



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE 223 OF 2003**

ADAN KEYNAN WEHLIYE.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR/RESPONDENT

JUDGMENT

The accused applicant has moved this court under sections 70 (a); 72 (3) (b); 72 (5); 77 (1); 81 (1) and 84 of the Constitution of Kenya and Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001; the inherent Jurisdiction of the court and all other enabling provisions and powers of the law. The applicant seeks the following prayers:

1. The instrument of nolle prosequi dated 10th May 2004 be declared invalid, null and void and of no legal consequence;
2. The Respondent do proceed with the prosecution of the accused/applicant in the manner provided for by the law until the determination of the criminal proceedings by the trial court.
3. The Respondent do pay the accused/applicant the costs occasioned by this application in any event. The application was based on the grounds on the face of the application to wit: The application was further supported by the affidavit to the applicant who deponed as follows:
 - That he was arrested on 27th October 2003 and held in police custody in connection with the deaths of Ibrahim Ali Abdulla alias Shek; Hassan Abduraham Mohammed and Mohammed Haji abdi.
 - That he was held in police custody for 29 days in violation of Section 72 (3) of the constitution of Kenya and after those days he was arraigned in the High court and was charged with three counts of murder.
 - That he pleaded not guilty.
 - The trial commenced on 1st March 2004 and after selection of the assessors the court sat on seven different occasions and in total heard 11 witnesses and the remaining witnesses were about eight to ten and it was clear that the trial was half way done.
 - On 10th May 2004, when trial resumed prosecution presented a nolle prosequi.
 - The nolle prosequi was signed by the Director of Public Prosecution (DPP) Mr. Philip K Murgor but that, that instrument was invalid because the Director of Public Prosecution is not a person to whom the Attorney General (A.G.) has delegated power to enter nolle prosequi. That the prosecution had advanced the reason that the entry of nolle prosequi was to enable the prosecution to have a joint trial with other person who had been charged with the murder of the same person that the applicant had charged for and that in that new case, HCCC R.M. NO. 57 OF 2004 one of the accused persons is Mohammed Maalim Noor alias Burani, who was called as P W 10 in the applicant's trial.
 - That the applicant's constitution rights to fair trial within a reasonable time

under sections 72 (5) and 77 (1) of the constitution, will be compromised by the termination of his trial and a new trial being commenced.

- That the applicant who pleaded not guilty to the charges and was anticipating being freed at the conclusion of the trial was now facing the infringement of his rights under section 81 (1) of the constitution in that his freedom of movement guaranteed under that section were being contravened.
- That the applicant's fundamental, inalienable and constitutional right to liberty, protection of the law and his right to a fair trial could not be compromised by the convenience of the prosecution and the applicant should not be punished for the predicament of the prosecution. That the other suspects in High Court Criminal Case No. 57 of 2004 can be tried separately to the applicant.
- That to take the applicant through his trial and terminate it mid way with intention to re-arrest the applicant and have him face the same charges is an abuse of power and the court process; in the face of having no explanation given why the nolle prosequi had been presented to court. Accordingly that conduct was high handed unreasonable, oppressive and capricious.
- That it was a fundamental infringement of the applicant's right to charge him before completion of investigation.

Learned counsel for the applicant, Mr. Kilukumi submitted in support of the applicant's application. That the nolle prosequi was not accepted at the trial and hence the applicant was seeking from this court that it be declared invalid. Counsel further submitted that the applicant was seeking an order of the court disapproving the prolonged detention of the accused in custody, for 29 days, which action infringed on his rights under section 72 (3) (b) of the constitution. That section provides: -

“(3) A person who is arrested or detained –

(a)

(b) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released shall be brought before a court as soon as is reasonably practicable, and where he is not brought before court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicions of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonable practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

In this regard counsel submitted that the applicant ought to have been presented before court within 14 days of arrest and in the absence of that, the prosecution ought to have given the court explanation. Counsel submitted that since the prosecution had not presented an explanation to the court the court should disapprove that action.

