



REPUBLIC OF KENYA

High Court at Nakuru

Civil Miscellaneous 345 of 2005

1. SEENOI ENE PARSIMEI ESHO SISINA

(SUING ON HER OWN BEHALF AND ON BEHALF OF HER CHILDREN)

2. LEAH NAISHORUASISINA

3. JOHN OPONUSISINA

4. LORNA SILOLESISINA

5. HANNAH LAILASISINA

6. PENINAMASHIPEISISINA

7. KELVIN TAJEUSISINA

8. ELIZABETH RESIATOSISINA

9. EMMANUEL LODI SISINA.....PLAINTIFFS

AND

ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. The case before this court arises from the termination, through the entry of a *nolle prosequi*, of Nakuru High Court **Criminal Case No. 36 of 2005-Republic-Vs.-Thomas Patrick Gilbert Cholmondeley** (the said case) on 17th May 2005. The facts giving rise to the current matter are that on 19th April, 2005 one **Samson Ole Sisina**, an employee of Kenya Wildlife Service was shot Dead at Soysambu Ranch, Gilgil. **Thomas Patrick Gilbert Cholmondeley**, the Interested Party herein was arrested by the police on suspicion of having shot the deceased. He pleaded not guilty and thereafter the Attorney General “**AG**” through the Director of Public Prosecutions “**DPP**” terminated the above mentioned criminal case against him through a *nolle prosequi*. The *nolle prosequi* was accepted by **Muga Apondi, J.** vide his ruling delivered on 18th May, 2005; leading to the filing of the current matter.

2. The suit was commenced by way of an Originating Summon “**OS**” dated 26th May, 2005 and is instituted by **Seenoi Ene Parsimei Esho Sisina** (the deceased’s wife), suing on her own behalf and on behalf of her children. The summons are expressed to be brought under the provisions of **Order 36 rule 7**

of the Civil Procedure Rules, Section 386 to 388 of the Criminal Procedure Code; Chapter XIX of the Penal Code, Sections 26, 60,67,70 and 86 and 123 (8) of the Constitution of Kenya (repealed), Rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001; the Judicature Act; the Interpretation and General Provisions Act; The Law Reform Act together with all other enabling provisions of the law.

3. The Defendant filed a Notice of Motion dated 9th August, 2005 in which it raised several Preliminary Points of Objection. The Notice of Motion was argued before **Osiemo J. and Mugo J.** and ruling delivered on 18th October, 2006.

THE PLAINTIFFS' CASE

4. The Plaintiffs seeks various declarations relating to the legality and constitutionality of the termination, through the entry of a *nolle prosequi*, of the said case on 17th May 2005 and the order of public inquest. There are 13 prayers in the OS as follows:

- a. **Whether in the circumstances of this case, the Honorable Attorney General acted in violation of the Constitution when he Terminated the murder trial in Republic-vs.-Tom Patrick Gilbert Cholmondeley Delamare by way of exercise of the power of *Nolle Prosequi* and thereby infringed on the Plaintiffs' constitutional rights;**
- b. **Whether in the circumstances of this case, the Honorable Attorney General acted in violation of the Constitution when in terminating the murder trial in Republic-vs.-Tom Patrick Gilbert Cholmondeley Delamare he purported to act through a person described as the Director of Public Prosecutions which person is unknown to law and could not therefore discharge on his behalf the constitutional functions as provided for under Section 26 (5) of the Constitution of Kenya;**
- c. **Whether in the circumstances of this case, the Honorable Attorney General acting in the manner he did exceeded his powers under the Constitution of Kenya or any other written law in purporting to initiate an inquest into the death of Samson Ole Sisina in spite of the murder trial in Republic-vs.-Tom Patrick Gilbert Cholmondeley Delamare and in total disregard of the content of police investigations;**
- d. **Whether the Honorable Attorney General is enjoined under the Constitution of Kenya to exercise his powers under the provisions of Section 26 thereof in a manner that accords with respect for fundamental rights and freedoms of the individual, the reasonable constitutional expectations of Kenyans, the due process of the law, the rule of law, internationally recognized standards respecting Exercise of such power amongst civilized and democratic nations and if so, whether in the circumstances of this case, the Honorable Attorney General has acted mala-fides, capriciously, unlawfully and therefore unconstitutionally;**
- e. **Whether the Honorable Attorney General has usurped the duties and functions of the court, to hear and determine the accused's defense and decide on his culpability and determine if he is innocent or guilty or otherwise; and whether the Honorable Attorney General has usurped the duties and functions of the accused's advocates, to defend and acquit the accused person;**
- f. **Whether the steps that were taken by the relevant constitutional officers and or organs of government relating to the Plaintiffs' loss at the death of husband and father are unlawful and unconstitutional;**
- g. **Whether the said action of the Honorable Attorney General acting in the manner he did was a violation of Sections 70 and 82 of the Constitution of Kenya in that it sought to afford discriminatory and differential treatment to the Plaintiffs and other victims of the offence of the deceased's murder vis-a-vis the accused person in Republic-vs.-Tom Patrick Gilbert Cholmondeley Delamare;**

