



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO. 36 OF 2017**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**BONFACE ODIAGA KAMSA.....ACCUSED**

**RULING**

1. The accused person herein was produced in court for the first time on 12<sup>th</sup> September 2017, when he was presented before the Deputy Registrar, BS Khapoya, who directed that he be produced before the Judge on 25<sup>th</sup> September 2017 for the purpose of taking plea.

2. Plea was not taking until 5<sup>th</sup> March 2018, when the accused was presented before Sitati J. The charges were read to him, and he pleaded not guilty, and was granted bond of Kshs. 500, 000.00 with sureties. Hearing was fixed for 17<sup>th</sup> October 2018. Curiously, the hearing date was brought forward, on 11<sup>th</sup> June 2018, to 12<sup>th</sup> July 2018. On 12<sup>th</sup> July 2018, the prosecutor did not have witnesses, and pointed out that the witnesses had not been bonded and he did not have the police file. It was also, on 12<sup>th</sup> July 2018, pointed out that the earlier date for hearing was meant to be 17<sup>th</sup> October 2018, when the trial court would be unavailable, and another date was allocated, for 13<sup>th</sup> November 2018. On 13<sup>th</sup> November 2018, three witnesses were in court, but the matter did not proceed as the defence advocate was not in court, on account of ill-health, and the matter was rescheduled for 5<sup>th</sup> February 2018, probably meaning 5<sup>th</sup> February 2019. The matter did not proceed on 5<sup>th</sup> February 2019, despite three witnesses being present, as the defence advocate had passed on, and a fresh advocate had to be appointed to take over the defence. A defence advocate was appointed on 20<sup>th</sup> February 2019, and the matter was fixed for hearing on 17<sup>th</sup> September 2019.

3. Come 17<sup>th</sup> September 2019, the matter did not proceed as the witnesses were not in court for they had not been bonded. The next hearing was on 3<sup>rd</sup> March 2020, when the prosecution indicated that the police file had not been brought. The court file was placed aside, and later in the day the prosecution indicated that the police file had been availed and they were ready to proceed with three witnesses. The defence then indicated that they wanted to enter into a plea bargain agreement, something that the prosecution said they were amenable to. The matter was put off for the purpose of plea agreement. When the matter was next placed before the Judge on 15<sup>th</sup> July 2020, the matter of plea bargain was not raised, for the same was allocated 19<sup>th</sup> October 2020 for hearing.

4. On 19<sup>th</sup> October 2020, the State was not ready to proceed with the hearing on account of lack of witnesses and the police file. The defence did not object, but asked that the matter be listed as last adjournment. The matter was adjourned, and was marked as last adjournment. The State indicated that if the state would not be ready at the next hearing date it would enter a *nolle prosequi*. The next hearing was fixed for 16<sup>th</sup> December 2020, and the court recorded that the matter shall be terminated should the prosecution not be ready then. On 16<sup>th</sup> December 2020, the State was not ready, for it did not have witnesses, neither did the prosecutor have the police file, and he asked for another date which was resisted by the defence. The court declined to adjourn the matter, noting that there had been a last adjournment for 19<sup>th</sup> October 2020. I allocated 4<sup>th</sup> February 2021 as the date when the State was to enter a *nolle prosequi*. The court did not sit on 4<sup>th</sup> February 2021, and the matter was mentioned next on 6<sup>th</sup> March 2021, when the prosecutor indicated that the State had not yet filed the *nolle prosequi*, and asked for a further date. On the next date, 3<sup>rd</sup> June 2021, the prosecutor indicated that her instructions were to have a date of hearing. She further informed the court that the State did not intend to enter a *nolle prosequi*, but was intent on a plea bargain. The defence stated that there could be a last adjournment, which the court declined to grant pointing out that a last adjournment had been granted previously. The court undertook to peruse the file and give directions on the way forward.

5. It is plain from the record, that the State presented three witnesses on three occasions. On the first two, the matter was adjourned because the advocate for the defence was ill and later died. The State was not to blame for the delay then. Thereafter the matter was adjourned several times on account of absence of witnesses and unavailability of the police file. On a day when witnesses were present the State agreed with the defence to adjourn the matter so that they could enter into a plea bargain agreement. When the matter came up next there was no plea bargain, and the State was asking for a hearing day, on condition that should it be unable to avail witnesses, it would enter a *nolle prosequi*. On the date appointed for hearing, the State did not avail witnesses, and the prosecution requested for a mention date to file the *nolle prosequi*. On the appointed date for mention, the State had not filed the *nolle prosequi*, instead the court was informed of two contradictory positions, one, that the State intended to have the matter heard fully, and, two, that that the State did not intend to enter a *nolle prosequi* but to a plea bargain with the accused.

6. From the record it is clear to me that the State is not keen, one way or the other, to proceed with the matter. When the matter is due for hearing the State would not be ready to proceed. When the matter is fixed for mention for entry of *nolle prosequi* at the request of the State, the State changes tact and stated that it does not intend to enter one, but was not keen on an entry of a *nolle prosequi*, but a plea bargain instead.

7. The accused herein was first presented in court on 12<sup>th</sup> September 2017, but plea was not taken until 5<sup>th</sup> February 2018, some five or so months later. Since 5<sup>th</sup> February 2018, no witness has ever taken to the witness stand to testify against the accused person, for the various reasons indicated above. The State talked of a *nolle prosequi*, which was not actualised. It is over four years since the accused was produced

in court, yet the case against him has never commenced. That clearly runs counter to the fair hearing principles, that the accused ought to be tried within reasonable time. That has clearly not happened in this case. As no witness has ever testified, I hereby order that the charges against the accused person are hereby terminated. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF DECEMBER., 2021**

**W MUSYOKA**

**JUDGE**