REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL MISCELLANEOUS APPLICATION NO 554 OF 2001

ALIELO ……APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

The applicant was on 19/12/2000 charged in Nairobi Chief Magistrates Court Criminal Case No 2773 of 2000, with the offence of stealing by servant contrary to section 281 of the Penal Code. He pleaded not guilty.

On 8.3.2001 the prosecution substituted the original charge sheet with a fresh one which contained one count of theft plus 3 others of destruction of evidence contrary to section 116 of the Penal Code. The prosecution sought and obtained an adjournment to 13/3/2001 and again to 2/4/2002 when the case took off. The first witness gave evidence partly but could not complete his testimony because some of the documents the witness wanted to produce as evidence were photocopies whose admission the trial court rejected. This appears to have thrown the prosecution into some confusion because it sought and immediately obtained an adjournment with a view to appeal against the trial court's order rejecting the copies of the documents it intended to introduce in evidence. On 14.5.2001 when the case came up the prosecution once again sought for another adjournment. An adjournment was once granted to 22/5/2001 when again the prosecution were not able to proceed. They got an adjournment to 29/ 5/2001 and again to 5/7/2001 when the prosecution said they could not proceed because the police file was away with the Attorney General for further directions. Once again the trial court indulged another adjournement on 31/7/2001. On 31/7/2001 when the case came up the prosecution asked for another adjournment until 11 am the same morning.

At 11 am, when the case came up again, the prosecution filed a *nolle prosequi* to terminate the proceedings under section 82 (1) of the Criminal Procedure Code. The document was signed and dated by the Director of Public Prosecution on 2/7/2001. It was at this juncture when the applicant's counsel Mr Nyandieka applied for a stay of proceedings to allow the applicant challenge the *nolle prosequi*. The trial court reserved its ruling over the issue whether to grant the stay or act on the *nolle prosequi*, until 1/8/2001. By this latter date the applicant had obtained an order for stay of the trial, pending the hearing and final determination of this application brought under an originating summons dated 31/7/2000. The summons in the meantime, had been filed by the applicant to challenge the *nolle prosequi*.

The prayers in the said application which are presently relevant and which have yet to be dealt with are:

4. That this Honourable Court do order the Hon Attorney General to disclose to this Honourable Court

reasons (if any) as to why the Attorney General or his agents seek to enter a *nolle prosequi* against the applicant herein who is an accused in Nairobi Chief Magistrate's Court Criminal Case No 2773 of 2000.

5. That this Honourable Court does call for and examine the records of Nairobi Chief Magistrate's Criminal Case No 2773 of 2000.

6. That this Honourable Court be pleased to declare that the exercise of the power of the entry of *nolle prosequi* by the Attorney General in the said case is capricious, oppressive and amounts to an abuse of the court process.

7. That this Honourable Court do declare the *nolle prosequi* dated 2/7/ 2001 and signed by the Director of Public Prosecutions Mrs Uniter Kidula, invalid.

8. That in the premises this Honourable Court do order the said case to proceed for hearing before the trial magistrate under section 208 of the Criminal Procedure Code.

Mr Nyandieka argued this application for the applicant. He stated that considering the manner in which the prosecution conducted themselves until they filed the *nolle prosequi*, the Attorney General acted unfairly and prejudicially against the applicant who was the accused person. That the prosecution's intention in trying to enter the *nolle prosequi*, was to oppress the applicant. He pointed out to the number of times the prosecution sought and obtained adjournments, which were eight times.

That the prosecution wanted at all costs to secure a conviction against the applicant and when their most important documentary evidence could not be admitted in evidence, and they established that there was nothing they could do about it in terms of seeking redress in an appeal, they decided to terminate the proceedings with a view of starting it afresh. Mr Nyandieka also argued that if the Attorney General was fair and was acting *bonafides*, he should have terminated the case under section 204 of the Criminal procedure Code under which no fresh prosecution would later be undertaken. Mr Nyandieka further argued that the applicant was entitled to make these reasonable conclusions because the Attorney General failed to show the grounds upon which he purported to enter the *nolle prosequi* in question and indeed sought that this Court orders him to spell out the reasons upon which he took the course he decided to take. And finally, the applicant pointed out that the *nolle prosequi* in question, despite all what has been argued for and against it, did not amount to one. The reasons for this he argued, is because it was signed not by the Attorney General or by any of the agents for that purpose prescribed under section 83 of the Criminal Procedure Code or under a notice in the Gazette as therein prescribed, but by a person unknown to the law and one who does not in law exist, called Director of Public Prosecutions.

