REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

PETITION NO. 15 OF 2018

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED DENIAL, VIOLATION OR INFRINGEMENT OF FIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 49(1) (A), ARTICLE 50(1), (2) AND THE BREACH OF ARTICLE 157 (6) (C) AND ARTICLE 157 (7) OF THE CONSITUTION OF KENYA

BETWEEN

SAMUEL MUNGAI CHEGE..................PETITIONER/APPLICANT

AND

REPUBLIC..RESPONDENT

RULING

This is a petition by the applicant against the defendant brought pursuant to a notice of motion dated 28/9/2018 expressly to be anchored under section 1A, 1,2,3 1B (1) section 3A of the Procedure Act Article 49(1) (a) 50 (1) (2) 157 (6) (c) and 157 (7) of the Constitution. In the notice of motion the applicant seeks the following orders:

> **1. That this honourable court does order the immediate and unconditional release of the applicant until a time when all the key witnesses in the offence the applicant is being charged with have been found.**
>
> **2. That this court does caution the state against the re-arrest of the applicant until such key witnesses in this matter have been found and or traced and the prosecution can prosecute their case without using ugly tactics with respect to this application.**

The applicant filed an affidavit deponed by his counsel Mr. Waiganjo detailing the circumstances upon which the orders sought should be granted.

In a rejoinder to the application the respondent filed a replying affidavit sworn by PC Morris Muli who is the Investigating Officer. In the affidavit PC Muli deponed that the applicant was facing a serious charge of murder contrary to section 203 of the Penal Code. That the state had challenges to secure the key witnesses who took flight out of the jurisdiction of this court. It is further averred in the affidavit that at all times the state has engaged the necessary machinery to assist them trace the witnesses to testify against the applicant. That in the interest of justice the state upon appraising the case file made a decision to enter a *nolle prosequi* on 27/9/s018but such an entry is not a bar to any subsequent prosecution of the applicant. The defendant further asserted that fortunately after the application for *nolle prosequi* was granted it emerged that the key witnesses had been traced and apprehended. That their presence as crucial witnesses should not be done away with under the guise that the state had entered a *nolle prosequi* against the applicant.

Factual Background

The applicant was on 23/1/2018 indicted before this court to stand trial for the offence of murder contrary section 203 as read with section 204 of the Penal Code. The applicant pleaded not guilty to the charge. He was represented at the trial by Mr. Waiganjo Advocate. In the pre-trial conference schedule, the state confirmed availability of witnesses and did apply for a hearing date. The trial of the applicant case was scheduled severally on diverse dates but none of the witnesses summoned attended the hearing. This forced the state to enter a *nolle prosequi* under section 82(1) of the Criminal Procedure Code.

The so called *nolle prosequi* was never to last for long as the applicant was apprehended and detained at Kajiado Police station in relation to that charge. On the respondent's own affidavit, they averred that witnesses have been traced and were in custody of the police station. It was therefore deemed necessary to re-arrest the applicant in order for him to face justice for the offence.

Submissions by Counsel for the Applicant

Mr. Waiganjo in relation to the notice of motion submitted and argued that the DPP action to enter a *nolle prosequi* and soon thereafter arrest the accused/applicant is an abuse of the court process. Counsel further submitted that the applicant has been in remand custody since his arraignment before court in January 2018 without any evidence being adduced in support of the charge. He contended that on several occasions the matter has been scheduled for hearing but not a single witness has been able to attend the trial on behalf of the state. According to learned counsel as a result of the delay in prosecuting the applicant he has suffered prejudice and an infringement of his rights to a speed and expeditious trial guaranteed by the constitution. Mr. Waiganjo further submitted that the DPP has no right to re-arrest and detain the applicant knowing very well there are no witness to testify on the pending charge of murder against him.

