



REPUBLIC OF KENYA



**Republic v Chebii (Criminal Case E028 of 2022)
[2025] KEHC 10587 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E028 OF 2022
RN NYAKUNDI, J
JULY 21, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

KENNETH KBIWOTT CHEBII ACCUSED

RULING

Background

1. The accused person before court was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 3rd August, 2022 at around 9:00PM at Chemamwes village, Kelji sub-location, Sergoit location in Moiben Sub-County within Uasin Gishu County in the Republic of Kenya murdered Hyvine Jepkorir Kurui.
2. During the pendency of the proceedings, it was pointed out that the accused person was not fit to plead and as a result, a second medical report was called for, which concluded that the accused has Bipolar Mood disorder and was not fit to plead. As a consequence, the prosecution entered a Nolle Prosequi on 13th May, 2024.

Decision

3. From the circumstances of the case as presented, two key questions emerge: first, whether the Director of Public Prosecutions has the authority to withdraw from prosecuting the defendants, and second, whether granting this withdrawal would compromise the defendants' fundamental rights to a fair trial and just administrative treatment.
4. The Black's Law Dictionary, 8th edition defines a nolle prosequi as "a legal notice that a law suit or prosecution has been abandoned."



5. The powers of the DPP to enter a nolle prosequi are derived from Article 157 (6) (c) of the Constitution which stipulates that –

“(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).”

6. The constitutional framework for prosecutorial discretion must be understood within the broader context of the separation of powers doctrine. Article 157 of the Constitution establishes the independence of the Director of Public Prosecutions while simultaneously imposing constitutional safeguards to prevent arbitrary exercise of prosecutorial power. This delicate balance ensures that while the DPP enjoys prosecutorial independence, such independence is not absolute and remains subject to judicial oversight particularly where fundamental rights may be implicated.

7. The requirement for judicial permission under Article 157(8) serves as a crucial check against potential abuse of prosecutorial discretion. This constitutional safeguard recognizes that the decision to discontinue criminal proceedings affects not only the immediate parties but also broader public interests including public confidence in the justice system, the rule of law, and the rights of victims and society at large.

8. In considering whether the Director of Public requires permission of the court when applying for a Nolle prosequi, a three-bench court in the case of; Republic v Nyakundi (Criminal Revision 524 of 2020) [2023] KEHC 1063 (KLR) (Crim) (19 January 2023) (Ruling) stated that: -

“93. In our considered opinion, the provisions of article 157 (6)(c) and (8) is wider in scope as the applicant’s power to discontinue proceedings can be invoked under sections 82 (1) of the Code only and section 87 (a) of the Code.

94. Pursuant to article 157 (8) of the Constitution under section 25 (1) of the Office of the Director of Public Prosecution Act, the applicant is obligated to seek for permission of the court before applying for discontinue of any criminal proceedings.

96. Pursuant to the afore provisions it follows that, in construing the provisions of section 82 of Code, regard must be had to the subject to the provisions of article 157 (8) of the Constitution. Therefore, whenever the applicant applies to withdrawal any criminal proceeding either under section 82 (1) or 87(a) of the Code or any other law, the applicant must seek for the permission of the court.”

9. Further in the same case, the court considered factors to take into account in allowing or disallowing the Director of Public Prosecution’s application discontinue criminal proceedings and held that: -

“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.”

10. In applying these factors to the present case, this court notes that the application for nolle prosequi is grounded in objective medical evidence establishing the accused's unfitness to plead due to Bipolar Mood disorder. The prosecution's decision appears to be made in good faith, based on professional medical assessment rather than convenience or expediency. The mental health condition of the accused is not a matter within his control, and continuing with prosecution against a person unfit to plead would violate fundamental principles of natural justice.
11. This court is mindful that the decision to discontinue proceedings in a murder case is not one to be taken lightly, given the gravity of the alleged offense and the interests of the victim's family and the broader community. However, the law recognizes that there are circumstances where the continuation of criminal proceedings would be contrary to the interests of justice. The accused's mental unfitness to plead, as established by medical evidence, constitutes such exceptional circumstances.
12. Article 157(8) of the *Constitution* establishes without ambiguity that prosecutorial discontinuation requires judicial sanction. In considering such applications, this court must apply rigorous scrutiny to prevent abuse of process, malicious intent, unauthorized exercise of power, or oppressive conduct, thereby ensuring that discretionary authority operates within the bounds of justice and public interest.
13. Having considered all the circumstances of this case, including the gravity of the offense, the interests of all parties, the medical evidence regarding the accused's mental state, and the broader interests of justice and public policy, this court is satisfied that the Director of Public Prosecutions has demonstrated compelling grounds for the discontinuation of these proceedings. The application is made in good faith, based on objective medical evidence, and serves the broader interests of ensuring that the criminal justice system operates in accordance with constitutional principles and human rights standards.
14. In light of that, the Nolle prosequi is allowed, resulting in discontinuation of the case and discharge of the accused.
15. Orders accordingly.



DATED, SIGNED AND DELIVERED VIA CTS ELDORET THIS 21ST DAY OF JULY 2025

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R. NYAKUNDI

JUDGE