- h. **Whether the Plaintiffs' reasonable expectation for a just and constitutional government has been infringed upon particularly the Plaintiffs' expectation as to a just, fair, equitable and constitutional conduct by the Attorney General and expectation as to a criminal justice system that is fair, just, impartial and conducted reasonably expeditiously, and expectation that all due judicial process relating to their loss have been lawfully and constitutionally observed, to determine the cause and circumstances and atone the death of her husband and her children's father;**
- i. **Whether the Plaintiffs' expectation as to protection of law, due regard for rule of law, and compliances with the constitution and other laws without departure have been infringed upon;**
- j. **Whether the Plaintiffs' constitutional rights have been violated, are being violated and will continue to be violated by the unconstitutional conduct of the Honorable Attorney General;**
- k. **Whether the Constitutional Court ought to make such orders, issue such writs and give such directions as it considers appropriate declaring the conduct of the Honorable Attorney General untenable in civilized and democratic jurisdiction such as obtains in Kenya, unconstitutional and of no effect;**
- l. **Whether the Constitutional Court ought to review the orders of Honorable Justice Muga Apondi made on 17th May 2005, recall the same, and in its state order that the proceedings commenced against *Republic-vs.-Tom Patrick Gilbert Cholmondeley Delamare* be entertained, heard and determined by the High Court in exercise of its criminal jurisdiction and in the event the Honorable Attorney General is unwilling to prosecute, the Plaintiffs be at liberty to commence and conduct such prosecution;**
- m. **Whether the Plaintiffs have suffered injury, loss and damage, and if they have, whether they are entitled to damages.**

5. The Originating Summons is supported by the affidavit of **Mrs. Seenoi Ene Parsimei Esho** sworn on 26th May, 2005. In the said affidavit after narrating the events that led to the deceased's death, the arrest charge and entry of the *nolle prosequi* she deposes that based on the legal advice from her advocate, she believes that the entry of the said *nolle prosequi* and the order for an inquest are improper, and mala fides and or inequitable, and or unfair, and or unjust, and or unlawful, and or invalid, and or unconstitutional on the grounds that the interests of the petitioners were not taken into account or considered and they were not afforded an opportunity of being heard on the matter as victims of the murder and dependants of the deceased; that the decision as to the innocence of the interested party was solely based on the version given by the interested party hence was a usurpation of the duties and functions of the court; that the said decision was made in ignorance of the witness statements and the recommendations of the police. It is further deposed that the said decision was unlawful and was made without jurisdiction since neither the Attorney General nor the Director of Public Prosecutions has authority to seek an inquest but just to receive an inquest report; that the cause and circumstances of death of the deceased being known and having been admitted by the interested party there was nothing to attract an inquest; that the police having decided to charge the interested party the Attorney General was estopped from finding that there was paucity of evidence and the Attorney General's view; that the exercise of the discretion to enter *nolle prosequi* was not in good faith and not in public interest and was based on purposes other than the interested of criminal justice hence was an abuse of office; that the *nolle prosequi* was purportedly entered by a person who held himself as Director of Public Prosecutions which office does not exist in law hence the said *nolle prosequi* was null and void; that the plaintiffs' reasonable expectation as to the gamut of justice predicated upon judicial determination of the deceased's death through an impartial and expeditious criminal justice system has been prejudiced by the discriminatory manner with which the Attorney General and the said DPP have handled the same which manner according to the deponent is attributed to the attributes of the accused person. The particulars of the matter in which the said discrimination is manifested according to the plaintiffs is the acceleration of the investigation with a view to acquitting the accused, the unlawful entry of the said *nolle prosequi*, the travelling of the DPP to Nairobi with a view to entry of the said *nolle prosequi*, the defence mounted by the Attorney General and the DPP in favour of the accused and affording the accused an opportunity to flee out of the country

before the said inquest was conducted.

