



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**H.C. CRIMINAL CASE NO. 223 OF 2003**

**ADAN KEYNAN WEHLIYE ..... ACCUSED/APPLICANT**

**V E R S U S**

**REPUBLIC ..... PROSECUTOR/RESPONDENT**

**R U L I N G**

The Applicant herein is charged with an offence of murder. His trial under Criminal Case No. 223 of 2003 commenced before me wherein 11 witnesses from the Prosecution have already given their evidence. Thereafter vide an instrument of Nolle Prosequi dated 10th May, 2004, the Attorney General applied to terminate the said proceedings.

Thereupon, the applicant has filed an application dated 10th May, 2004 by way of Notice of Motion. This application is provided under Section 70 (a), 72 (3) (b), 72 (5), 77(1), 81(1) and 89 of the Constitution of Kenya and under Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of Individual) Practice and Procedure Rules, 2001, the inherent Jurisdiction of the Court and all other enabling provisions and powers of the laws.

The said application seeks orders to declare the aforesaid Nolle Prosequi invalid, null and void and to continue the hearing of the trial. Of course, the applicant also seeks the orders for the costs. The application is supported on grounds stated on the face thereof and on affidavit of the Applicant sworn on 10th May, 2004.

The Respondent, Republic has opposed the said application and have filed three affidavits sworn by Inspector John Otieno Anandali, the Investigation officer in the case here of, Mr Jacob Ondari the Prosecution Counsel of the case and Director of Public Prosecutions Mr. Philip Kipchirchir Murgor.

Before the hearing of the application could commence Mr. Murgor the learned Deputy Public Prosecutor made an oral application before the court to refer the application to the Honourable Chief Justice for his administrative direction to empanel a Constitutional Bench consisting of not less than three Judges of the High Court.

His reasons for such application, he contended, were that the issue involved in the application is a serious constitutional issue having far reaching effect on the criminal prosecutions in the country. He also contended that while determining the application, even though not explicitly stated by the applicant, Section 26 of the Constitution shall have to be interpreted and hence the necessity for reference to the Honourable Chief Justice.

He substantiated by pointing out grounds (g) and (k) of the application and paragraph 6 of the supporting affidavit of the Applicant.

According to Mr. Murgor to contest these grounds as well as stands taken by the Applicant, it shall be inevitable that Section 26 and specifically Section 26 (3) and (5) of the Constitution have to be interpreted, Vis – a - Vis Sections 82 and 83 of the Criminal Procedure Code.

Furthermore it is also a matter of fact that it was in 1996 that the then President of the Republic of Kenya created the office of the Director of Public Prosecution vide powers conferred upon him under Section 24 of the Constitution. Presumably after the creation of the said Post the Attorney General had delegated his powers under Sections 81 and 82 and part VII of the Criminal Procedure Code on the Director of Public Prosecution amongst other officers subordinate to him. This delegation was made vide legal Notice No. 331 of 1996 which notice also repealed legal Notice No. 106 of 1984.

The instrument of Nolle Prosequi in question is manifestly signed by Director of Public Prosecution. As the learned Defence Counsel has contended that the reading of the said Nolle Prosequi per se shall show that the same is devoid of any legality, I shall find it fit to quote the same:-.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. CRIMINAL CASE NO. 223 OF 2003

REPUBLIC vs ADAN KEYNAN WEHYLIYE

NOLLE PROSEQUI

*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 the proceedings against the above named accused person who is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code, SHALL NOT continue.*

Dated at Nairobi this 10 th day of May, 2004.

P.K. MURGOR

DIRECTOR OF PUBLIC PROSECUTIONS

The Director of Public Prosecution has cited the above referred Legal Notice for his authority to author the same. But the learned Defence Counsel relies on the clear wordings of Section 82 & 83 of the Criminal Procedure Code wherein the office of Director of Public Prosecution is not mentioned whereas other officers are specifically mentioned.

Only considering this issue, I feel that the interpretation of Section 26 (5) of the Constitution would become necessary. That Sub-section stipulates and I quote:-

Section 26 (5) *The powers of the Attorney General under subsections (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.*

I thus agree with the learned Deputy Public Prosecutor that the powers of the Attorney General provided under Section 26 (5) need to be looked at while determining the validity or otherwise of the Nolle Prosequi in question.

But it is pointed out to me that provisions of Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of Individual) Practice and Procedure Rules, 2001 (hereinafter referred to as 'the Rules' ) give power to the trial court itself to resolve all the issues raised before it. The learned Defence Counsel relied on an unreported ruling of the High Court in H.C.C.S. No. 418 of 1998 (Kamlesh Mansuklal Damji Pattni V/S Nassir Ibrahim Ali and 2 Others ).Ibrahim J. considered the issue whether he was obliged to refer the Constitutional reference to the Chief Justice for directions and further order. He found that there is no law which requires that the High Court must sit as a bench of more than one Judge and that it would involve expense and waste of judicial time if every time a citizen or person alleges a violation of his fundamental rights the High Court must refer the matter to the Chief Justice. He however did not find that the court can never refer the matter to the Chief Justice.

I agree on those observations but each case has to be decided on its own facts and circumstances. I have carefully perused the above referred Ruling and do not find that in the said case an issue of interpretation of a Constitutional provisions was likely to be raised. This is the likelihood in this case.

I also take note of the fact that the issue of interpretation of a constitutional provisions is always a serious issue and taking support from Section 67 of the Constitution, I find that the makers of the Constitution also deemed it fit to be tried by a bench of not less than three Judges.

I may also note that the findings of the High Court on interpretation of the Constitutional provisions is not appealable under Section 67 of the Constitution.

I shall however hasten to note that Section 67 also envisages the determination of interpretation by a subordinate court and an appeal from that decision is specifically provided for. Thus by analogy it may be presumed that this court can hear and determine the issue.

But by doing so I may be opening a gate for delay and waste of judicial time to entertain the issues which are not directly relevant to the complaints made by the Applicant herein. Those issues could be raised and determined in a matter of civil nature where the liberty or freedom of the party is not at stake.

I shall also deal with the point raised by the learned counsel for the Applicant that the Respondent cannot make an oral application to seek the order to refer the matter to the Hon. Chief Justice. The reason for this point obviously was that under Rule 10 (a) of the Rules the matter is governed by Order L of Civil Procedure Rules and that order does not stipulate any oral application. That may be so but the wordings of Rule 10 (a) of the Rules are not all inclusive and this court shall be hesitant to adhere strictly to the technical side of law in the matters where fundamental rights and other Constitutional provisions are under scrutiny of the High Court.

Thus not making any specific finding on the issues raised in the application as well as on the submissions made by both the counsel, I feel it shall be prudent to refer the matter to Honourable Chief Justice for his further direction.

I therefore direct that the matter be urgently placed for the attention of the Honourable Chief Justice so that he can order earliest hearing date and make appropriate administrative directions.

Dated and delivered at Nairobi this 15th day of June, 2004.

K. H. RAWAL

JUDGE.