Further counsel submitted that the information presented against the applicant stated that he committed the offence with others not before the court. That the prosecution commenced the trial of the applicant with the knowledge that there were other suspects out there. That P W 10, in the applicant's trial, was kept in custody for 14 days after which he recorded a statement and then was eventually called as a prosecution witness No. 10. It was after his testimony; applicant's counsel argued, and his evidence having not been favourable to the prosecution that the prosecution opted to charge him with the same offence the applicant's counsel submitted that it was incumbent upon the prosecution to enforce the law in fairness to all and with the respect to the law; in this regard counsel relied on section 10 (1) of the Public Ethics Act, which requires a public officer to carry out his duties in accordance with the law. Counsel submitted that the applicant is entitled to have a speedy trial as provided for in sections 72 (5) and 77 (1) of the constitution, which was likely to be violated if the trial was to start de novo. Section 72 (5) provides:

“If a person arrested or detained as mentioned in sub section (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be

brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Section 77 (1) provides: - “

If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

Counsel relied on the case RE MILAMBO (1993) 2 LRC 28 (SC). The applicant in that case had made a reference to Supreme Court of Zimbabwe on the basis that his rights under section 18 (2) of the constitution had been infringed. Zimbabwe’s section 18 (2) is similar to section 77 (1) of our Constitution. The applicant in the Zimbabwe’s case had been arrested in 1986 and charged with a criminal offence. The prosecution withdrew the charge then had the applicant rearrested in 1991. The Supreme Court of Zimbabwe upheld the applicants reference and found that his rights to a hearing within a reasonable period had been infringed. The Zimbabwe Supreme Court referred to the case of KLOPPER V NORTH CAROLINA 386 US 213 (1967) where the applicant contended that the entry of a nolle prosequi denied him a speedy trial. At the appeal stage the court held:

“By indefinitely prolonging this oppression, as well as the “anxiety and concern accompanying the public accusation”, the criminal procedure condoned in this case by the (court below) clearly denies the Petitioner the right to a speedy trial which we hold is guaranteed to him by the sixth Amendment.”

Mr. Kilukumi Counsel for the applicant submitted that the rationality for a speedy trial was; firstly, that it aided good administration; secondly, to ensure witnesses vividly remember events; thirdly, it removes the stigma related to criminal charges and trial; fourthly, the community is comforted in the knowledge that those who committed crimes are out of their midst; fifthly, in a case like the present one, where there is no right to bail, the pretrial incarceration should be short, and anything which interferes with speedy trial, this court should frown upon and stop it.

In regard to the fact that the charge being faced by the applicant is non bailable, counsel requested the court to have regard to the court diary, which is already congested, and if the accused was to have a fresh trial it may take another three to four years before it is concluded.

On the prosecution’s intention to jointly have trial of the applicant alongside the other people who are the accused in HC Criminal Case 57 of 2004, counsel relied on the case of REPUBLIC V THORNE & OTHERS 66 CR. APPL. R. 6 (C.A.) and quoted the following passage:

“Our experience warns us, however, that in long cases involving a number of accused, there is a danger that those on the fringes will be dragged down by the weight of evidence against in the center..... No more accused should be indicted together than is necessary for the proper presentation of the prosecution’s case against the principal accused. Necessity, not convenience, should be the guiding factor.”

Counsel posed a question to the court, whether injustice would be suffered by the applicant if the trial was allowed to proceed and if the answer was in the negative then only can the court proceed. He was of the view that the prosecution had failed to sufficiently demonstrate a joint trial was absolutely necessary. The Respondent counsels only reason for wanting to terminate and consolidate is convenience. Counsel argued that the law ought to be dispensed in a fair way, see GITHUNGURI V REPUBLIC (1986) KLR 1. Applicant’s counsel made a broad submission that the courts have a responsibility to ensure that the criminal justice is not abused. He relied on the case of CRISPUS KARANJA NJOGU V THE ATTORNEY GENERAL UR CRIMINAL APPLICATION NO. 39 OF 2000 (HC) and quoted extensively from it as follows: -

“Thus, rightly contended; this court is the sole constitutional entity vested with the Responsibilities, rather than the Attorney General, of ensuring that criminal justice system is not abused or used oppressively. This court does, for instance, by inquiring whether the power of entering a Nolle Prosequi vested in the Attorney General has been exercised in accordance with this constitution or any other law.....so that, under our constitution, the exercise of such powers of the Attorney General with respect to the entering of a Nolle Prosequi can be questioned by the courtthe power 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 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.”

On the issue whether in law the office of the Director of Public Prosecution exists, counsel began his arguments by referring to the Nolle Prosequi presented to the trial judge. We reproduce the same verbatim hereunder: -

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI HIGH COURT CRIMINAL CASE NO. 223 OF 2003

REPUBLIC VS ADAN KEYNAN WEHYLIYE”

IN EXERCISE of the powers conferred on the Attorney General by Section 82 (1) of the Criminal Procedure Code Cap 75 Laws of Kenya, and delegated to me by legal Notice Number 331 of 1996, I hereby enter a Nolle Prosequi and inform this Honourable court that the Republic intends that proceedings against the above named accused person who is charged with the offence of murder contrary to section 203 as read with section 2004 of the Penal Code, **SHALL NOT** continue. Dated at Nairobi this 10th day of May 2004.