6. It is therefore contended that this Court has powers to review the orders entering a *nolle prosequi* and the inquest by recalling the same and declaring the same unfair, unjust and unconstitutional and that the charge be reinstated and in the event that the Attorney General is averse to the prosecution that the plaintiffs be granted permission to proceed with the same.

7. In support of their case, Learned counsel for the Plaintiffs **Mr. Katwa Kigen** submitted on their behalf and reiterated the contents of the Summons and the Plaintiff's' affidavit. According to counsel, the DPP acted in bad faith in entering the *nolle prosequi* and referred to sections 386, 387 and 388 of the ***Criminal Procedure Code***. According to him under section 386, there are instances when an inquest is available and these are instances of suicide, where a person is killed by another or in cases of accident; where a person is found dead in circumstances that show that someone has committed a crime concerning the death; where a person has gone missing under circumstances that show that he is dead. Section 387 of the Code, on the other hand deals with situations where a person dies in police custody or in prison custody. It is submitted that in cases of suicide, accidental death, suspicion of crime or where a person goes missing, the issue is left to the police to determine whether or not an inquest is to be conducted. The only case where the discretion is given to the Attorney general is where one is missing and is suspected to be dead, where a person dies while in the police or prison custody. In this case, it is submitted that the circumstances did not empower the Attorney general to order for the inquest hence the Attorney General acted in excess of his power in acting in the manner he did and hence abused the Court process since it was admitted that it was the act of the interested party that led to the death of the deceased. Therefore the only issue for determination was whether the death was murder or manslaughter. According to counsel, sections 386, 387 and 388 aforesaid are meant to determine the person who has caused the death of another.

8. It is further submitted that section 388 in so far as it states that the Attorney General may direct a Magistrate to hold an inquiry is unconstitutional.

9. It is contended that the DPP misused his power by conducting public media interviews in which he emphasized that he had listened to the Interested Party without extending the same consideration to the victims of the situation and accordingly did not discharge his duty to the public. By applying that the inquest be conducted in Nairobi, it is submitted that that was a further indicator of ulterior motive on the part of the DPP. On the issue of jurisdiction, it was submitted that the same had been canvassed and there is no appeal against the decision. In the written submissions, the plaintiffs stated that with respect to the issue of this court's jurisdiction to entertain the suit herein against the ruling of **Justice Muga Apondi**, learned counsel submitted that the matter before court is about violations of fundamental rights and this court sitting as a Constitutional court has jurisdiction to hear the case in exercise of its original jurisdiction under Section 84 of the repealed Constitution of Kenya. In support of this argument he cited **Peter Ng'ang'a Muiruri vs. Credit Bank and Another, HCC Misc. 1382 of 2003**. The plaintiffs also relied on several authorities in support of the Plaintiffs' case among them: **Crispus Karanja Njogu vs. AG HCC Criminal Appeal. No. 39 of 2000**, **Associated Provincial Picture Houses Limited vs. Wednesbury Corporation [1947] 1 K.B 223**, **Githunguri vs. Republic (1986) KLR 1**, **Gregory & Others vs. Republic [2004] 1KLR 55**.

