



Republic v Siatah (Criminal Case E040 of 2021) [2025] KEHC 6023 (KLR) (9 May 2025) (Ruling)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL CASE E040 OF 2021**

JR KARANJA, J

MAY 9, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

ISAAC SIRENGO SIATAH ACCUSED

RULING

1. Isaac Sirengo Siatah stands Accused of murder, Contrary to Section 203 as read with Section 204 of the *Penal Code*. It is alleged that on the 1st March 2014 at about 2:00am at Saniak Village, Kamoiywo Location, Nandi North County, he murdered Edwin Kipchumba [deceased].
2. On the 26th January 2016, the Accused appeared before the High Court at Eldoret for plea, but this was deferred to the 2nd February 2016, when he pleaded not guilty to the charge and was released on bond pending hearing and determination of the case.

Approximately two [2] years after the plea was taken the matter was on 31st July 2018, fixed for hearing on 27th November 2018, on which date it was adjourned to 9th April 2019 when it was further adjourned to 10th June 2019, despite opposition from the defence which called upon the prosecution to invoke Article 157[6] of *the Constitution* if they had no witness to call.
3. On 10th June 2019 the family of the deceased through the Learned Counsel, Mr. Choge, indicated that the matter had been reconciled under the Nandi Culture and that they no longer wished to proceed with it. The Learned Defence Counsel, M/s Khadambi, confirmed as much, but the Learned Prosecution Counsel, M/s. Kagali, indicated that they had not received a letter to that effect from the family of the deceased. The Learned Prosecution Counsel therefore requested for a mention date to enable them discuss the matter and take a decision on the way forward.
4. The matter was then carried forward to the 2nd July 2019, when the learned prosecution counsel informed the court that they had resolved as the offence of Director of the Public Prosecution [ODPP]



to proceed with the case to its logical conclusion. They therefore prayed for a hearing date and this was set for 28th October 2019.

5. Notably, on that 2nd July 2019, all the parties present including a representative of the Independent Police Oversight Authority [IPOA] confirmed having attended the meeting called by the Office of the Director of Public Prosecution [ODPP]. The representative of Independent Police Oversight Authority [IPOA], Mr. Kinoti, stated as follows:-

“We attended the meeting and a decision taken to proceed with this matter. The Accused is a police officer and this is a public interest case. It is a serious matter which cannot just be withdrawn by way of a plea agreement.”

6. On 28th October 2019, the prosecution indicated that they had eight [8] witnesses, but sought another date for hearing. As the trial judge was indisposed, the matter was fixed for mention on 21st January 2020 with a view to fixing hearing date.

The matter was accordingly fixed for hearing on the 21st and 22nd April 2020, and witness summons were to issue to Nathaniel Kipkosgei, Amon Kipkosgei, Elvis Cheruiyot and Veronica Chelagat.

7. With the advent of the corona virus [covid-19] in the month of March/April 2020, the hearing of the case stalled just like many other cases which were scheduled for hearing within the period. However, on the 14th October 2020, the matter was fixed for hearing on 3rd February 2021, but it was adjourned at the instance of the defence and re-scheduled to 19th May 2021 when it was indicated that the matter had been transferred to this court for hearing and disposal. The matter was therefore fixed for mention on 30th June 2021, when it was fixed for hearing on 29th September 2021 at Kapsabet.

8. The record does not reflect what happened on the 29th September 2021 as the matter was never mentioned at all. However, on 6th October 2021 the Deputy Registrar fixed the matter for hearing on 8th December 2021 when nothing happened again.

On 15th December 2021, the matter was fixed for hearing on 27th April 2022, when it was rescheduled for hearing at Kapsabet on 28th September 2023, and then again on the 23rd May 2023.

9. It was on that 23rd May 2023, that the matter was for the first time mentioned before this court. The prosecution through Learned Counsel, M/s. Asiyo indicated that they had two witnesses. The defence counsel, M/s. Kayeli holding brief for Mr. Kamau, drew to the attention of the court that the deceased's father had deponed an affidavit to the effect that the case be withdrawn. The family of the deceased through Mr. Choge confirmed as much even as they considered the possibility of resolving the matter through the Alternative Justice System [AJS].

10. The prosecution not being aware of the affidavit deponed by the father of the deceased sought for a mention of the matter at a later date or the way forward. The IPOA through Mr. Tenge, indicated that a plea bargain had failed and felt that there was an attempt by the Accused to interfere with the witnesses. In fixing the case for mention on 2nd October 2023, the court decried the delay in the hearing and determination of this matter and hinted to the parties to think of the Alternative Justice System [AJS] with a view of expediting this matter and ensuring that justice is served to both the victims of the offence and the Accused.

