**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 8 OF 2009**

**REPUBLIC**

**VERSUS**

**FRANCIS WERU MBUGA**

**RULING**

The accused was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, cap 63; according to the information, on the 1st day of December, 2008 at Mt Kenya hospital in Nyeri South district within central province, jointly with others not before court, the accused murdered David Maina Wangeci.

He pleaded not guilty to the charge and so his trial commenced in earnest before Kasango, J. on 12th February, 2009. On that day, three witnesses testified for the state and thereafter the learned counsel for the state, Ms Ngalyuka, applied for adjournment to enable her call other four witnesses; she informed the court that the four were the only remaining witnesses. The court allowed the state's application and adjourned the hearing.

It later turned out that the three witnesses who testified were the only ones that the state was able to bring to court as none of the four remaining witnesses ever turned up every time this case up for hearing. In order to bring to a halt the numerous adjournments occasioned by the state for the same reason for lack of witnesses, the court granted the state a final adjournment on 27th April, 2016. When the matter came up again for hearing on 21st July, 2016, the learned counsel for the state informed the court yet again that he did not have witnesses but considering that the court had previously granted him the final adjournment, he sought to enter a *nolle prosequi* and terminate the case against the accused person.

Mr Kimani, the learned counsel for the accused, opposed the state's application and urged that it was not being made in good faith; according to the learned counsel the application by the state flew in the face of the **article 157 (11)** of the Constitution and did not serve public interest.

A *nolle prosequi* is basically a formal entry on record by the state notifying the court that it does not wish to prosecute the case and it is in effect withdrawing the charges against the accused person. In Kenya, this concept is encapsulated in **article 157(6) (c)** of the Constitution which states as follows:

> ***157(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-***
>
> ***(a) ..***
>
> ***(b) …***

***(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).***

Clause 7 simply states that the accused person will be acquitted if the proceedings are discontinued after the close of the prosecution case. Clause 8, on the other hand, is categorical that the Director of Public Prosecutions cannot exercise his powers under paragraph (c) without the permission of the court; it says:

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

I would think that one of the reasons, if it is not the only one, why the Director's power to discontinue proceedings is subject to the court's permission is for the court to look into and consider whether the reasons given for the intended discontinuance are sufficient, reasonable or otherwise valid. The rationale behind it is that this power is bound to be abused unless it is subject to checks and balances which, in a way, are embedded in clause 11 of article 157; that clause reminds the Director of Public Prosecutions that in exercising his powers under this article, including the power to discontinue criminal proceedings, he must have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

One of the means through which the court can consider whether in exercise of his powers the Director has taken into account these tenets is to interrogate the reasons given for any course he has taken or has proposed to take. It is from this perspective that I have to consider the *nolle prosequi* in issue.

As noted, the background against which the *nolle prosequi* is sought to be entered is the unavailability of prosecution witnesses whenever the accused person's trial has come up for hearing. In fact, when the state sought to enter the *nolle prosequi*, this is what its learned counsel stated:

***I am not ready to proceed though I was granted the last adjournment on 3rd December, 2015. The state indeed has been granted several adjournments for the same reason of non-attendance of witnesses. The state had a good case against the accused. I have sought instructions from my senior Mr Kaigai on the way forward. I have instructions to file a nolle prosequi because we have failed to secure witnesses. Should we get all the witnesses we shall reinstitute the case.***

It is appreciated, and it is not in doubt, that the state cannot prosecute its case without the necessary witnesses; however, I am of the humble view that it is not sufficient for the state to simply make a bare assertion that the witnesses are not available and rest its case. It is incumbent upon it, particularly in such a case where it seeks to take such a drastic course as discontinuance of a trial, to demonstrate that it has done all that is within its power to marshal its witnesses; it must demonstrate to the satisfaction of the court that it cannot secure the attendance of its witnesses notwithstanding that it has made such efforts as are reasonable in the circumstances and exercised the necessary diligence to secure them.

In my humble view, if the Director of Public Prosecutions was to be allowed to arraign anybody in court, keep him there for five years and ultimately seek to terminate his trial for lack of witnesses without proffering any reason or reasons why these witnesses are lacking and without demonstrating whether any attempts have been made to secure them, it would be a clear case of disregard of the public interest in the criminal justice system; it would also not be in the interest of the administration of justice and it would amount to a blatant abuse of the legal process.

Yet this appears to be exactly what the Director has sought to do in this case; I have perused the record and I have been unable to find one occasion when the state informed the court either the reasons for the non-attendance of the witnesses or the efforts the state had made to secure their attendance in court, including taking such simple steps as bonding them to attend court. Of worth noting, the four witnesses the state was to call were two government doctors and two police officers; these are civil servants whose attendance in court to testify should not have been a problem and who, by the very nature of their duties, bear a duty to testify for the government which they work for.

I am bound to conclude that if I accept the state's *nolle prosequi*, I will only have succeeded in perpetuating the contravention of article **157 (11)** of the **Constitution** which as noted is the yardstick against which the exercise of the powers by the Director of Public Prosecutions under **article 157** is measured. The *nolle prosequi* has not been demonstrated to be in the interest of the public; neither has it been shown to protect the interests of the administration of justice. To the contrary, it appeals to me as an instrument that serves no purpose other than that of abuse of the legal process. I reject it.

**Dated, signed and delivered in open court this 10th February, 2017**

Ngaah Jairus

**JUDGE**