

Nolle Prosequi: The AG's exercise of the power to enter nolle prosequi under section 82(1) of the Criminal Procedure Code Cap 75 is subject to supervision by the High Court by virtue of s. 60(1) and 128(3) of the Constitution. Such power can only be exercised in good faith and for the purpose of serving the public good. Exercise of the power so as to abuse the process of the court or prejudice the constitutional rights of an accused improper.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Misc Crimi Appli 29 of 2005

VERONICAH NJERI KIARIE APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Veronica Njeri Kiarie, the applicant, sought in her Notice of Motion dated 3-5- 2005 an order that the *nolle prosequi* intended to be entered by the Attorney General in Criminal case No.1524 of 2002 pending in Kakamega before the Chief Magistrate was invalid and should be rejected because the Attorney General exercised his power to do so in bad faith, oppressively, against public interest and was unfair to and violated the rights of the Applicant.

The application shows that the applicant was arrested on 11/4/05 and was charged with others with robbery with violence in criminal case No.838 or 2000 at Kakamega in the Chief Magistrate's court. The case was withdrawn on 12-8-02 under section 87A of the Criminal Procedure Code, Cap 75 after the hearing had been adjourned three times.

Immediately after her discharge, the applicant was re-arrested and charged again with the offence of causing grievous bodily harm to one Mary Wambui in Kakamega Criminal case No. KMGCR.Case No.1524 of 2002 and she pleaded not guilty on 12/8/02 when the case was fixed for hearing on 24.9.02. The hearing did not commence on 24/9/02 as the Attorney General had called for the file. It commenced on 18-2-03 when six prosecution witnesses gave evidence after which it was adjourned to 18-3-03. The hearing could not proceed on 18-3-03 as the trial magistrate had been transferred. The proceedings had to be typed and this took up to 13-10-03. On 21.12.04, the trial magistrate granted the last adjournment to the prosecution because the case had been adjourned severally before. Hearing proceeded on 25.1.05 and again on 26.1.05 when it was adjourned to 23.2.05 and again to 26.2.05 when the prosecution sought adjournment. The court declined to grant adjournment whereupon the prosecution sought a short adjournment and when the court sat at 3.55 p.m. that day a *nolle prosequi* was presented. The defence took objection. The *nolle prosequi* has hitherto not been accepted or rejected by the trial court. On 4.5.05, this court granted a stay of the proceedings in Kakamega CMCRC. No.1824 of 2002 pending the disposal of this application.

The applicant averred that she had for a period of three years from 2002 to 2005 faithfully attended court and spent considerable amount of time and resources in the case and that she and her family had suffered mental anguish and torture due to it. She contended that the AG's use of the *nolle prosequi* amounted to abuse of office and was in bad faith and contrary to public policy. She contended that it was an abuse of the court process and should be rejected.

Mr. Nandwa, Advocate, who appeared for the Applicant urged the court to grant the application and nullify the *nolle prosequi*.

Mrs. Kithaka, Principal Stat Counsel, left the matter to the court to determine.

The State also did not file an affidavit in reply to the application.

The averments in the supporting affidavit of the applicant stood uncontroverted. It shows that the attempt to enter nolle prosequi was prompted by the inability of the prosecution to procure an adjournment on 26.4.05. It was the answer to the court's refusal to grant adjournment. It is dear it was intended to avoid the prosecution having to close its case before it had called the remaining witnesses. It was not in good faith. The trial court had given the prosecution many adjournments previously but the prosecution had continued to fail to produce witnesses. As at 26.4.05, only seven witnesses had given evidence.

The exercise by the AG of the power to use nolle prosequi to terminate the case was not proper. The High Court has constitutional and inherent power to prevent both the improper exercise of the power to enter nolle prosequi under section 82 of the Criminal Procedure Code and section 26(3)(c) of the Constitution by the Attorney General and also abuse of the court process. The Attorney General's discretionary power to enter nolle prosequi can only be exercised in good faith and for the public good. Where the exercise of the power is in bad faith or is oppressive or capricious or against public interest, the High Court shall be entitled to intervene to censure the Attorney General's exercise of that power to ensure it is not misused. This court is vested with the power to do so by section 60(1) and section 123(8) of the Constitution which enjoin it to supervise the use of statutory power by the Attorney General and other public officers.

On the material before me, I am satisfied that the nolle prosequi submitted to the trial court in Kakamega CM.Cr. Case No.1524 of 2002 was in bad faith and amounted to abuse of the court process. It prejudiced the applicant's right under s.77 (1) of the Constitution to a fair hearing within a reasonable time.

I declare the nolle prosequi null and void on the ground that the power to enter it was improperly exercised.

The trial magistrate is directed to reject the nolle prosequi and to proceed with the hearing of the said criminal case No. 1524 of 2002 and determine it in accordance with the law.

Dated at Kakamega this 11th day of November, 2005.

G. B. M. KARIUKI

J U D G E