC – Kakamega H.C. MISC. CRIMINAL CASE NO. 50 OF 2005 this court said:-

“This court has constitutional and inherent power to stop the Attorney General from exercising his power of nolle prosequi improperly or using nolle prosequi to abuse the process of the court..... This court is entitled under sections 60 (1) and 123 (8) of the Constitution to check improper use by the Attorney General of his discretionary power under s. 26 (3) (c) of the Constitution and s. 82 (1) of the Criminal Procedure Code to enter nolle prosequi.”

The prosecution had been given adjournments repeatedly and had had ample time to proceed with the prosecution of the case. But unable to tolerate the prosecution’s tardy and desultory manner of prosecuting the case, the trial magistrate put his foot down and ordered the prosecution to proceed. But unable to tender further evidence, the prosecution was forced to close its case prematurely. After dragging its feet, the prosecution decided to pull the carpet from under the feet of the trial court. If successful in doing so, the prosecution will render the court process hitherto a futile exercise. The exercise of the power to enter **nolle prosequi** by the Attorney General cannot in those circumstances be said to have been in good faith. It was not in the interest of fair play. The Attorney General was flexing his muscles to get what the court had denied the prosecution. The exercise of the power to enter **nolle prosequi** in the case will make nonsense the process of the trial if the **nolle prosequi** is allowed to be entered. The exercise of such power cannot be said to aid the interest of justice or fair play and justice. It requires to be checked.

It is my finding in the instant case that the Attorney General’s power to enter **nolle prosequi** was invoked in bad faith, and oppressively, which was improper. As the exercise of the power to enter nolle prosequi is being improperly exercised, I declare the **nolle prosequi** null and void. I order that it be rejected. The case shall proceed to hearing in accordance with the provisions of the Criminal Procedure Code Cap. 75.

Dated at Kakamega this 15th day of November, 2007.

G. B. M. KARIUKI

JUDGE