THE DEFENDANT'S CASE

10. The Defendant opposed the Plaintiffs' case through a replying affidavit sworn by **James Mungai Warui** dated 3rd August 2005 and submissions. **Mr. Mungai** submitted on behalf of the Defendant that the order which the plaintiffs challenge was validly given by the High Court at the time when the Constitution gave the Attorney general the powers to commence and terminate criminal cases. In interpreting that power, it is submitted that the High Court in **Crispus Karanja Njogu vs. AG** (supra) held that the power is not absolute and could be exercised by the High Court on reasons given by the Attorney general. It is submitted that when the DPP applied to terminate the case by way of *nolle prosequi*, he gave reasons for the said termination after which the Court retired to write a ruling in which

the court accepted the same and directed that the matter be referred to the Chief Magistrate's Court for an inquest. By accepting the entry of the nolle, it is submitted that the Court found that the same was proper and valid at that time. It was submitted that in all criminal cases the rights of the victims are well taken care of and when the Attorney General or the DPP decides to terminate the case, he looks at the victims' welfare and only on being satisfied does he go on with the trial. According to the Defendant the accused person had been arrested and arraigned in court before the Attorney general had the opportunity to look at the investigation file and thereafter he was of the opinion that the evidence was insufficient and that it was in the interest of the accused that the trial ought not to proceed.

11. It is submitted that the entry of the nolle was not a bar to subsequent charge with the offence. The High Court having made an order that an inquest be considered that should have been done and the investigation completed so that the same could be acted on. However that did not proceed due to the present proceedings.

12. It is submitted that section 385 deals with situations in which a Magistrate holding a first class status is empowered to hold an inquest generally where there is sudden death hence the AG was not coming under sections 386, 387 or 388 but under section 385. The request was not an order but just a request.

13. On jurisdiction it is submitted that after the request for the inquest the High Court made an order which order cannot be vacated save on review or on appeal since the High Court sitting as a Constitutional Court cannot revise the said orders and reliance is placed on **Kenya Bus Service & Two Others vs. Attorney General & Another Misc. Civil Suit No. 413 of 2005.**

14. In the written submissions filed on behalf of the Defendant it was submitted that under Section 82 of the Criminal Procedure Code and Section 26 (3) (c) of the Repealed Constitution of the Republic of Kenya which was in force at the time the current proceedings were instituted, the AG has power to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or another person or authority. Further, it was submitted that Section 83 of the ***Criminal Procedure Code*** (hereinafter referred to as the Code) allows the AG to delegate his powers of terminating criminal proceedings granted under Sections 81 and 82 of the said Code to state counsels and the exercise of those powers is to operate as if they have been exercised by the AG. In the said criminal case, the AG delegated this power to the DPP pursuant to Legal Notice No. 331 of 1996 as amended by Legal Notice Number 72 of 2005. The learned counsel sought to rely on **Kamau John Kinyanjui vs. The Attorney General, High Court Civil Case No. 1176 of 2004** in that regard. Learned counsel further submitted that the AG's powers to enter *nolle prosequi* were subject to interference by the High Court under Section 123(8) of the Constitution for purposes of ensuring they were exercised fairly, judiciously and not arbitrarily or capriciously. He cited **Crispus Karanja Njogu vs. A.G (supra) and Otieno Clifford Richard vs. Republic, Misc. Civil Suit No. 720 of 2005 (O.S)** in support of that contention and invited the court to look at **Justice Muga Apondi's** ruling of 18th May 2005 which he claims shows that the High Court considered the reasons advanced by the AG while seeking to terminate the said criminal case and found them to be plausible and hence accepted the *nolle prosequi*.

15. It was also submitted on behalf of the Defendant that the Plaintiffs have not demonstrated in any ways which of their rights under Sections 77(1) and 77(9) of the repealed Constitution have been infringed by the Defendant's actions. The Defendant relied on the case of **Rev. Dr. Timothy M. Njoya & Others vs. The AG & Another, Misc. Civil Application No. 82 of 2004 (OS)** at page 26 where the court reiterated a holding in the case of **Nottinghamshire CC-vs.- Secretary of State** that:

“Where a minister's exercise of statutory power required and received House of Commons approval then as a matter of constitutional propriety the courts would not intervene to review the exercise of the power on grounds of unreasonableness unless the minister had deceived the house because if the House of Commons approval was required the responsibility for overseeing the minister's action lay within the House rather than the courts.”

16. Further, the Defendant submitted that this court being a Constitutional Court cannot sit on appeal

against the orders of **Hon. Justice Muga Apondi**. The Defendant concludes that this court being a Constitutional Court has no jurisdiction to assess damages and therefore cannot grant such orders.

THE INTERESTED PARTY'S CASE.

