



**Republic v GBM & another (Criminal Case E027 of 2023)  
[2025] KEHC 11048 (KLR) (28 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E027 OF 2023**

**AC BETT, J  
JULY 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GBM ..... 1<sup>ST</sup> ACCUSED**

**EDWIN ININA MUHANGA ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The two Accused persons, GBM and Edwin Inina Muhanga Alias Ndolia are charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The information before the court is that on diverse dates between the nights of 27<sup>th</sup> and 28<sup>th</sup> June 2023, at Lunyalala Village in Mukulusu Sub-location, Muranda Location, Kakamega East Sub-County within Kakamega County, jointly with others not before court, the Accused persons murdered one Elizabeth Minayo.
2. The Accused persons pleaded not guilty to the charge and the matter proceeded to hearing. After 5 witnesses had testified, and with an indication that only 3 witnesses were remaining, the 1<sup>st</sup> Accused who had been remanded in custody at the Kakamega Children Remand Home, failed to attend court.
3. Pursuant to the 1<sup>st</sup> Accused’s absence in court, the officer-in-charge of the Kakamega Children Remand Home attended court and under oath, stated that the 1<sup>st</sup> Accused had escaped from their custody on 1<sup>st</sup> June 2024 by scaling a two metre wall. He stated that they reported the incident at the Kakamega Police Station vide OB No. 52/01/06/2024.
4. On 21<sup>st</sup> January 2025, Corporal James Tajeu who was the investigating officer attended court and testified that after receiving the report on the 1<sup>st</sup> Accused’s escape, they embarked on a search for him by first visiting his home at Mukulusu village where the family members confirmed that he had never gone home. Further inquiries made in December were fruitless and since at the time of the escape the 1<sup>st</sup>



Accused did not have any form of identification, it was difficult to trace him. The investigating officer said that he also made attempts to trace the 1<sup>st</sup> Accused through his mother's relatives at Magala village, Virembe Location but to no avail.

5. On 7<sup>th</sup> April 2024, the prosecution sought to terminate the proceedings under Article 157 (6) (c) and 157 (9) of the Constitution. In furtherance of their application, the prosecution entered a 'Nolle Prosequi' dated 7<sup>th</sup> April 2025. The basis of the Nolle Prosequi is that the 1<sup>st</sup> Accused absconded court and the case against the 2<sup>nd</sup> Accused is predicated on a confession statement made by the 1<sup>st</sup> Accused and which had not yet been produced. The prosecution submitted that if they were to proceed with the case as it was, it would automatically lead to the acquittal of the 2<sup>nd</sup> Accused. The Accused's Counsel did not oppose the application.
6. The Director of Public Prosecutions requires the leave of the court in order to terminate criminal proceedings.
7. Article 157 (6) (c) of the Constitution provides:-

“

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

Article 157 (8) and (9) provide:-

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

8. While exercising his powers to enter a Nolle Prosequi, the Director of Public Prosecutions is guided by Article 157 (11) of the Constitution which states:-

“(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions 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.”

9. From the legal provisions set out in the Constitution, whereas the Director of Public Prosecutions has discretion as to when to enter a Nolle Prosequi, the discretion must be exercised with due regard to the interest of the public. The Director of Public Prosecutions should also observe due care lest he applies the powers donated to him by the Constitution to protect suspects or frustrate the cause of justice. The decision to enter a Nolle Prosequi must therefore be well thought out and should not be capricious, irrational, unreasonable, nor arbitrary. It must be demonstrated that there are cogent reasons for seeking the termination since the Director of Public Prosecutions is enjoined by the Constitution to act justly and fairly.



10. The circumstances under which the court can grant leave to enter a Nolle Prosequi were considered by a three Judge Bench in the case of Republic v. Assa Kibagendi Nyakundi (Criminal Revision 524 of 2020 [2023] KEHC 1063 (KLR) when the court held as follows:-

“ 80. We hold that, in considering whether to grant the application for discontinuance of the proceedings, the trial court needed to consider primary the threshold set under article 157(11) of the Constitution as to whether the applicant was acting in public interest, the interests of the administration of justice and to prevent and avoid abuse of legal process.

81. In that case to determine whether the applicant complied with the aforesaid threshold the court will consider inter alia:-

- a) Whether the application is brought in good faith.
- b) Whether matter in issue is a matter in which the society has a stake.
- c) Whether the party against whom the proceedings are to be discontinued will suffer any prejudice if the application is allowed or denied.
- d) Whether the reasons advanced for the application are reasonable, sufficient and/or adequate.
- e) Whether the matter to be withdrawn has commenced hearing or is fresh matter.
- f) Whether there has been inordinate delay in making the application for withdrawal.
- g) The sentiments of the respondent to the application.”

11. Flowing from the above rendition, it is clear that the ODPP should be allowed to enter a Nolle Prosequi only if he can demonstrate that he has acted within the parameters set out under Article 157 (11) of the Constitution.

12. I have reviewed the evidence on record as at the time the 1<sup>st</sup> Accused absconded. There is no evidence, direct or circumstantial, linking the 2<sup>nd</sup> Accused to the murder of the deceased. The Prosecution’s evidence was clearly reliant on a confession that was said to have been made by the 1<sup>st</sup> Accused in which he implicated the 2<sup>nd</sup> Accused. In the absence of the 1<sup>st</sup> Accused, the said confession is rendered useless as it was yet to be produced. Further, chances of apprehending the 1<sup>st</sup> Accused are quite remote as he was a minor at the time of his arrest and did not have any form of identification which can be used to trace him.

13. In view of the stated difficulties faced by the Prosecution, I find that the application to terminate the proceedings is proper. There is no abuse of the process of the court, and the application is in the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Proceeding with the hearing will clearly not serve any useful purpose in the circumstances.

14. In the premises, and in view of the fact that the Prosecution has indicated that in the event the 1<sup>st</sup> Accused is arrested, the proceedings can be re-opened, I allow the application to enter a Nolle



Prosequi. The case against the 1<sup>st</sup> and 2<sup>nd</sup> Accused is hereby terminated and the 2<sup>nd</sup> Accused discharged accordingly.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28<sup>H</sup> DAY OF JULY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Mr. Ogenga for the Accused

Court Assistant: Polycap