P K MURGOR

DIRECTOR OF PUBLIC PROSECUTIONS.

” Applicant’s counsel pointed out that the nolle prosequi did not quote the constitutional provision under which the power was given by the Attorney General to the Director of Public Prosecution; further the office of Director of Public Prosecution is not one of the offices listed in section 83 of the Criminal Procedure Code. That section provides:

“The Attorney General may order in writing that all or any of the powers vested in him by sections 81 and 82 and by part VIII, be vested for the time being in the Solicitor-General, the Deputy Public Prosecutor, the Assistant Deputy Public Prosecutor or a state counsel, and the exercise of those powers by the solicitor- General, the Deputy Public Prosecutor, Assistant Deputy Public Prosecutor or a state counsel shall then operate as if they had been exercised by the Attorney General”.

The power under which the Director of Public Prosecution states in the Nolle Prosequi, to have acted pursuant to so as to enter the nolle prosequi is legal Notice No. 331 of 1996. That notice provides:

“THE CRIMINAL PROCEDURE CODE

(CAP 75)

DELEGATION OF POWERS

IN EXERCISE of the powers conferred by Section 83 of the Criminal Procedure Code, the Attorney General orders that all powers vested in him by section 81 and 82 and by part VII the Criminal Procedure Code shall be exercised by the person for the time being holding the offices of –

Director of Public Prosecution

, Deputy Public Prosecutor Assistant Deputy Public Prosecutor,

Senior Principal state counsel,

Principal state counsel.”

Applicant’s counsel argued that the office of the Director of Public Prosecution is not provided for under section 83 Cap 75, and further the legal notice No. 331 of 1996 relied upon by the Director of Public Prosecution was invalid because it quoted part VII rather than Part VIII of the Criminal Procedure Code. Since the legislature through section 83 cap 75, had indicated the officers that the Attorney General could delegate his powers to, it was not right to expand the list those officers by means of a legal notice.

Applicant’s counsel conceded that the President under section 24 of the Constitution had power to create office in public service, he argued that there was however need to gazette the creation of such offices because people of Kenya ought to know the establishment of such office and its functions. He argued that it is clear that there was no document in the public domain to show that the office of Director of Public Prosecution was created; see the case of **EX-PARTE ATTORNEY GENERAL, NAMIBIA; CONSTITUTION Relationship Between the Attorney General and the Prosecutor General, (1995) 3 LRC (SC)** and the case of STEPHEN MWAI GACHIENGO AND ANOTHER V REPUBLIC HC MISC APPLICATION NO. 302 OF 2000.

The application was opposed. The respondent had the following to say on the validity or otherwise of the Nolle Prosequi; that the state had charged other persons with the same offence as the applicant was facing, and it was therefore necessary to terminate the applicant’s case in order to have him jointly charged together with the other persons; that the law permits consolidation where two or more persons are charged with the similar offence; such joint trial would ensure that the prosecutor’s time, which is precious, was not duplicated; that there were certain developments within the realm of investigation which led the Attorney General to seek the termination of the applicant’s case; and on the issue that delay will cause an injustice to the applicant, the respondent submitted that the applicant’s case had been prosecuted in record time since he was arraigned in October 2003, and the trial started in March 2004, but since it is more convenient to have all the parties tried in one case the respondent should be allowed to terminate the applicant’s case.

On the issue of the number of witnesses respondent submitted that 40 witnesses were lined up to testify against all the accused persons. On the argument on the validity of the office of Director of Public Prosecutions the respondent relied on section 24 of the Constitution, which empowers the President to constitute and abolish offices, of making appointments to any such office and terminating such appointment. That, that power does not require the President to make a gazette notice of such constitution, abolishment, appointment and termination thereof. The President did however by gazette notice No. 5098 of 2004 appoint Philip Kipchirchir Murgor as the Director of Public Prosecution with effect from 19th May 2003. Respondent further submitted that the office of the Director of Public Prosecution can be classified as an office subordinate to that of the Attorney General and since the Attorney

General was empowered to delegate his power to officers subordinate to him the Director of Public Prosecution had been so delegated the power to sign the nolle prosequi. The respondent’s counsel submitted that the use of the words **“The Attorney General may order “.....be vested for the time being”**, in Section 83 in the Criminal Procedure Code indicated that the officers named therein to whom the Attorney General could delegate his powers was not all inclusive and therefore the Attorney General delegation of power to Director of Public Prosecution did not contravene this section; and accordingly the Attorney General was permitted by Section 26 (5) of The Constitution of Kenya and Section 83 of Cap 75

to delegate his powers as he deemed it fit. Counsel added, “*There is nothing in a title.*” The applicant’s counsel responded to this argument and disagreed with the interpretation afforded by the respondent and argued that the use of the word ‘may’ in section 83 cap 75 meant that the Attorney General could either exercise the power personally or he could delegate, he further requested the court to again look at the nolle prosequi and said that the Director of Public Prosecution stated therein that he was exercising the power given to the Attorney General and he was therefore violating the Constitution.