17. The Interested Party opposed the Plaintiffs' case through Senior Counsel **Mr. Fred Ojiambo**. **Mr. Ojiambo** associated himself with the Defendants submissions and added that the DPP was an officer of the Attorney General acting under the Attorney General and acted pursuant to section 26(5) of the Constitution which provided that the powers to discontinue criminal proceedings may be exercised by the Attorney General in person or by officers subordinate to him under special or general instructions. It is therefore submitted that the DPP presented the *nolle prosequi* which constituted the Attorney General's instructions and the intention to terminate the proceedings before the Court. It is submitted that the entry of the *nolle* has the automatic effect of releasing and discharging the accused hence the same does not amount to proceedings under section 82 of the Code. The discharge however does not amount to an acquittal. However, it was submitted that following the decision in Crispus Karanja Njogu vs. A.G (supra) the jurisprudence changed and the Attorney General was required to justify such an order. In other words the jurisprudence had moved on and it became a judicial process in which the Court would look at the *nolle* and arrive at a decision based on the reasons given. Therefore, **Justice Muga Apondi** heard the submissions and allowed the request for entry of the *nolle* and further granted the order for the inquest. That decision, it is submitted was judiciously reached after considering the reasons given and no attempt was made to either review the same or appeal against the same. It is submitted that only an appeal would deal with the issue and that being the case, this Court is being asked to re-open the decision and sit on appeal against the decision of a High Court yet this Court cannot review a decision of a Court of concurrent jurisdiction and reliance is placed on Peter Nganga Muiruri vs. Credit Bank Civil [2008] eKLR. It is reiterated that the Court was not acquitting the accused but simply recognized that there was no evidence with which to charge the accused and so directed that further investigation be conducted to secure evidence with which to charge the accused. Accordingly, it was submitted that there is no basis for the application and that the Court has no jurisdiction to deal with the application which ought to be dismissed with costs.

18. In the written submissions, it is contended that this Court does not have jurisdiction to hear the suit herein owing to the fact that the Plaintiffs seek to impugn the orders of **Justice Muga Apondi** as per the ruling delivered on 18th May, 2005 in which he accepted the *nolle prosequi* and directed the Chief Magistrate Nakuru to conduct an inquest; an act that would amount to a court of concurrent jurisdiction sitting on appeal in respect of the Learned Judge's orders. He relied on the High Court decision of Jane Njeri Maina vs. Mwanajuma Mohammed & Others 2012 eKLR and Court of Appeal case of M'Mithiaru vs. Maore & 2 others (No 2) (2008) 3 KLR (EP) 730. The learned counsel further submitted that there are no new facts that would warrant this court to exercise its jurisdiction on the grounds of review. It was also submitted on behalf of the Interested Party that under Section 82 of the **Criminal Procedure Code** and Section 26 (3)(c) of the repealed Constitution of the Republic of Kenya which was in force at the time the current proceedings were instituted, the AG has power to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority. Further, it was submitted that Section 83 of the **Criminal Procedure Code** allows the AG to delegate his powers of terminating criminal proceedings granted under Section 81 and 82 of the Criminal Procedure Code to state counsels and the exercise of those powers is to operate as if they have been exercised by the AG. **Mr. Ojiambo** submitted that the DPP exercised the delegated power to enter the said *nolle prosequi*. He cited the Court of Appeal case of Mwau vs. Republic 1985 KLR 748. He also sought to rely on Habimana Sued Hemed v Kenya Revenue Authority [2006] eKLR and the Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] 2 All ER 680, to the effect that a court in exercise of judicial authority can only override a decision that has contravened the law. The Interested Party concluded that the DPP's decision to proffer the *nolle prosequi* on the grounds of lack of evidence was within the law, which decision was upheld and accepted by the Learned Judge.

REJOINDER BY THE PLAINTIFFS

19. In his rejoinder, **Mr Katwa Kigen** submitted that a decision of a Court of concurrent jurisdiction cannot be overturned on its unconstitutionality and secondly, the plaintiffs were not parties to the proceedings in which the impugned decision was made and hence the plaintiff's chances of appeal or review are circumscribed. It is also submitted that there is unlimited power given to the Court to do justice to the parties and that the plaintiffs have shown injustice and injury that is likely to be occasioned to the widow and the orphans hence the Court ought to consider the interest of the parties who have not had a chance to be heard and allow the application.