As regards the Petition Mr. Waiganjo relying on the following authorities urged this court to make a finding that the re-arrest and continued detention of the applicant is illegal, unjust, capricious and an abuse of the court process: The **Constitution of Kenya 2010**, **Jared Alupi Makokha v Republic 2008 Eklr, Philomena Musembi v Republic 2005 eKLR, Moses Lipeya v Republic & 2 Others 2004 eKLR 547.**

On the part of the state Mr. Meroka submitted that Detective Muli replying affidavit lays down the foundation of the case and the reasons for entering a *nolle prosequi* and subsequent re-arrest of the applicant. Mr. Meroka further submitted that the exact nature of the powers of the DPP to initiate, continue or terminate any Criminal proceedings are powers conferred under Article 157 1, 6, 7, 9, 10 & 11 and shall not be questioned by anybody. Mr. Meroka argued and submitted that the DPP was forced to review the case based on the law and on the new evidence availed by the Investigating Officer. It is against this background counsel submitted that the applicant was re-arrested so that he can face trial for the initial offence of murder. Learned counsel for the state placed reliance on the following authorities. **The Constitution of Kenya, the office of the Director of Public Prosecutions Act, Jared Alupi Makokha (Supra), Republic v Boniface Rora Onchieku & another 2017 eKLR, Republic v Philip Muthiani Kathiwa 2015 eKLR**

Analysis and Determination

The question involved in this case is whether the state had a right to re-arrest and charge the accused person afresh upon entering a *nolle prosequi* under section 82(1) of the Criminal Procedure Code.

By virtue of Article 157 (6) (a) of the Constitution, the DPP has power to institute and undertake criminal proceedings against any person before court (other than a court martial) in respect of any offence alleged to have been committed. Further, subject to Sub-section (7) and (8) discontinue at any stage before judgement is delivered any criminal proceedings instituted by the DPP or takes out by the DPP. Under Sub-section (6) and (7) if the discontinuance of any proceedings under Sub-section 6(c) taken place after the close of the prosecution case, the defendant shall be acquitted. In Sub-section (11) In exercising the powers conferred by this Article 157, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

The Latin phrase *nolle prosequi* is not captured in our constitution but it is expressly stated in section 82(1) of the Criminal Procedure Code. The Oxford English Dictionary 2nd Edition 1989 defines the phrase to mean unwilling to pursue. Therefore, by the DPP entering a *nolle prosequi* it means he is no longer interested in pursuing the case against the defendant.

When considering the decision to enter a nolle prosequi it is of course necessary for the DPP to be guided at all times by the values and principles of governance espoused in Article 10 of the Constitution. In the case of **Harrison Auko v Republic HCMSC Application No. 55 of 2006** the court held that

> ***"It is expected that the DPP is to exercise his power to enter a nolle prosequi for the public good and in good faith. In short, his action is expected to promote public interest. The court is enjoined to impeach its use if and where it is exercised in bad faith, oppressively, capriciously or for interest antithetical to public good. The discretionally power can only be exercised where the DPP acts in good faith and in the public interest or for the public good if and where it is shown that the exercise of power to enter nolle prosequi under section 82 of the Criminal Procedure Code was in bad faith; or was oppressive or capricious or against public interest, the High Court would be entitled to intervene to challenge not the DPP power to enter a nolle prosequi but rather the use of that power."***

As stated in **Seenoi Ene Parsimei Esho Sisina & 8 others v A.G. 2013 eKLR** The Court held That:

> ***"An application to enter a nolle prosequi can only be a subject of courts intervention where it has been shown that the DPP has abused his discretion where the decision maker exercises discretion for an improper purpose where the decision maker is in breach of the duty to act fairly, where the decision maker has failed to exercise statutory discretion reason reasonably where the decision maker acts in a manner to frustrate the purpose of the Act donating the power where the decision maker fetters the discretion given. Where the decision fails to exercise discretion, where the decision maker is irrational and unreasonable."***

It should be appreciated from the above principles that a *nolle prosequi* in our situation is a temporary measure which has the effect of stalling the proceedings unless the order is granted after the close of the prosecution as expressly stated under Article 157(7) of the Constitution which requires the court to acquit the defendant.

It is of fundamental importance to hold that the DPP has the power to re-charge an accused (defendant) person after a *nolle prosequi* unless is in breach of any of the grounds stated in the case of **Parsimei Esho Sisina (Supra).** Cited above.