Mr Okumu representing the Attorney General admitted that that the *nolle prosequi* in question was indeed signed by "Director of Public Prosecutions".

Legal Notice No 331 dated 19/12/1996 published by the Attorney General in the Kenya Gazette, revoked the then existing Legal Notice No 106 of 1984. It specifically named the agents of the Attorney General who would thereafter have power to sign a *nolle prosequi* under the said section 83 of the Criminal Procedure Code. The

"Director of Public Prosecutions" was one of the named persons. Mr Okumu who pointed out to the publication of the said legal notice, did not elucidate it further, despite the fact that the applicant had raised the issue of nonexistence of such an office in the public service of Kenya. He accordingly concluded that the *nolle prosequi* under discussion was validly signed and should have been acted upon.

To the issue as to whether or not the trial court accepted and acted upon the *nolle prosequi*, Mr Okumu wanted to eat his cake as well as save it at the same time. He at one stage argued that the trial magistrate terminated the proceedings when the *nolle prosequi* was handed over to her at court so that the proceedings of Nairobi Chief Magistrate's Court's Criminal Case No 2773 of 2000 do not exist presently. But he also argued that he filed an affidavit sworn by the trial magistrate in reply to this application.

Mr Okumu accepted the magistrate's deponement to the effect that on receiving the *nolle prosequi* in court, she had adjourned the case upon the accused's application for a temporary stay to enable him to make a reference of same to the High Court, which application she had granted.

Even the ruling she had made in relation thereto, she further deponed on oath, had never been delivered. Mr Okumu however, inexplicably finally admitted that the proceedings are still pending before the trial magistrate's court.

Mr Okumu also submitted that the intention of the Attorney General to enter a *nolle prosequi* in this case was not embellished with malice or ill intent. That when the prosecution tried to introduce secondary evidence in terms of certain accounting documents and the same were disallowed by the trial court, the prosecution thought they needed time to seek advise from the Attorney General's office. The prosecution file was sent to the DPP who realizing that the rejection of the said piece of evidence cannot be appealed against, decided to terminate the case with a view of starting it afresh. That he considered the public importance of the case in that the applicant/accused was alleged to have stolen a large sum of public funds belonging to depositors, the employer of the applicant being the Post Bank Ltd. That the backbone of the criminal charges which the applicant was facing, was the said documentary evidence rejected by the trial court and that the reason why the prosecutor was trying to rely on such evidence was because the original documents had been possibly removed and destroyed by the applicant to deter his own prosecution, and that the act of destroying the documentary evidence itself, formed the subject of several charges in the same case. Mr Okumu admitted that the prosecution had inadvertently failed to serve a notice to produce such secondary evidence and that being faced with this kind of situation when he received the police file, and being pressed by the complainant, the Post Bank, the DPP with *bonafide* intention of saving the situation decided to enter the *nolle prosequi*. Mr Okumu urged the Court to note that the Attorney General did not act with any malice or any intended oppression, if any there was, which he denied. He also pointed out that the intended termination of the proceedings was brought within three or four months of the starting of the case, which period was all utilised for consultation and communication between the complainant, the police and the Attorney General's chambers. Mr Okumu also wanted this Court to note that the filed *nolle prosequi* was being entered at the earliest stage of the proceedings as only the first witness had just given part of his evidence.

He concluded that the Attorney General, carefully and impartially acted fairly, justly and in public interest, which, he persuaded, deserved being upheld by this Court.

I have carefully perused and considered the material placed before this Court which include the original criminal file No 2773 of 2000 aforementioned. I have also considered the submissions and the legal authorities presented by both Mr Nyandieka for the applicant and Mr Okumu for the Attorney General. Before I resolve the issues raised in the applicant's prayers within the framework of both parties submissions, I will first wish to examine the legal principles upon which the powers of the Attorney General to control criminal proceedings, are based.