DETERMINATION

20. I have considered the Plaintiffs' OS, affidavits, the submissions, written and oral, and judicial authorities herein and have come to the conclusion that this court is called upon to determine several substantive issues. However, before addressing any substantive issue, the court must first answer the question whether it has jurisdiction to entertain this OS in light of the ruling by **Muga Apondi J.** delivered on 18th May, 2005.

21. Circumstances under which a jurisdictional challenge may be taken were restated by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC No. 1546 of 1971 (HCK) [1972] EA 525** where the learned judge held:

“It is axiomatic that when a statutory tribunal sits to administer justice, it must in accordance with the law as Parliament so clearly intended.....Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction.”

22. Since the issue of jurisdiction is central to these proceedings, as was stated by **Nyarangi JA** in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1:**

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

23. In this suit, the Plaintiffs are questioning the Defendant's powers to enter a *nolle prosequi* in the circumstances of the case from which these proceedings arose. To that extent this Court has jurisdiction to entertain the suit since the Defendant is not a Court of concurrent jurisdiction and its exercise of jurisdiction may properly be the subject of investigation by this Court. Accordingly, it is my view and I so hold that to contend that this Court had no jurisdiction to embark on the inquiry as to whether or not the defendant acted lawfully in entering the *nolle prosequi* cannot be correct. In other words the first scenario set out by **Madan, J** in **Choitram and Others vs. Mystery Model Hair Saloon** (supra) is inapplicable. In my view the issue that this Court will have to determine at the end of this judgement is whether it has jurisdiction to grant the orders that are sought in this suit. That is a different issue altogether from the issue whether the Court has jurisdiction to embark on the hearing of the suit in the first place. Accordingly the issue whether or not the orders sought herein can be granted will be dealt with later in this judgement.

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.**

25. In **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003 Warsame, J** (as he then was) held that where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters and that High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers.

26. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

“Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

27. It is therefore my view that even where the law does not expressly enjoin the concerned authority to give reasons for the exercise of discretion, it ought to give reasons so as to satisfy the requirement that it is acting bona fide and not abusing the statutory power or discretion conferred upon it. I believe it was this reasoning that led the court in **Crispus Karanja Njogu vs. A.G** (supra) to hold that where the Attorney General seeks to have a *nolle prosequi* entered by the Court he must give reasons for seeking the same.

28. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court expressed itself as follows:

“The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law.....In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts..... The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority..... An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law.”

29. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, the Court held:

“Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law..... It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

30. Under the current Constitution Article 10 provides *inter alia* that the national values and principles

of governance in the said Article bind all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law and the said national values and principles of governance include equality, human rights, non-discrimination, good governance, integrity, transparency and accountability. It is trite that the concept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament is not acceptable since the Constitution is not an Act of Parliament. It exists separately in the statutes. It is supreme law and its provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e. restrictive way – Constitutional provisions must be read to give values and aspirations of the people and the Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document. See Crispus Karanja Njogu vs. A.G (supra).

31. In ABDALLA & ANOTHER VS. ATTORNEY GENERAL & OTHERS [2007] 1 EA 1 Nyamu, J (as he then was) expressed himself as follows:

“Victims of crimes have in the past few years gained a position not hitherto given to them by the municipal criminal laws of many jurisdictions including Kenya. Thus the expanding international jurisdictions in this area recognises their rights to right of hearing by prosecutors, compassion, their right to damages, compensation and restitution. In addition the Covenants on civil and political rights and in particular article 7 does demand that the States would in certain cases have responsibilities to the victims of crime. It is therefore still unsettled as to what the petitioners’ rights under international law could be as against the State in the situation before the court but that perhaps is the realm of another court or courts on a different plane.”

32. It is therefore my view that whether in the current constitutional dispensation or in the old constitution the spirit of the constitution enjoined the Attorney General in the exercise of his powers of *nolle prosequi* to satisfy the Court that the same was being exercised bona fide in the interest of the public and in so doing that the interests of all the parties concerned including the victims had been taken into account and the Court ought to consider whether or not the interests of the victim have been considered in deciding whether or not to enter a *nolle prosequi* taking into account that under Article 50(9) Parliament is now mandated to enact legislation providing for the protection, rights and welfare of victims of offences.