The issue here is whether the accused charge sheet should be quashed an acquittal be entered in his favour.

There is no hard and fast rule to determine the powers and extent of entering a *nolle prosequi* by the Director of Public Prosecution. As

shown in the Scholarly text of Sir **Elwyn Jones 1969 CLJ at page 49** the act and decision to initiate a prosecution is a grave one as demonstrated in this passage:

> ***"The decision when to prosecute, as you may imagine is not an easy one. It is by no means a law officer considers that a conviction might be obtained that it thought desirable to prosecute sometimes there are reasons of public policy which make it undesirable to pursue the case perhaps the prosecution would enable him to present himself as a martyr or perhaps he is too ill to stand his trial within great risk to his to his health or even his life. All these factors enter into the consideration".***

Counsel for the applicant submitted that the court should take cognizance of the fact that the accused has not been accused a fair hearing within a reasonable time under Article 50 of the Constitution. In the course of hearing the petition learned counsel of the accused is an infringement of his right to freedom and security under Article 29 of the Constitution.

In the history of the case unfortunately on several occasions the state had difficulty in procuring the necessary witnesses. The presumption of innocence a right for every accused person under Article 50 2(a) of the Constitution placed a burden on the prosecution not to continue holding in determination the accused person. The importance of the nolle prosequi was therefore to balance the rights of the victims with that of an accused person to underscore the constitutional protections on a right to a fair speedy trial with a reasonable time. The significance of the nolle prosequi is that if the circumstances which led to the entry of the nolle prosequi remain the same the accused will remain discharged of the offence until such a time there is prima facie evidence incriminating him of the offence. In the previous trial the case was discontinued before any meaningful evidence could be adduced by the prosecution. The rule against double jeopardy is not applicable to the facts of this case.

In the words of **Rand J of the supreme Court of Canada in case of Cullen v The King 1949 SCR 658-6568**. The court held:

> ***"At the foundation of Criminal Law lies the Cardinal Principle that no man shall be placed in jeopardy twice for the same matter."***

The **Supreme Court of the United States in Green v United States (1957) 355 US184** had occasion to rule on this principle in the following words:

> ***"The underlying idea, one which is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though in a court he may be found guilty."***

On whether the trial proceedings amount to a double jeopardy and breach of constitutional rights of an accused person. This court relies on the principles in the case of **Clark v Attorney General of Lagos State 19861 QLRN 119.** The court held as follows:

> ***"Experience of the practice and procedure in our courts and in fact in the law under which the practice in this country show that a trial is regarded a complete trial when both parties are heard on the merits of the issues in dispute between them. It may also amount to a complete trial where a party with full opportunity to present its case facts in the court of the proceedings to do so and abandoned the compliance. All powers to settle issues between the parties is vested in courts and courts must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through acts of persecutions. It is for that reason that the accused person despite the power to file indictment on an information should not be indirect to face trial that from the outset it was clear he should not face."***

The emerging jurisprudence in Kenya had is the constitutional provisions on victim rights and the enactment of the Victim Protection Act 2014 section 9(1) of the Act provides that:

> ***"A victim has a right to be informed in advance of the evidence the provision and defence intends to rely on and to have reasonable access to that evidence. The manifest purpose of the Victim Protection Act is normally to assist in the prosecution of cases but also they are entitled to notice and information to the on-going proceedings and decisions of the court from a criminal prosecution. It is perfectly proper to state in my view that the victim is entitled to disclosure of sufficient material in advance to justify the requirement of entry of a nolle prosequi by the Director of the Public Prosecutions. The relevance and interference of this consideration is the fact that the decision not to prosecute has a direct correlation with the victim rights to compensation by the offender as expressly stated in section 23(1) of the Act."***

Luke Mofan in his article: Realizing of Justice for the victims before International Criminal Court succinctly stated on this issue as follows:

> ***"Administrative justice encompasses the outcomes of Judicial processes. For victims' substantive justice involves redressing the harm. They have Suffered and the Causes of Victimization. This Corresponds with an Effective Remedy in Human Rights Law which has developed three rights for the victims of gross violations: Truth, Justice and reparations." …………………".***

It cannot be too strongly overemphasized that the Director of Public Prosecutions pursuant to Article 10 of the constitution and section 4 of the Fair Administration Act should be mandated by way of disposition and decision on *nolle prosequi* to give reasons to discontinue the prosecution of a criminal charge. To this extent when a situation of abuse of the process arises and the protection of the victim rights, of a judicial review mechanism can be initiated founded on the issues in connection with the decision.

