



Republic v Momposhi alias Kipangara & another (Criminal Case E014 of 2024) [2025] KEHC 7850 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 7850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL CASE E014 OF 2024
CM KARIUKI, J
JUNE 5, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMUEL KISERIAN MOMPOSHI ALIAS KIPANGARA 1ST ACCUSED

JULIUS SINDA KURATE 2ND ACCUSED

RULING

1. The accused persons are charged with offence of murder. Particulars are that on 02/11/2022 at Isolo village, Sikawa location, Trans Mara West Sub- County, Narok County jointly with others not before court murdered Lilian Ratite Momboshi.They pleaded not guilty, and the matter went in pre-trial directions. The matter was fixed for hearing on 4.6. 2025.On this date, the ODPP intimated that he had two witnesses and ready to proceed against accused no 2. However, he notified court that a nolle pros Qui dated 3.6.2025 had been lodged with regard to the accused no 1 thus he desired to be heard on application for leave to entering nolle pros Qui and then proceed with hearing against Accused 2. The nolle is based on the facts that the prosecution, the IO forwarded mobile phone believed to link the Accused 1 with the offence for the forensic analysis at DCI headquarters and the report has taken longer than expected to availed to the IO The report and the mobile phones are crucial to proving the charges against accused 1.Further the state negotiated an agreement with accused two(2) to convert him to a prosecution witness but he backed down at last minute thereby occasioning the need for further investigations for availability for other evidence against accused 1.To this end the state is pursuing more witnesses /evidence before proceeding with charges against accused 1.and further, these activities need more time as the prosecution is not ready to proceed with charges against accused 1 in court expeditiously as provided by law thus the need to withdraw the charges to provide room for more investigations. The application was opposed by the accused persons counsels on the grounds that, accused 1 was arrested in 2022 and produced in subordinate court for permission to hold him for 14



- days to concluded investigations. He was released later on bond pending further investigations. He was later discharged. In 2024 together with accused two (2) were arrested after further investigation were completed and were charged with murder. The prosecution was then ready to proceed with trial. They even supplied bundles of the statements and documents to the defence.
2. However, they were stannned by the prosecution banging in a nolle notice to terminate the proceedings which was withdrawn on 4.4.2025.and hearing was fixed on 4.6.2025.The second accused advocate submitted that the prosecution of the accused persons has been lingering since 2022and by now is 2 years seven months and 29 or so days still accused person been chance to face their accusers' is the counsels contention that accused two is being tormented for refusing to testify against accused no 1 a right he cannot be denied. That his backing down on negotiation in which he was being lured into being converted into a witness against accused 1.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.
 3. 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.”
 4. 18.The “Nolle prosequi” filed and entered herein by the prosecution on the 3rd^h June 2025, is anchored on the provisions of Article 157[6] and 157[9] of the [Constitution](#) as supported by the grounds set in the notice, and duly opposed by the defence on the basis of the averments of the Accused in his replying affidavits earlier filed sworn dated 18th^h March 25^h March 2025.
 5. 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].
 6. 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 prosecutor counsel (ii) of Public Prosecutions, Emmanuel Okeyo.
 7. 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 against accused 1.
8. 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.
 9. 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*.
 10. 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.
 11. 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 *Klopper 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 clearly denies the Petitioner the right to a speedy trial which we hold is guaranteed to him by the sixth amendment”.
 13. 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.
 14. 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.”
 15. 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.



16. 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.
17. 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.
18. 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 or accusers ,the police and the prosecution are either unable or disinterested to face the the Accused who may be innocent parties to the alleged Criminal Transaction which led to the loss of a life. It is exactly for this reason that they have all along demonstrated a reluctance to testify in this case against the Accused persons.
19. 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”.
20. 32.In sum, in presenting the nolle prosequi when the trial has been delayed for an inordinate period of time mainly due to the insufficiency of evidence or absence of the key prosecution witnesses, the prosecution is perceived to have 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. Thus, court makes the orders;
 - i. 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 date they took hearing date of the matter.
 - ii. Ordered accordingly

DATED AND DELIVERED AT KILGORIS THIS 5TH JUNE 2025

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CHARLES KARIUKI

JUDGE