33. It is, however, contended that the DPP had no powers to enter the *nolle prosequi* on behalf of the Attorney General since the office of the DPP did not exist. It is not disputed that under Article 26 of the former Constitution the Attorney General was empowered to delegate its powers to his officers. Section 38(1) of the *Interpretation and General Provisions Act, Cap 2 Laws of Kenya* provides:

Where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the Attorney-General or a Minister, the President, the Attorney-General or the Minister, may, unless by law expressly prohibited from so doing, delegate, by notice in the Gazette, to a person by name, or to the person for the time being holding an office specified in the notice, the exercise of that power or the performance of that duty, subject to such conditions, exceptions or qualifications as the President, the Attorney-General or the Minister may specify in the notice.

34. In this case I do not have sufficient material before me to enable make a determination that this provision was not complied with by the Attorney General when he delegated his powers to **Mr Philip Murgor**. Even if the office of the DPP did not exist as alleged by the Plaintiffs, if the notice delegated the powers to the said person by name, in my view that would have sufficed.

35. I now wish to deal with the instances under which an inquest may be conducted. Section 385 of the Code only stipulates who is empowered to hold inquests. It does not stipulate the circumstances under which inquests are to be conducted. Accordingly, I do not agree that the request made by the Attorney General for an inquest to be conducted was made pursuant to section 385. Section 386 on the other hand deals with inquiries and reports by police of certain deaths mentioned therein. Section 387 is the one that gives the powers to the Magistrate to conduct an inquest based on the report made under section 386 or where a person dies in police custody or in custody of a prison officer or in prison. Section 388(1) of the

Code however provides that “the Attorney-General may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.”

36. It is therefore my view and I so hold that subject to what is stated hereinabove the Attorney General is empowered to enter a *nolle prosequi* and direct a magistrate to hold an inquiry.

37. It is however contended that section 388 is unconstitutional to the extent that it permits the Attorney General to direct a Magistrate to hold an inquiry. Article 160(1) of the Constitution provides:

In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

38. Article 162 provides that the Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff. I have not seen anywhere in the Constitution where it is provided that the judiciary as defined under this Article is subject to the control or direction of the Attorney General. To purport to give the Attorney General powers to give directions to magistrates without any constitutional backing is in my view contrary to Article 161 of the Constitution and under Article 2(4) of the Constitution “any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

39. In Masalu and Others vs. Attorney General [2005] 2 EA 165 it was held:

“The Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual’s the full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purpose construction. While it is not disputed that it is the duty of every citizen to play certain roles in a society under Article 17, the judicial officer’s role and duties are unique and different. Judicial officers are charged with safeguarding the fundamental rights and freedoms of the citizenry and in the performance of their duties, they are entrusted with checking the excesses of the Executive and the Legislature. These duties require insulation from any influence direct or indirect that may warp their judgement or cause them to play into the hands of corrupt elements, especially when there is a climate of political excitement. It is noteworthy that the administration of justice is the firmest pillar of Government.When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim.”

40. In my view to place judicial officers at the beck and call of the executive in any guise is to whittle away the independence of the judiciary and that negates the spirit of Article 161 of the Constitution.

41. Section 7(1) of the Sixth Schedule to the Constitution provides that “all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.” Accordingly, I have no hesitation in declaring which I hereby do that Section 388 of the Criminal Procedure Code is contrary to the letter and the spirit of Article 161 of the Constitution and is to that extent null and void.

42. For avoidance of doubt and pursuant to what I shall state herein below with respect to the jurisdiction of this Court to disturb the powers of a Superior Court, the orders made by **Muga Apondi, J** directing that an inquest be conducted by the Senior Principal Magistrate, Nakuru, not being a directive by the Attorney General, however, remain undisturbed.

43. Back to the issue of jurisdiction, in Re The Matter of the Interim Independent Electoral Commission Constitutional Application 2 of 2011 (Unreported) at para. 29, the Supreme Court had this to say about jurisdiction:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.” (emphasis mine).

