



**Republic v Mwangi (Criminal Case E007 of 2023)
[2024] KEHC 10084 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE E007 OF 2023**

GL NZIOKA, J

JULY 19, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

FREDRICK NGARUIYA MWANGI ACCUSED

JUDGMENT

1. The accused was arraigned before the court on 26th May 2023, charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the charge are that on the 12th day of April 2023 at an unknown time at Kamathatha within Gilgil Sub-County within Nakuru County they murdered Peris Murugi Wairiuko.
2. The information was read to him and he pleaded not guilty and the matter set down for hearing. On 24th October 2023, the hearing proceeded with the prosecution calling one witness, Salome Wanjiku Wairiuko (PW1). The matter was then set down for further hearing on the 10th April, 2024. However, hereafter the prosecution filed a *Nolle prosequi* to discontinue the proceedings against the accused.
3. On 11th April, 2024 the court directed that the victim's family be availed to confirm that they were aware of the prosecution's intention to discontinue the proceedings against the accused person, and the Probation Department file a victim's impact report. The matter was then set down for further orders on 9th May, 2024.
4. On 9th May, 2024, the family of the deceased informed the court that they were not aware of the prosecution's intention to withdraw the case. However, upon inquiry by the court, it transpired that the family members were divided on whether to concede or oppose the application for entry of *Nolle prosequi*.
5. The accused's children; Neema Nyambura and Caleb Mwangi held the view that the *Nolle prosequi* be allowed and the accused be released while other family members; Rose Wangui Wairiuko, the mother



- of the deceased, Daniel Muiruri Wairiuko the brother of the deceased and Salome Wanjiku Wairiuko the sister of the deceased held contrary view that case be heard to its conclusion.
6. The matter was stood over to 14th May 2024 and referred to the In-charge prosecution at Naivasha High Court to establish whether or not the views of the victim's family were sought before the decision to file a *Nolle prosequi* was made and stood over the matter to 11th June, 2024.
 7. On the 11th June, 2024, the learned State Counsel Mr. Abwajo informed the court that, the victim's family were called to the Office of the Director of Prosecution Naivasha but did not avail themselves. That it was the view of the prosecution, that views of the victim's family were necessary as a matter of good faith but not as a requirement under the law for the Director of Public Prosecution to seek their view before a *Nolle prosequi* can be entered.
 8. That the prosecution has recommended that the case be determined by way of an inquest which position is supported by the defence.
 9. Pursuant thereto the court directed the parties to address it on the mandate of the Office Director of Public Prosecution to enter a *Nolle prosequi*, and whether it was subject to the court's leave or permission.
 10. On 8th July, 2024 the learned State Counsel Mr. Abwajo submitted orally that Article 157 of *the Constitution* of Kenya gives the Director of Public Prosecution the powers to institute or discontinue any case before judgment is entered. However, he conceded that the Director of Public Prosecution requires the permission of the court to discontinue a case.
 11. That the court only will only interferes where it finds that the Director of Public Prosecution has exercised the discretion to terminate a case for an improper purpose, or where there is failure to exercise statutory discretion fairly, or where the decision is irrational as held in the case of; High Court Criminal Case 39 of 2012 *R vs Boniface Ochieng and Mayaka Henry*.
 12. That in the present case there is nothing to indicate that the *Nolle prosequi* fell in the purview of the grounds above. Further in any case, a *Nolle prosequi* is not an acquittal but a discharge.
 13. Furthermore, courts have observed that section 23 of the Victim's Protection *Act No. 17 of 2014* does not give a structure in which information is to be shared and/or given to the victim. He relied on the case of; *Republic v Kamotho & another* (Criminal Case 60 of 2019) [2022] KEHC 16055 (KLR) (Crim) (6 December 2022) (Ruling) where the court stated that the Victim's Protection Act does not stipulate a time frame in which information is to be given to the victim by the Director of Public Prosecution and whether failure to consider the victim's views was fatal.
 14. He submitted that the *Nolle prosequi* herein having been brought in good faith and in the interest of justice, it is properly before the court.
 15. The defence on its part relied on his submissions dated; 2nd July, 2024 and cited Article 157 (6)(c) of *the Constitution* of Kenya, 2010 which states that the Director of Public Prosecution can discontinue criminal proceedings at any stage before judgment is delivered.
 16. That, Article 157, (8) of *the Constitution* of Kenya, 2010 and section 25(1) of the *Office of the Director of Prosecutions Act* provides that the Director of Public Prosecution may not discontinue prosecution without the permission of the court.
 17. Reliance was placed on section 82 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which states that the Director of Public Prosecution's power to enter a *Nolle prosequi* is subject to the supervision



