



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO.66 OF 2004**

REPUBLIC PROSECUTOR

VERSUS

JOSEPH MATHERI NJAU AND 3 OTHERS..... ACCUSED

RULING

The applicants herein are charged with others with an offence of murder in High Court Cr. Case No.66 of 2004.

It so happened that the Attorney General has seen fit to file Nolle Prosequi in respect some of the Accused persons of the said case (Accused Nos.7 and 8 in specific). The filing thereof resulted in discharge of those two Accused persons by order of 26th July, 2004.

This application was then filed on 28th September, 2004, by four Accused persons (1st to 4th Accused persons in the criminal case.) It is provided under order 72 and 77 of the Constitution and of course all other enabling provisions of law. It is based on the grounds stated on the face of the application and on the affidavit sworn by Mr. Rumba Kinuthia the Learned Counsel for the applicants. The affidavit contains various statement of facts which cannot be within personal knowledge of Mr. Kinuthia but those statements lack the grounds or source of his information. I shall only quote paragraph 3 of the affidavit in support, namely,

“That on the material day the 1st , 2nd, 3rd, and 4th Accused persons were at their home in Karambaini in Kiambu.“ Paragraphs 4, 5, 6 and 7 all similarly contain facts which cannot be within the knowledge of the Learned Counsel.

Furthermore, the said affidavit details reasons why there are gaping holes in the prosecution case against the Accused persons. In other words, Mr. Kinuthia is putting forth his arguments in favour of the applicants before the trial.

I am not surprised when the state/Respondent has thought it fit not to file any replying affidavit in view of the above premises.

Mr. Kinuthia while opening his submissions asked me to go through the bundle of documents filed in Cr. Case 66 of 2004 and, at this stage, to arrive at the conclusion that the information is defective and that the Applicants are denied their right of personal liberty on the strength of charge brought against them.

He also complained on discriminative selection to file nolle prosequi against two accused persons who were jointly charged.

The court has to tread very carefully while balancing between personal liberty of the person and the public interest. The Attorney General is a custodian of the public interest and in this case the applicants were charged, and still are charged with two more accused persons, with a very serious offence.

To make it worse, I have not been given details of the alleged discrimination or abuse of power exercised by the Attorney General. Section 72 of the constitution itself gives the exceptions wherein the liberty of a person can be curtailed.

Furthermore Sec.276(1) of Criminal Procedure Code stipulates the grounds under and the procedure by which an information can be quashed. This application does not seek to do so.

I can only say that a court is not expected and cannot look into statements before hand and arrive at a conclusion in the manner in which it is asked to do. This can be dangerous and very derogatory to the advertial judicial system.

Lest I may be mistaken, I have to make it clear that this court has power to check the abuse of the process by any authority but only upon adequate evidence and under appropriate circumstances. This is not one of such cases and I shall refuse this application. The application is thus dismissed.

Dated and Delivered at Nairobi this 22nd day of November, 2004.

K.H. RAWAL

JUDGE