44. Article 165(6) of the Constitution provides that “the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.” Article 165(3)(d) of the Constitution donates to the High Court the power to hear any question respecting the interpretation of the Constitution. Therefore there is no “Constitutional Court” under the Constitution. Instead what we have is a Constitutional and Human Rights Division of the High Court. The set up of the judiciary as currently constituted recognises only one High Court in the whole republic. The setting up of divisions is purely an administrative decision which does not take away the powers of each High Court judge as enshrined in the Constitution and the law. In holding so, I am supported by the decision of the Court of Appeal in the case of **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** where the Court expressed itself thus:

“The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed “The Judicature” and section 60 of the Constitution establishes the High Court with “unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law”. Although the Constitution stipulates that the jurisdiction of the High court in criminal and civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers...Section 64 of the Constitution establishes the Court of Appeal with such “... jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law”. On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other Court other than the High Court...Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrate’s Courts and Kadhis’ Courts, and also Court Martial. Each of these courts exercises such jurisdiction and powers as “may be conferred on it by law”...There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division which is not an independent Court by merely a division of the High Court. The wording of section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court but talks about the High Court...With regard to the protective provisions section 84 of the Constitution, it does not in any of its sub-sections talk about the Constitutional Court but instead talks about an application being made to the High Court...The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court...Any single Judge of the High Court in this Country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision, emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision, is at best a nullity. Jurisdiction is everything and without it, a court has no power to make one more step...courts must follow the law as it is currently...The appellant by filing the Originating Summons which was referred to the Chief Justice and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither Constitutional nor Statutory authority to support that approach. Therefore, neither the Chief Justice, nor Nyamu J. had the jurisdiction to entertain the appellant’s application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no Constitutional or Statutory right of appeal or review was available. This matter had been concluded a long time back and attempts to revive it can only have one outcome – failure”.

45. This position has not changed even with the advent of the current Constitution. In **Philip SKipchirchir Moi vs. Attorney General & Another Petition No. 65 of 2012** at para.15 Lenaola J. stated:

“.....I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case continue to invoke that fallacious and misguided jurisdiction.”

See also, **Robert Mwangi vs. Hon. Lady Justice Pauline Nyamweya & Others Petition No. 84 of 2012.**

46. In allowing the *nolle prosequi*, **Hon. Justice Muga Apondi** was exercising the powers conferred upon a superior court. Accordingly whether the exercise of such powers was right or not this Court cannot go behind the said decision and make orders whose effect would amount to reversing the same. The issues being raised in this petition ought to have been raised before the Honourable Judge.

47. The Court, however, appreciates the fact that the Plaintiffs herein were technically not parties to the said proceedings and were not afforded an opportunity to be heard before the Court made its decision. Whereas the Plaintiffs contend that not being parties would neither appeal nor apply for review, Rule 59(1) of the Court of Appeal Rules provides:

Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal.

48. It is therefore my view that any person who is aggrieved by a decision of the High Court is entitled to appeal to the Court of Appeal and it is not necessary that the appellant be a party to the proceedings in the High Court. It is therefore my view that the Plaintiffs ought to have appealed against the decision to the Court of Appeal rather than challenging the same by way of a Constitutional Petition or Reference.

49. In my view the request or application by the DPP for entry of a *nolle prosequi* was subsumed by the decision of the Court and therefore it is not proper to challenge the said decision in isolation of the Court's decision taking into account the fact that the Court considered the application and delivered a detailed decision in respect thereof. To grant the orders which are being sought in the Originating Summons herein would, in my view, amount to overturning the decision of a Superior Court. In effect whereas this Court has the jurisdiction to investigate the action of the Defendant herein the Court has no jurisdiction to grant the orders sought in the Originating Summons.

ORDER

50. In the result save for a declaration that section 388 of the Criminal Procedure Code is inconsistent with the Constitution, this Originating Summons fails and the same is dismissed but in the circumstances of this case there will be no order as to costs.

Dated at Nairobi this day of 10th May 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of:

Ms Chidagaya for Mr Katwa with Mr Kamaru for the Plaintiff.

Mr Mungai Warue for the Defendant.

Ms Mutisya for Mr Ojiambo for the Interested Party