11. On 2nd October 2023, the matter was fixed for hearing on 18th January 2024, but due to the absence of the Accused and his advocate it was rescheduled to 22nd May 2024 for hearing.



Indeed, the hearing of the case effectively commenced on 22nd May 2024 with the prosecution calling two witnesses i.e. a doctor [PW1] and a retired chief [PW2] before asking for an adjournment to call nine [9] additional witnesses.

The application for adjourned though objected to by the defence was allowed by the court which then fixed the case for further hearing on 23rd October 2024, when it was again adjourned for mention on 21st January 2025 after the prosecution indicated that witnesses were not available and that there was a development in the matter.

12. On 21st January 2025, the prosecution sought for another mention date and this was slated for 7th April 2025, when the prosecution indicated that it was pursuing a plea bargain in the matter and were in the process of engaging IPOA and the defence.

The defence through Mr. Kamau was taken aback and surprised by what the prosecution was saying. In response, the prosecution stated that according to IPOA the witnesses were not available and it would not be viable to plea bargain.

13. The prosecution therefore applied for a mention date to engage on the matter with a view to a withdrawal. IPOA, through Mr. Tenge agreed with the prosecution, but the family of the deceased through Mr. Choge seemed not to agree and insisted that they are no longer interested in the matter and do not intend to testify.

The court noted that the prosecution was dillydallying in this matter thereby going against the interest of justice on the side of both the victims and the suspect. In that regard, the court fixed the case for further hearing on 6th May 2025, when the prosecution indicated that they were unable to proceed with the matter as they could not trace the key witnesses.

14. The prosecution through the Investigations Officer, Eugene Musoga Muteshi deponed an affidavit on why they cannot proceed with the matter and filed it on that 6th May 2025. They therefore applied to withdraw the case under Article 157 [6] and [7] of *the Constitution* and tendered a “nolle prosequi” to that effect.

The defence opposed the application and termed it an ambush. In that regard, they were given time to file a replying affidavit in opposition and they did as much on 8th May 2025, after which today's date [9th May 2025] was set for ruling.

15. The prosecution in responding to the replying affidavit by the defence contended that the ODPP has the power to institute and terminate proceedings at any stage and that Article 157 [6][c] of *the Constitution* applies to the circumstances of this case rather than Article 157 [7] of *the Constitution*.

16. Having considered the history of this case, the contentions of both sides with regard to the present application and the reasons for the same, this court notes that “Nolle prosequi” is a Latin phrase meaning “do not prosecute.” It is a power exercised by the DPP at any point before a final verdict is given in a criminal case for reasons such as innocence of the Accused, lack of sufficient evidence, plea negotiations or even due to triviality of the case. It is a formal notice of abandonment of a case partly or wholly by the prosecution.

17. Such power allows the Director of Public Prosecution to formally determine a case with consequences of having the Accused discharged rather than acquitted of the charge. The Accused would not be



cushioned against any future prosecution based on similar facts and evidence as provided in Section 82 [1] of the *Criminal Procedure Code* which reads as follows|: -

“In any Criminal Case and at any stage thereof before verdict or judgment as the case may be, the Director of Public Prosecution may enter a “nolle prosequi” either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the Accused shall be at once discharged in respect of the charge for which the “nolle prosequi” is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but discharge of an Accused Person shall not operate as a bar to subsequent proceedings against him on account of the same facts.”

18. The “Nolle prosequi” filed and entered herein by the prosecution on the 6th May 2025, is anchored on the provisions of Article 157[6] and 157[9] of *the Constitution* as supported by the averments of the investigating officer in this matter in his supporting affidavit dated 6th May 2025, duly opposed by the defence on the basis of the averments of the Accused in his replying affidavit dated 8th May 2025.
19. Article 157[1] of *the Constitution* establishes the office of Director of Public Prosecutions and Article 157[6] grants the Director of Public Prosecution state powers of prosecution to the extent that he/she may under Article 157[6] do the following: -
 - a. Institute and undertake criminal proceedings against any person before any court [other than a court martial] in respect of an offence alleged to have been committed.
 - b. Take over and continue any criminal proceedings commenced in any court [other than a court martial] that have been instituted or undertaken by another person or authority, with the permission of the person or authority.
 - c. Subject to clause [7] and [8], discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution or taken over by the Director of Public Prosecutions under paragraph [b].
20. There cannot be any doubt therefore that the Director of Public Prosecutions is clothed with the necessary constitutional power to withdraw at any stage any criminal proceedings such as the present one. It is in the exercise of this power that the prosecution filed the impugned “Nolle Prosequi” through the Senior Assistant Director of Public Prosecutions, Jackline Kiptoo.
21. Article 157 [9] of *the Constitution* provides that: -

“The powers of the Director of Public Prosecution may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

On its face value the “Nolle Prosequi” as drafted appears to be defective in as much as the enabling sub-section of Article 157[6] of *the Constitution* is not specified i.e. Article 157[6][c]. However, the omission does not affect the substance of the write as its intention and purpose is as clear as daylight i.e. to discontinue these proceedings at this stage.