In my view the Attorney General enjoys, both constitutional and statutory discretion in the prosecution of criminal cases. No other person nationally controls his said powers. However, like any other discretion, such discretion is not to be arbitrarily exercised. This is because the Attorney General's power in the prosecution of criminal cases will almost without exception, involve or touch on the rights and freedoms of the individual.

While such power is necessary for the protection of the common good of society ie to punish wrongs against society, the exercise of the same must be carried out within caution to ensure that the Attorney General does not put the said individual freedoms and rights in jeopardy. Hence this Court's inherent supervisory jurisdiction to halt the state's power from being exercised in a manner or to the extent where such exercise will jeopardise the individual rights and freedoms. In a case, therefore, where this Court is of the view that any criminal prosecution or the termination thereof, is an abuse of the process of the Court and/or is oppressive or vexatious, that is to say, it has no foundation or is brought recklessly and for extraneous purpose, the Court will interfere with it. To that end the following principles were laid down by a constitutional court in the case of *Stanley Mungai Githunguri v Republic* [1986] KLR 1.

(a) where a criminal prosecution amounts to nothing more than an abuse of the process of the Court, the

Court will employ its inherent power and common law to stop it.

(b) a prosecution that does not accord with individual's freedoms and rights under the constitution will be halted; and

(c) a prosecution that is contrary to public policy or interest will not be allowed

It will be observed that these principles are intertwined. The same were again expressed thus in the case of *Republic v Attorney General and Chief Magistrate's Court at Nairobi and ex parte, Kipngeno Arap Ngeny* at page 15:-

"A prosecution that is oppressive and vexatious is an abuse of the process of the Court. Although we must constantly remind ourselves that the Attorney General is not subject to control in the exercise of his power to prosecute criminal offences, we are of the view that he must exercise that power upon reasonable ground. It is an affront of our sense of justice as a society to allow the prosecution of individuals on flimsy grounds.

Although in this application we cannot ask the Attorney

General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual."

The above references clearly demonstrate that while the Attorney General is the only person who by the Constitution and statute, is empowered to institute and control criminal prosecution such power is subject to the supervisory inherent jurisdiction of this Court to the extent that the exercise of such power and discretion must be within the perimeters of the law and the Constitution.

The next issue to consider is whether the control of the Attorney General's powers to terminate any criminal prosecution under the constitution or any other relevant statute is also similarly under supervisory powers of this Court. Mr Okumu argued that once the Attorney General files a *nolle prosequi* to terminate criminal proceedings, the trial court has no power to question the process or ask him to give reasons for taking such a course.

I believe he had in mind section 26(8) of the Constitution which states thus:-

"in exercise of the functions vested in him by section (3) and (4) of this section and by section 44 and 55, the Attorney General shall not be subject to the direction or control of any other person or authority".

However, a constitutional court in the case *Crispus Karanja Njogu v Attorney General*, in High Court Criminal Application No 39 of 2000, addressing the issue as relating to the powers of the subordinate courts, stated thus at page 45 of its ruling:-

"The question which now needs to be determined is whether the subordinate court has been conferred with inherent jurisdiction under the Constitution to check the abuse of power or abuse of court process. We are of the considered view that the subordinate court as defined in section 123(1) of the Constitution is not the Court which is conferred with the power prescribed in section 123 (8) of the Constitution".

It is therefore, clear that Mr Okumu's view is correct in so far as subordinate courts are concerned. Such court has therefore no authority to question the Attorney General's power to enter a *nolle prosequi*. A subordinate court will need to comply with a *nolle prosequi* immediately, except in a case where it needs to stay proceedings to enable either party to make a reference of the issue to the High Court under the relevant legal provisions.