In the instant case despite the accused being indicted of the offence of murder since January 2018 he has not been tried before this court on the merits. A purported trial has always hit a snag in the circumstances the prosecution alleged reasons constitute non-availability of witnesses who took flight out of the jurisdiction of this court. I think that Article 50 of the constitution safeguards and insulates rights to a fair hearing to every person to be tried in our courts. The basis upon which the DPP moved to enter a *nolle prosequi* in the accused favour has been explained in their replying affidavit and submissions by learned principle prosecution counsel Mr. Meroka for the state.

From the submissions by learned counsel Mr. Waiganjo on behalf of the applicant there is no evidence that by virtue of entry of the *nolle prosequi* and subsequent recharging of the accused on the same offence he has been deprived of the right to fair trial and due process that would constitute a violation of his constitutional rights. Given the stipulation in Article 50 and the enumerated rights identified in accordance with these provisions there is constitutional protection against double jeopardy against the accused person. It is significant to bear in mind that the trial in due course to be commenced by the DPP the accused is still presumed innocent of the criminal charge in the indictment until proven guilty. See Article 50 2(a) of the Constitution.

I am of the view that the purported retrial of an accused person notwithstanding the discharge order by this court pursuant to the entry of the *nolle prosequi* would not constitute a violation to right to a fair trial. With regard to the applicant's complaint on his immediate arrest after the *nolle prosequi* was entered due weight has been given to the hierarchy of rights as deponed in the illustration in Article 26 of the Constitution it concerns the right to life. Quite properly I find guidance from the principles enunciated in the case of **People v Shaw 1982 IRISC at page 56** where the court observed as follows on this issue:

> ***"The hierarchy or priority of the conflicting rights must be experienced, both as between themselves and in relation to the general welfare of society. This may involve the turning down or even doting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and importance right in a given set of circumstances may be prepared and given application."***

Having so dealt with the circumstances of this case, I find that there is substance on an infringement and violation of a right to life of the victim of murder is superior as opposed to the right to the fundamental freedoms on personal liberty of an accused person. The accused case has not been heard on the merits. He is still presumed innocent until the contrary is proven by the state.

I take cognizance of the fact that the accused/applicant has been in prison remand for a period of 9 months since his indictment without a single witness testifying as to his culpability. This was one of the reasons why the DPP invoked section 82(1) of the Criminal Procedure Code to enter a *nolle prosequi* to discontinue the criminal proceedings.

However, in the circumstances of this case the position is that there is fresh and compelling evidence from a witness who has been out of jurisdiction of this court whom the police have in custody. I am far from being convinced that the former charge should be considered a nullity on grounds that a *nolle prosequi* was entered and consented to by this court.

It would be contrary to public policy and effective administration of justice not to permit the DPP to prosecute the accused for the charge in which there is evidence of a violation of the right to life under Article 26 of the constitution.

For the above reasons I am unable to intervene in this case with a view to quash the charge or permanently prohibit the trial of the accused person on grounds that there has been an abuse of discretion and in breach of the duty to act fairly by the DPP. This court must strike a balance between the fundamental rights of an accused person, the protection of victim rights to the crime and right to the community at large who look up to the courts to deliver justice when dealing with offences more significantly those classified as serious.

In the result the notice of motion and subsequent petition filed by the applicant is lost for lack of merit. Accordingly, the accused person shall be required to take plea for the offence of murder contrary to section 203 of the Penal Code. The prosecution and admission of evidence be undertaken without unreasonable delay

Dated, delivered and signed in open court at Kajiado on 18th October, 2018.

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R. NYAKUNDI

JUDGE

Representation:

- Mr. Waiganjo for the applicant
- Mr. Meroka for the state
- Accused person present in person