22. Under Article 157[7] of *the Constitution* if the discontinuance of any proceedings under Clause [6] [c] takes place after the close of the prosecution’s case, the Accused shall be acquitted. This provision would not apply in the circumstances of this case as the prosecution case is yet to be closed.



23. Under Article 157[11] of *the Constitution*, the Director of Public Prosecution shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process in the exercise of the powers conferred by the provision.

Despite all the foregoing, the Director of Public Prosecutions may not discontinue a prosecution without the permission of the court as provided in Article 157[8] of *the Constitution*.

24. This means that the present application may not be allowed without proper and reasonable grounds which would not infringe on the Accused's constitutional rights to a fair trial and expeditious hearing and disposal of his case within a reasonable period.

With regard to the right to a hearing within a reasonable period or a speedy trial or indeed, fair hearing the constitutional bench of the High Court in the case of Adam Keynan Wehliye v Republic [2005] eKLR, it was held that the power of the "Nolle-prosequi" should be used to advance the cause of Criminal justice and not to obstruct it. The power cannot be used to infringe the Accused's constitutional rights.

25. In the aforementioned case, the decision of the Supreme Court of Zimbabwe in Re - Milambo [1983] 2LRC 28[SC] was cited. It was therein found that the Applicant's right to a hearing within a reasonable period had been infringed. In so finding, the Zimbabwe Supreme Court referred to the American Case of Klopfer 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 that: -

26. "by indefinitely prolonging this oppression, as

well as the "anxiety and concern accompanying the public accusation," the criminal procedure condoned 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."

Ultimately in the Kenyan case [supra], the court held that the power vested in the Attorney General of presenting the nolle prosequi is subject to an inquiry by the court to determine whether it has been exercised within *the constitution*. Perhaps it was for this reason that Article 157[8] of the 2010 Constitution was created in order to ensure that the criminal justice process is not abused.

27. In the case of Crispus Karanja Njogu v The Attorney General [Criminal Application No. 39 of 2000], the High Court in reference to the pre-2010 Constitution stated that: -

"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..... 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 court."

Even with the advent of the new 2010 Constitution the position as stated in the case hereinabove remains the same only that the role of the Attorney General in the Criminal Justice System has shifted to the Director of Public Prosecution.

28. It was further stated in the Njogu case [supra] that 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 received 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 [read, the Director of Public Prosecutions].



In the Keynan case [supra] it was held that the nolle prosequi entered therein was invalid, oppressive, unreasonable and capricious and was thus declared null, void and of no legal consequence.

29. Being guided by the law, the findings and observations of the court in all the foregoing decisions and considering the long history of this case and the reasons being advanced by the prosecution to enter the nolle prosequi which reasons are in the opinion if this court meant to serve the convenience of the prosecution rather than the interest of justice, this court agrees with and sustains the objection by the defence to the present application.
30. More so, considering that the Application is a clear abuse of the Criminal Justice System intended to rescue a hopeless case against the Accused in which the actual and real victims of the alleged offence are disinterested and consider the Accused to be an innocent party to the alleged Criminal Transaction which led to the loss of their kin. It is exactly for this reason that they have all along demonstrated a reluctance to testify in this case against the Accused whether or not they undertook a “cultural cleansing” of the Accused who ironically does not belong to their community, neither would he be bound by their cultural rites and traditions.
31. Besides, it is oppressive to arraign a person in court and prosecute him/her knowing too well that the evidence gathered against the person is insufficient and in between attempt to undo the sorry state by seeking a discontinuation of the case by a writ of nolle prosequi possibly for purposes of recharging the suspect at a future date thereby putting him in a perpetual state of anxiety and distress and grossly infringing his constitutional rights to a fair hearing “inter-alia”.
32. In sum, in presenting the nolle prosequi when the trial has been delayed for an inordinate period of time mainly due to the absence of the key prosecution witnesses, the prosecution acted capriciously and oppressively. This would definitely amount to an abuse of the Criminal Justice System. In the Keynan case [supra] it was firmly stated that in the scale of justice liberty comes before convenience.

The present application is hereby disallowed. The Nolle Prosequi is rejected and the matter shall proceed to its logical conclusion as clearly expressed by the prosecution on the 2nd July 2019.

Ordered accordingly.

DELIVERED AND DATED THIS 9TH DAY OF MAY 2025

HON. J. R. KARANJAH,

JUDGE