This remains the position even where the subordinate court has already rejected an application by the

prosecution to withdraw the case under section 87(a) of the Criminal Procedure Code. As earlier stated however and different from the immediately above position, the High Court has inherent supervisory jurisdiction to ascertain that Attorney General's power and/or discretion is being properly exercised. Speaking about this supervisory jurisdiction of the High Court *vis a vis* the exercise of the

Attorney General's power to terminate criminal proceedings by a *nolle prosequi,* the constitutional court in the *Crispus Karanja Njogu* case (*supra*) stated thus at page 40 of its ruling:-

"it is our considered view that the present practice in our criminal justice system that a *nolle prosequi* cannot be challenged in a court file on the face of the doctrine of separation of powers. To say that the Attorney

General's exercise of powers, as a member of the Executive, cannot be questioned in court when entering a *nolle prosequi,* is to say that the Executive arm of Government is accountable to itself. We find such a proposition untenable under the Kenya Constitution.

And at page 42 the same court concluded thus:

"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. Where therefore the exercise of the discretion to enter a *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."

The effect of the above pronouncements as I understand them, and which is the position I accept, is that the powers of the Attorney General or his agents under section 26(3) of the Constitution and section 82 of the Criminal Procedure Code to enter a *nolle prosequi* are not absolute.

I will now turn to the specific issues raised in this case to resolve them. As earlier admitted by Mr Okumu, the *nolle prosequi* filed in this case before me was not acted upon. It would appear that Mr Nyandieka on being confronted with the situation where the prosecution tendered the *nolle prosequi* to court, immediately sought for a stay to enable the applicant herein to apply for reference to the High Court. The honourable trial magistrate decided to reserve her ruling on Mr Nyandieka's application. She apparently thereafter wrote her ruling but had not delivered it by the time a stay of the proceedings had been granted by the High Court thereafter leading to this application. It is not correct therefore, as Mr Okumu at one stage urged, that the proceedings in Criminal Case No 2773 of 2000 were successfully terminated. This prompts me to restate the procedure of entering a *nolle prosequi* which I fully concur with. It is stated on page 29-30 of the ruling in *Crispus Karanja Njogu* case, *supra*:-

"… when a *nolle prosequi* is presented to a trial court there must be (a) acceptance of that communication from the Attorney General to the Court through the physical acknowledgement of the *nolle prosequi* (b) cessation of jurisdiction by the trial court by acting upon the *nolle prosequi*."

This means that the mere receipt of the *nolle prosequi* by the trial court from the prosecutor and the placing of it in the court file, is not enough.

The trial magistrate must act on it. Nor can staying of the proceedings and referring the issues raised by the applicant to the High Court, amount to acting on the *nolle prosequi*. Reference of the issues to the High Court merely means that the trial court stays the pending proceedings until the High Court sends down a decision as to whether or not the trial court should act upon the *nolle prosequi* or proceed on with the trial. I accordingly hold that in this case before me, the Attorney General did not succeed in entering a *nolle prosequi*. The proceedings therein are therefore, only stayed.

In prayer (4) the applicant sought that this Court do order the Attorney General to disclose to this Court reasons as to why he or his agents sought to enter a *nolle proseque* to terminate Nairobi City Magistrate's Court Criminal Case No 2773 of 2000. To do so this Court has to be satisfied that it has power to make

such an order. It is clear form the principles and legal authorities cited and discussed hereinabove that this Court has such supervisory powers. In addition an accused person has, under section 77 of the Constitution, a right to be heard on any application which is raised in his trial. He would be entitled to be heard where he is likely to suffer prejudice. It is in recognition of this right that under section 364 and 365 of the Criminal Procedure Code under which this Court has revisionary powers, this Court does not make any orders to the prejudice of the accused person without first giving him an opportunity to be heard in his own defence personally or by an advocate. As earlier stated however, while the Attorney General should not give reasons for wishing to enter a *nolle prosequi* before the subordinate court, he would be required to do so before this Court. In my view however, Mr Okumu has already complied. He stated that the main reason as to save the case from going down the drain in view of the fact that the most important piece of evidence in the case had been rejected for being presented in a secondary form instead of a primary form. He explained that the case file had been sent to the Deputy Public Prosecutor's office after the trial court had rejected the relevant secondary evidence. He argued that had the file been received before the trial of the case started, the DPP would have directed that a notice to introduce secondary evidence under section 69 of the Evidence Act should have been given in good time before the evidence could be introduced.

