



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO 40 OF 2012

(FORMERLY NYERI HC CR CASE NO 26 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MWANGI MWERERI

LINUS MWIRIGI MWANGI.....ACCUSED

R U L I N G

1. On 18th October 2015 I granted the prosecution the last adjournment in this case upon the ground of non-attendance of its witnesses. On 18th May 2016 when the case came up for further hearing, yet again the prosecution did not have their witnesses, and I declined to grant any further adjournment and directed that the trial do proceed after the tea break.
2. When the court resumed, learned prosecution counsel, Miss Keya, informed the court that she had consulted her senior, Mr. Njeru, during the break, and that he had instructed her to seek a mention of the case in about a week to enable preparation and presentation of a *nolle prosequi*. Mr. Njeru was said to be away at Meru on duty. He was the only one at the DPP's office Murang'a with the delegated authority to sign a *nolle prosequi*. Miss Keya did not have such authority.
3. Learned counsel for the accused persons, Mr. Mbuthia, opposed this new move by the prosecution; he viewed it as a mere attempt to go round the refusal of adjournment.
4. In allowing the case to be mentioned in a week the court pointed out that what was being sought by the prosecution was not an opportunity to proceed with the trial another day, but to have some leeway in how the prosecution might want to handle the matter in the future.
5. When the case was mentioned on 24/05/2016 Mr. Mbuthia for the accused person was absent. Mention of the case was therefore pushed to 04/06/2016. On that date Mr. Mbuthia was present; so was Mr. Njeru for the Republic. Mr. Njeru stated his *nolle prosequi* was ready and sought leave to terminate the proceedings by it. Mr. Mbuthia resisted. More or less the same arguments as had been made before were made. This ruling therefore is on the issue whether or not the prosecution should be permitted to terminate the trial of the accused persons by *nolle prosequi* under **section 82** of the ***Criminal Procedure Code***.

6. The powers of control of prosecutions that the **Director of Public Prosecutions** enjoys are set out in **Article 157(6)** of the **Constitution of Kenya, 2010**. They are, the power to institute and undertake criminal proceedings against any person before any court (other than a court-marshal) in respect of any offence alleged to have been committed; the power to take over and continue any criminal proceedings commenced in any court (other than a court martial) that has been instituted or undertaken by another person or authority with the permission of the person or authority; and the power to discontinue at any stage before judgment is delivered any criminal proceedings instituted by himself or taken over by him.

7. The power of discontinuance is subject to the condition that if the discontinuance takes place after closure of the prosecution case, the defendant shall be acquitted. The power of discontinuance is also subject to permission of the court.

8. The Accused persons were charged with **murder** contrary to **section 203 as read with section 204** of the **Penal Code** by information dated 16/09/2011. The particulars of the offence are that on 22/08/2011 at Kiuu Village, Nginda Location in Murang'a County, they jointly murdered one **Peter Irungu Mwirigi**. Their plea was taken at the High Court, Nyeri on 29/09/2011. They were granted bail in a ruling dated and delivered on 06/07/2012 (Sergon, J). They have been out on bail since then.

9. Eventually their case was transferred to this court from Nyeri. Their trial commenced on 16/06/2014 before my predecessor (Ngaah, J) who took the evidence of the first prosecution witness. Thereafter the prosecution witnesses failed to attend court a number of times, and eventually further adjournment of the trial was refused as already seen.

10. The main point of objection taken by Mr. Mbutia for the Accused persons is that permitting the prosecution to terminate the trial by *nolle prosequi* will merely afford them another opportunity to re-arrest the Accused persons and charge them afresh. This, he submitted, would not be a proper exercise of the power to enter a *nolle prosequi*. Mr. Mbutia cited the case of **George Gitau Wainaina –v- Republic [2008] eKLR.**'

11. In that case the High Court comprising a 3-judge bench held that in the particular circumstances of the case concerned the Director of Public Prosecution's effort to enter a *nolle prosequi* was not a proper exercise of that power. The case concerned was a criminal prosecution before a magistrate's court where the prosecution had already closed its case and the accused (who was the petitioner before the High Court) was in the middle of presenting his defence. It was pointed out that the Director of Public Prosecutions had power to discontinue the trial under **section 87** of the **Criminal Procedure Code, Cap 75**. Under paragraph (a) of that section (that is, before the accused is called upon to make his defence), the resultant discharge of the accused would not be a bar to subsequent proceedings against him on same facts. But if the discontinuance was under paragraph (b) (that is, after the accused person is called upon to make his defence), then he would be acquitted. It was thus clear in the case cited by Mr. Mbutia that by seeking to enter a *nolle prosequi* under section 82 of the Criminal Procedure Code, the Director of Public Prosecutions wanted to deny the accused his right to be acquitted under section 87(b) of the same Code. The court held, *inter alia*, that this would not be proper exercise of the power to enter a *nolle prosequi* when the trial had proceeded that far.

12. The situation in the present case is markedly different. Only one prosecution witness has testified; there are many more who could have testified, but have not attended court. It is said that the Deceased in this case was closely related to the accused persons, and that the prosecution witnesses are also closely related to the accused and the Deceased. The case cited by Mr. Mbutia is therefore distinguishable.

13. Murder cases ordinarily evoke strong emotions, obviously because a human being has lost a life. Justice for the victim, which term includes the victim's family and relatives, is of as much concern to the court as justice for the accused. In the instant case the accused persons have not been tried within a reasonable time as is their constitutional right. That is why this court refused any further adjournments.

14. An expeditious and timely trial would have afforded justice not only to the accused persons, but also to the victim. True, the delayed trial has affronted the accused persons' constitutional right to trial within

a reasonable time. But the same delayed trial has denied the victim justice, which would have come with a judgment rendered after a full trial (it matters not if conviction or acquittal ensued!).

15. In these circumstances I consider that it is in the interests of justice that the Director of Public Prosecutions be permitted to retain some measure of his constitutional control over the situation. This may or may not result in a future prosecution of the accused persons upon the same facts. If it does, there would be nothing to stop the accused persons from resisting the prosecution as they may deem appropriate; but that is a bridge best crossed if and when it is gotten to.

16. For the above reasons, I will permit the prosecution to enter the *nolle prosequi*. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF JULY 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 15TH DAY OF JULY 2016