Respondent further argued that Section 38 of cap 2, provided the Attorney General with power to delegate by notice in the gazette, his power conferred to him by statute, so long as there was no express prohibition. Respondent’s argument is that legal notice No. 331 delegated to him the power to terminate the applicant’s criminal case. The applicant’s counsel responded to this submission by drawing the court’s attention to that legal notice No. 331, which stated the Attorney General was delegating his power to the Director of Public Prosecution, amongst others, under the power conferred by section 83 Cap 75.

The Respondent concluded by saying that the Director of Public Prosecution was exercising power delegated to him by the Attorney General which was exercised in good faith. The applicant’s counsel in response pointed out that the respondent had failed to reply to the injustice that will be suffered by the applicant if the nolle prosequi is entered and the applicant is charged afresh with the same charges. He said that on a scale of justice liberty weighed more than convenience, and that the court should choose liberty for the applicant.

Those, then, were the submissions made before us. Those arguments fall into two broad areas. Firstly is whether the Director of Public Prosecution is an officer with properly delegated legal powers to sign a nolle prosequi; and secondly is whether entry of the nolle prosequi will contravene the applicant’s constitutional rights.

Perhaps before we go to those two broad identified areas it is necessary to respond to submissions of the applicants counsel on the issue of the applicant being detained before trial, for 29 days in contravention of section 72 (2) (b) of the Constitution.

The Respondent did not dispute this assertion and we were being asked by the applicant to disapprove the police act of detention. We are of the view that this is a matter that should rightly be raised and canvassed by the applicant before the trial judge at his trial; suffice it to say that in our consideration of whether there has been or is likely to be injustice towards the applicant in accepting the nolle prosequi the period of incarceration prior to the trial will be considered in its cumulative effect.

We now wish to start with the submissions on whether or not the Director of Public Prosecutions is an officer with legal power to sign the nolle prosequi; we find that these submissions should be looked at from two angles. One, whether indeed in law there is an office of Director of Public Prosecutions. The Respondent argued that the President by virtue of section 24 of The Constitution is empowered to constitute a public office amongst other powers. Indeed we accept these submissions and also accept that there is no provision in the Constitution that directs the manner in which such constitution of the office should be exercised. Accordingly the letter produced by the respondent, dated 23rd December 1996 addressed to the Mr. Benard Chunga was sufficient to create the office of the Director of Public Prosecutions. The letter stated as follows: -

“I am pleased to inform you that His Excellency the President has appointed you to the post of Director of Public Prosecutions under the Attorney General in the state of law office with effect from 5th December 1996.”

Since we accept that the Constitution does not provide the manner in which the President is to exercise the power under Section 24 of the Constitution it follows therefore that it is not necessary for the President to gazette such a creation of a public office although gazettment would in our view be desirable. In any case, in regard to Mr. Philip Kipchirchir Murgor there was gazettement of his appointment as Director of Public Prosecutions in gazette Notice No. 5098 of 2004.

Having made that finding that there is legally constituted office of the Director of Public Prosecutions, the second angle to consider is whether the Director of Public Prosecutions is an officer with the legal power to sign a nolle prosequi. The power to institute and undertake criminal proceedings against any person, to take over and continue any criminal proceedings and discontinue at any stage before judgment is bestowed upon the Attorney General, under Section 26 of The Constitution. This power is vested in Attorney General to the exclusion of any other person. The power to enter a nolle prosequi is given to the Attorney General under section 82 of the Criminal Procedure Code. Under section 83 of the Criminal Procedure Code the Attorney General is empowered to delegate his powers under that Act. The officer to whom he may delegate are named thereof and absent in that list is the Director of Public Prosecutions. It therefore follows and we so find that that the power to enter nolle prosequi is not delegatable to the Director of Public Prosecutions; and that prohibition in section 83 of cap 75 is not assisted by section 38 (1) Cap 2 because the very Act, Cap 75, which gives the Attorney General power to enter nolle prosequi does not recognize the office of the Director of Public Prosecutions. Section 83 has to be amended to make this possible and the nolle prosequi purporting to be signed by the Director of Public Prosecutions is in our view invalid on this ground as well.