He believed that with such notice the evidence would most probably have been admitted especially since the criminal charges facing the applicant herein composed not only of the main charge of stealing by servant contrary to section 281 of the Penal Code but also of three others of destroying relevant evidence under discussion contrary to section 116 of the Penal Code. Mr Okumu further explained that the applicant was charged with stealing money from the complainant, the Post Bank, belonging to depositors. This, he argued, raised an issue of public interest in the criminal charges and it was necessary to prosecute the applicant in protection of such wider interest. That under these circumstances, the attempt to terminate the case came very early during the trial when the first witness had given only part of his evidence and had more evidence to give. That there were several other witnesses to testify in the case. That the only reason for the Attorney General's wish to terminate the proceedings was to start a fresh prosecution in the common and public interest and not to secure a conviction at any cost. That such an intention and conduct on his part smacked not of any malice or ill will against the accused. Mr Okumu accordingly concluded that such reasons as given above were weighty and were neither oppressive, malicious nor an abuse of the court process.

In my view therefore, prayer (4) has been fully satisfied. In conclusion, in general, this Court will where necessary order the Attorney General to give reasons for entering or intending to enter a *nolle prosequi*. Prayer (5) in the applicant's application in my view, has been met in that the trial court criminal case file, Nairobi Chief Magistrate Court Criminal Case No 2773 of 2000, was called for examination of its records which has been thoroughly done. Prayer (6) was that this Court do declare that the exercise of the power of the entry of *nolle prosequi* by the Attorney General was capricious, oppressive and an abuse of the process of court. As already pointed out earlier, this Court has power to make this kind of declaration. In my view however, it is only the circumstances sorrounding the entry of any *nolle prosequi* that will be taken into account in order to guide the Court to either grant or refuse such declaration. I have to that end, considered the facts and the circumstances of this particular case. The trial of the case in question started on 2/4/2001 when the first witness started to give evidence.

The witness did not last long in the witness box before being stood down because the second evidence he had started to introduce was rejected.

The prosecution then sought and obtained an adjournment. The Attorney General has explained that what followed immediately was consultations and communications between the police and complainant bank and DPP's office. The issue before them was explained by Mr Okumu to have been an effort to save the case from going down the drain. Appeal against the trial magistrate's rejection order was found not feasible. DPP appears to have decided that the only way available to save the case was to terminate the proceedings by a *nolle prosequi* and thereafter restart the case. The process of arriving at this decision took about four months until 31/7/01 when the *nolle prosequi* was introduced. The adjournments of the case from 2/4/2001 until 31/7/2000 would also appear to have been sought and obtained as the DPP considered the best way out of the predicament.

It is my opinion and decision therefore, that the period spent to arrive at the decision by the DPP, was not inordinate taking into account the circumstances of the case in terms of the time taken averagely to complete a trial these days. It is my further view and decision that the Attorney General's move to terminate the case came very early during the trial when the accused defence had not been defined or revealed. Furthermore I agree with Mr Okumu that this case has a serious public interest in it.

The applicant is facing theft of funds stolen from a bank wherein members of the public have kept their life savings for greater security. The sum involved is over Kshs 3,000,000/- not petty by any standards, and the applicant is alleged to have played a major role not only in the stealing of the money but also in destroying of the evidence intended to prove the theft. I have no doubt in my mind that it was the fault of the prosecution in starting the trial without first giving the notice necessary to open up the way to introduce secondary evidence. But considering the fact that those prosecuting such cases are not trained lawyers but police officers, I am prepared to forgive the slip, although there was some evidence that the prosecution all along expected to receive the original copies of the documents. I am therefore, persuaded that the Attorney General's reason to file the *nolle prosequi* was not capricious or oppressive. Nor do I find any abusive conduct in the process of filing the said *nolle prosequi*. I have in coming to these conclusions considered whether the applicant will suffer any prejudice if the termination of this case is permitted with a view of freshly charging him. Such prejudice would arise if basic rights would be violated or be likely to be violated in a fresh trial after allowing the *nolle prosequi* to take effect; or if the basic purpose of our criminal justice system which is predominantly to determine the guilt or innocence of the applicant is to be used towards the achievement of any different purpose by the Attorney General; or if the intended fresh prosecution is called for merely to punish the applicant and thus oppress him through the use of the said *nolle prosequi*. The applicant in all his submissions did not say in what way the Attorney General's *nolle prosequi* was abusive of the court process or how it was going to make the intended fresh prosecution, oppressive. He did not argue that the Attorney General, apart from the technical hitch of lack of primary evidence, has no adequate evidence to prove the one or more of charges in the case. On the other hand the Attorney General has persuaded this Court successfully that the DPP was acting *bona fides,* for good reasons in public and just interest.