of the court. However, the court shall only interfere with the same where it is shown that the Director of Public Prosecution has abused that discretion.

18. Further, that Article 157(11) of *the Constitution* of Kenya gives a caveat on the conduct of the Director of Public Prosecution's functions and states that the Director of Public Prosecution shall have regards to public interest, administration of justice and need to prevent and avoid abuse of the legal process.
19. The defence relied on the case of *Republic vs Sarah Wairimu Kamotho* Criminal Case No. 60 of 2019 where the court quoted with approval the case of; *Seenoi Ene Persimei Esbo Sisina & 8 others vs Attorney General* (2013) eKLR and stated that the court shall intervene in an application to enter *Nolle prosequi* where it is shown that the Director of Public Prosecution abused his discretion, or exercised it for improper purposes in breach of a duty to act fairly or where there is failure to exercise statutory discretion.
20. The defence submitted that in the present case there is no element of abuse of discretion by the Director of Public Prosecution in the exercise of its powers under the law to warrant the intervention of the court and as such the application be allowed and he discharged from custody.
21. In considering the case in the light materials placed before the court I note that the application for entry of a *Nolle prosequi* herein is brought under the provisions of Article 157 (6)(c) and 157 (8) of *the Constitution* of Kenya that states: -

- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - (c) subject to clauses (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).

And sub article (8) states as follows:

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

22. Furthermore, the application is premised on section 82 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides: -

- “(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions 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.
- (2) If the accused is not before the court when a *Nolle prosequi* is entered, the registrar or clerk of the court shall forthwith cause notice in writing of the entry of the *Nolle prosequi* to be given to the keeper of the prison in which the accused may be detained.”



23. However, the above provisions should be read in tandem with Article 157 (11) of *the Constitution* which gives a guideline on the Director of Public Prosecution's discretion in making any decision including the discontinuance of criminal proceedings under the Article and 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.”

24. 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.”

25. 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.”

26. Similarly, the High Court in *Seenoi Ene Parsimei Esbo Sisina & 8 others v Attorney General* [2013] eKLR stated that: -

“24. Under what circumstances can the Court allow a *Nolle prosequi*? In my view the decision whether or not to enter a *Nolle prosequi* is an exercise of discretion and ought to be exercised bona fide based on reasons. Where Parliament clearly vests the exercise of discretion on a person or authority it would be wrong in the Court’s view to intervene in the merits of the decision. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.”

27. Pursuant to the aforesaid, it is clear under Article 157(8) of *the Constitution* of Kenya 2010 there is no dispute, that to discontinue a suit and/or matter the Director of Public Prosecution requires the court’s permission. And while considering the application the court must ensure that there is no abuse of the legal process, mala fides, misuse of power or oppression and that the discretion is judiciously exercised in the interest of administration of justice and the public.

28. In view of the fact that the prosecution intends to conduct an inquest in the matter and there is no evidence of abuse of the discretion by the prosecution in the entry of the *Nolle prosequi*, I allow the same, the case is discontinued and the accused discharged accordingly.

29. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 19TH DAY OF JULY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The accused present

Ms. Achieng for the prosecution

Mr. Bogonga for the accused

Ms. Ogutu: Court Assistant