We now move to the consideration of whether the nolle prosequi will contravene the applicants fundamental rights and freedoms bestowed upon him by the Constitution. The applicant was arrested on 27th October 2003 and was held in custody for 29 days in connection with the murder of three people. On being arraigned in court he pleaded not guilty. His trial commenced on 1st March 2004 and the court sat for 7 days on different occasions and 11 witnesses testified. The remainder of the witnesses who were yet to testify at his trial were eight to 10 witnesses, according to counsel for the applicant. It is at this stage that the prosecution sought to enter nolle prosequi with the clear intimation that the applicant would be freshly charged with the same offence and tried together with another person who had infact testified in his trial as P W 10 and perhaps with other persons as well in a trial which has already commenced and upon which we understand a Constitutional reference has been filed and has not come up for hearing. This aspect is also likely to add to further delay in reaching finality were consolidation to prevail.

Unlike the civil trials where there is discovery, exchange of documents and interlocutory applications, not to mention the pleadings, in a criminal trial the accused's defence is only discernable from the cross examination of prosecution witnesses and finally from the accused's own evidence. That being so we are of the view that at the stage at which the applicant's case had reached, undoubtedly the prosecution was aware of the applicant's line of defence. For the prosecution, to seek to terminate the trial and charge the applicant afresh would be to give the prosecution an unfair advantage in the prosecution of the new case that would lead to an unfair and unjust result. We would approvingly quote the case of CRISPUS KARANJA NJOGU – V – THE ATTORNEY GENERAL CRIMINAL APPLICATION NO. 39 OF 2000 as follows: -

“.....under our constitution the responsibility to ensure that the criminal justice system is neither abused nor used to achieve oppressive result, and that an accused receives secure protection of the law, lies squarely with the courts all the time and it ought never to be abdicated to the Executive through the Attorney General.”

The police arrested and detained the applicant for 29 days, and being satisfied that they had a sufficient case against the applicant they accordingly arraigned him in court and in total called 11 witnesses. We are of the view that it is time the police and the prosecuting authority took the rights of an individual more seriously and put to a stop the oppressive practice of arraigning persons when there is no sufficient evidence and when they find themselves at a “dead end” or a blind they look for a way out by seeking to start the trial afresh, through the entry of nolle prosequi. To allow such practice to take root the court would in our view be abdicating its responsibilities as the custodian of the fundamental rights of the individual as enshrined in the constitution. Such practice infringes on the individual rights to liberty, protection of the law under Section 70 of The Constitution; and also infringe the provisions of Section 72 (5) and 77 (1) which entitle the applicant to a fair and speedy trial within a reasonable time; and Section 81 (1) is also likely to be infringed because the applicant will have to be held for a longer period awaiting the commencement of a fresh trial. We accept the applicant's counsel's submissions that the respondent has acted capriciously and oppressively in presenting the nolle prosequi when the trial was about come to

an end. That indeed would amount to an abuse of the process of the court. The respondent argued that it is more convenient to have a joint trial and consequently sought to justify the nolle prosequi. We wish to reecho the applicants counsel that in the scale of justice liberty comes before convenience.

The court was not told the reason why the nolle prosequi was being presented at that stage. We are not persuaded that the joint trial in the circumstances of this case was an absolute necessity. This is what the authorities in these proceedings provide as a guideline for considering whether a joint trial should be held. It matters not that valuable judicial and prosecutor's time will be taken if separate trials are conducted. This is the price we have to pay if we have to honor the tenets of our constitution and the rule of law. We agree with the submissions of the applicants counsels that on a scale of justice the court should lean towards liberty of the individual as opposed to the respondent's convenience. The power of nolle prosequi should be used to advance the cause of criminal justice and not to obstruct it. The power cannot be used to infringe accuseds constitutional rights.

The court can inquire whether the power which is vested in the Attorney General of presenting the nolle prosequi has been exercised within the constitution under the court's inherent power and under Section 123 (8) of The Constitution.

In invoking that inherent power and for the foregoing reasons we find and we hold that the nolle prosequi dated 10th May, 2004 is invalid, oppressive, unreasonable and capricious and hereby declare the same to be null and void and of no legal consequence. That respondent shall resume the prosecution of the applicant from where it was halted when an attempt was made to enter a nolle prosequi until the determination of the same by the trial court. Finally we do order that the respondent do pay the applicants costs of the application dated 10th May 2004.

Dated and delivered at NAIROBI this 24th June 2005.

J G NYAMU

JUDGE

MARY KASANGO

JUDGE

M S A MAKHANDIA

JUDGE