This Court is accordingly, in the peculiar circumstances of this case successfully persuaded to declare the Attorney General's *nolle prosequi* as not capricious, nor oppressive, nor amounting to an abuse of the court process.

Prayer (7) of the applicant's application was that this Court do declare the *nolle prosequi* dated 2/7/2001 and signed by the director of Public Prosecutions, Mrs Uniter Kidula, invalid. His argument, if I understood it properly is that there is no such office in the Public Service of Kenya. Power to enter a *nolle prosequi* as legally provided lies with the Attorney General as per the provisions of section 82(1) of the Criminal Procedure Code. These powers are delegable under section 83 of the Criminal Procedure Code by the Attorney General's order in writing, to the Solicitor General, Deputy Public Prosecutor, Assistant Deputy Public Prosecutor or State Counsel. Mr Okumu rightly in my view, pointed out that by Legal Notice No 106 of 1984 the Attorney General delegated the said powers to said officers abovementioned. He however, again by Legal Notice No 331 of 1996 not only revoked the said Legal Notice No 106 of 1984, but delegated the same power and authority to the following officers:-

Director of Public Prosecutions

Deputy Public Prosecutor

Assistant Deputy Public Prosecutor

Senior Principal State Counsel, and

Principal State Counsel

Mr Okumu therefore, argued that the said Legal Notice No 331 of 1996 established the office of the Director of Public Prosecutions who in this case exercised the Attorney General's powers under section

82 and 83, to sign the *nolle prosequi* under discussion. I have examined the said legal notice and I have no reason to doubt that it was genuinely published by the Attorney General and intended to take effect. It took effect in view, without doubt in relation to all the officers mentioned in section 83. However, Mr Okumu was not heard to be arguing that section 83 of the Criminal Procedure Code recognised the existence of the office of the "Director of Public Prosecutions". Further more it is not, in my understanding, any or every public officer or advocate of the High Court appointed a public prosecutor who can carry out the powers given to the Attorney General under section 82 touching on a *nolle prosequi*. It is only, in my view, those named in section 83 who can sign a *nolle prosequi*. Mr Okumu did not urge that section 83 has ever been amended to include the office of "Director of Public Prosecutions".

Indeed when Mr Nyandieka raised the issue Mr Okumu in his wisdom chose not to specifically respond. As a result this Court was left unenlightened over this baffling issue. Some of the questions which spring up are: Has the office ever been established? If so, when? If the office was established, why was no amendment effected on section 83 of the CPC to include it? If the office was lawfully created but no amendment was brought to section 83 of CPC to include the new office, would the creation of the new office have had any effect on the section? Without finding it necessary to delve too much into the issue, my approach, view and decision would be this: that the officers who have authority to execute a *nolle prosequi* are only those clearly spelt out in section 83 aforementioned. Any officer who is not therein prescribed would be unqualified. No evidence was placed before me that the office of

Director of Public Prosecutions was at any stage created or exists apart from as shown in the Legal Notice No 331 of 1996. If the office indeed exists, then until now, in my opinion, its powers do not include the power to execute a *nolle prosequi* as per the clear provisions of section 83 of CPC. I would therefore, declare that the *nolle prosequi* dated 2/7/2001, is invalid and therefore, ineffective. It cannot therefore terminate proceedings in Nairobi CMCC Criminal Case No 2773 of 2000.

Having come to the above conclusions this Court orders that the said case should proceed for a hearing under section 208 of the CPC before the same or another magistrate. However, since the said *nolle prosequi* was invalidated on a mere technicality, the Attorney General in the meantime may if he so decides, immediately enter a valid *nolle prosequi* to terminate the proceedings on the same grounds as originally intended, after formally withdrawing that one of 2/7/2001. Orders accordingly.

Dated and delivered at Meru this 24th day of August, 2004

D.A. ONYANCHA

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JUDGE